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FOR: Any person who uses the Federal Register and Code of Federal Regulations.

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WHAT: Free public briefings (approximately 3 hours) to present:

1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.
2. The relationship between the Federal Register and Code of Federal Regulations.
3. The important elements of typical Federal Register documents.
4. An introduction to the finding aids of the FR/CFR system.

WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WHEN: Tuesday, February 24, 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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Federal Register

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

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

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 532

RIN 3206-AL76

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

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule.

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

DATES: *Effective date:* This regulation is effective on March 11, 2009.

Applicability date: The affected employees in Crawford, Madison, and Sebastian Counties, AR, and McDonald County, MO, would be placed on the wage schedule for the Tulsa, OK, wage area on the first day of the first applicable pay period beginning on or after March 11, 2009.

FOR FURTHER INFORMATION CONTACT: Madeline Gonzalez, (202) 606-2838; e-

mail pay-performance-policy@opm.gov; or FAX: (202) 606-4264.

SUPPLEMENTARY INFORMATION: On December 8, 2008, the U.S. Office of Personnel Management (OPM) issued a proposed rule (73 FR 74374) to redefine the Little Rock, AR, Southern Missouri, and Tulsa, OK, appropriated fund Federal Wage System wage areas. This proposed rule would redefine Crawford and Sebastian Counties, AR, from the Little Rock wage area to the Tulsa wage area and Madison County, AR, and McDonald County, MO, from the Southern Missouri wage area to the Tulsa wage area. The proposed rule had a 30-day comment period, during which OPM received no comments.

Regulatory Flexibility Act

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

List of Subjects in 5 CFR Part 532

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

U.S. Office of Personnel Management.

Kathie Ann Whipple,

Acting Director.

■ Accordingly, the U.S. Office of Personnel Management is amending 5 CFR part 532 as follows:

PART 532—PREVAILING RATE SYSTEMS

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

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

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

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

*	*	*	*	*
ARKANSAS				
Little Rock				
Survey Area				

Arkansas:

Jefferson
Pulaski
Saline
Area of Application. Survey area plus:

Arkansas:
Arkansas
Ashley
Baxter
Boone
Bradley
Calhoun
Chicot
Clay
Clark
Cleburne
Cleveland
Conway
Dallas
Desha
Drew
Faulkner
Franklin
Fulton
Garland
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Marion
Monroe
Montgomery
Newton
Ouachita
Perry
Phillips
Pike
Polk
Pope
Prairie
Randolph
Scott
Searcy
Sharp
Stone
Union
Van Buren
White
Woodruff
Yell

* * * * *

MISSOURI

* * * * *

Southern Missouri Survey Area

Missouri:
Christian
Greene
Laclede
Phelps
Pulaski

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

* * * * *
 OKLAHOMA

* * * * *
 Tulsa
Survey Area

Oklahoma:
 Creek
 Mayes
 Muskogee
 Osage
 Pittsburg
 Rogers
 Tulsa
 Wagoner
Area of Application. Survey area plus:
 Oklahoma:
 Adair
 Cherokee
 Choctaw
 Craig
 Delaware
 Haskell
 Kay
 Latimer
 Le Flore
 McCurtain

McIntosh
 Nowata
 Okfuskee
 Okmulgee
 Ottawa
 Pawnee
 Pushmataha
 Sequoyah
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 Benton
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 Sebastian
 Washington
 Missouri:
 McDonald
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 [FR Doc. E9-2629 Filed 2-6-09; 8:45 am]
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DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1412

RIN 0560-AH84

Direct and Counter-Cyclical Program and Average Crop Revenue Election Program

Correction

In rule document E8-30763 beginning on page 79284 in the issue of December 29, 2008, make the following correction:

§1412.53 [Corrected]

On page 79299, in the third column, §1412.53(b)(1)(ii)(K) should read:
 (K) Other oilseeds—\$9.30/cwt.

[FR Doc. Z8-30763 Filed 2-6-09; 8:45 am]
 BILLING CODE 1505-01-D

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG-2008-1247]

RIN 1625-AA11

Regulated Navigation Area and Safety Zone, Chicago Sanitary and Ship Canal, Romeoville, IL

AGENCY: Coast Guard, DHS.

ACTION: Temporary interim rule with request for comments.

SUMMARY: The Coast Guard is establishing a regulated navigation area and safety zone on the Chicago Sanitary and Ship Canal near Romeoville, IL.

This temporary interim rule places navigational and operational restrictions on all vessels transiting the navigable waters located adjacent to and over the Army Corps of Engineers' electrical dispersal fish barrier system.

DATES: This temporary interim rule is effective from 11:59 p.m. on January 17, 2009, until September 30, 2009.

Comments and related material must reach the Docket Management Facility on or before April 10, 2009.

ADDRESSES: You may submit comments identified by docket number USCG-2008-1247 using any one of the following methods:

(1) *Federal eRulemaking Portal:* <http://www.regulations.gov>.

(2) *Fax:* 202-493-2251.

(3) *Mail:* Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202-366-9329. To avoid duplication, please use only one of these methods. For instructions on submitting comments, see the "Public Participation and Request for Comments".

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call CDR Tim Cummins, Deputy Prevention Division, Ninth Coast Guard District, telephone 216-902-6045. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted, without change, to <http://www.regulations.gov> and will include any personal information you have provided.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG-2008-1247), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online, or by fax, mail or hand delivery, but please use only one of these means. We recommend that you

include your name and a mailing address, an e-mail address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to <http://www.regulations.gov>, select the Advanced Docket Search option on the right side of the screen, insert "USCG-2008-1247" in the Docket ID box, press Enter, and then click on the balloon shape in the Actions column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change this rule based on your comments.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov>, select the Advanced Docket Search option on the right side of the screen, insert USCG-2008-1247 in the Docket ID box, press Enter, and then click on the item in the Docket ID column. You may also visit either the Docket Management Facility in Room W12-140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008 issue of the **Federal Register** (73 FR 3316).

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one to the Docket Management Facility at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Regulatory Information

The Coast Guard is issuing this temporary interim rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because the electric current in the water poses a safety risk to commercial and recreational boaters who transit the area. Likewise, under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register** because of the safety risk to commercial and recreational boaters who transit the area. The following discussion and the Background and Purpose section below provides additional support of the Coast Guard's determination that good causes exist for not publishing a NPRM and for making this rule effective less than 30 days after publication.

In 2002, the Army Corps of Engineers energized a demonstration electrical dispersal barrier located in the Chicago Sanitary and Ship Canal. The demonstration barrier, commonly referred to as "Barrier I," generates a low-voltage electric field (one-volt per inch) across the canal, which connects the Illinois River to Lake Michigan. Barrier I was built to block the passage of aquatic nuisance species, such as Asian carp, and prevent them from moving between the Mississippi River basin and Great Lakes via the canal. In 2006, the Army Corps completed construction of a new barrier, "Barrier IIA." Barrier IIA is designed to operate continuously at one-volt per inch, and can operate at higher levels. Barrier IIA is slated to undergo additional testing to determine optimal operating levels. Because of its design, Barrier IIA can generate a more powerful electric field, over a larger area within the Chicago Sanitary and Ship Canal, than Barrier I.

A comprehensive, independent analysis of Barrier IIA, conducted in 2008, at the one-volt per inch level, found a serious risk of injury or death to persons immersed in the water located adjacent to and over the barrier. Additionally, sparking between barges transiting the barrier (a risk to flammable cargoes) occurred at the one-

volt per inch level. Operating Barrier IIA at four-volts per inch (the maximum capacity) presents a higher risk; however, there is no data yet to indicate how much higher. The Coast Guard and Army Corps developed regulations and safety guidelines, with stakeholder input, which addressed the risks and hazards associated with operating the barriers at the one-volt per inch level. These regulations were published in 33 CFR 165.923, 70 FR 76692 (Dec 28, 2005) and in a series of temporary final rules: 71 FR 4488 (Jan 27, 2006); 71 FR 19648 (Apr 17, 2006); 73 FR 33337 (Jun 12, 2008); 73 FR 37810 (Jul 2, 2008); 73 FR 45875 (Aug 7, 2008); and 73 FR 63633 (Oct 27, 2008).

The Army Corps of Engineers recently notified the Coast Guard that it plans to activate Barrier IIA on a full-time basis starting in middle to late January 2009. Both Barrier IIA and Barrier I will operate at the same time; hence, Barrier I will provide a redundant back up to Barrier IIA.

The Coast Guard has advised the Army Corps of Engineers that it has no objection to the Army Corps activating Barrier IIA at a maximum strength of one-volt per inch, which is the operating strength of Barrier I. In addition, the Coast Guard advised the Army Corps that it does not object to the Army Corps' plans for additional testing of Barrier IIA at peak field strength of up to four-volts per inch. Peak field strength tests are necessary to evaluate safety risks to mariners and their vessels when Barrier IIA is operated at a higher voltage.

To mitigate the safety risks created by operation of the barriers, navigational and operational restrictions are necessary for all vessels transiting through the navigable waters located adjacent to and over the barriers. Specifically, and as discussed in more detail in the Discussion of the Rule section below, the Coast Guard is establishing a regulated navigation area, which requires vessels to adhere to specified operational and navigational requirements while inside the regulated navigation area. In addition, the Coast Guard will occasionally enforce a safety zone, which prohibits the movement of all vessels and persons through the electrical dispersal barriers during tests of Barrier IIA at voltages higher than one-volt per inch.

Background and Purpose

The Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990, as amended by the National Invasive Species Act of 1996, authorized the Army Corps of Engineers to conduct a demonstration project to identify an

environmentally sound method for preventing and reducing the dispersal of non-indigenous aquatic nuisance species through the Chicago Sanitary and Ship Canal. The Army Corps of Engineers selected an electric barrier because it is a non-lethal deterrent with a proven history, which does not overtly interfere with navigation in the canal.

A demonstration dispersal barrier (Barrier I) was constructed and has been in operation since April 2002. It is located approximately 30 miles from Lake Michigan and creates an electric field in the water by pulsing low voltage DC current through steel cables secured to the bottom of the canal. A second barrier, Barrier IIA, was constructed 800 to 1300 feet downstream of the Barrier I. The potential field strength for Barrier IIA will be up to four times that of the Barrier I. Barrier IIA was successfully operated for the first time for approximately seven weeks in September and October 2008, while Barrier I was taken down for maintenance. Construction on a third barrier (Barrier IIB) is planned; Barrier IIB would augment the capabilities of Barriers I and IIA.

In the spring of 2004, a commercial towboat operator reported an electrical arc between a wire rope and timberhead while making up a tow in the vicinity of the Barrier I. During subsequent Army Corps of Engineers safety testing in January 2005, sparking was observed upon metal-to-metal contact between two independent barges in the barrier field.

The electric current in the water poses a safety risk to commercial and recreational boaters transiting the area. The Navy Experimental Diving Unit (NEDU) was tasked with researching how the electric current from the barriers would affect a human body if immersed in the water. The NEDU final report concluded that the possible effects to a human body if immersed in the water include paralysis of body muscles, inability to breathe, and ventricular fibrillation.

A Safety Work Group facilitated by the Coast Guard and in partnership with the Army Corps of Engineers and industry initially met in February 2008 and focused on three goals: (1) Education and public outreach, (2) keeping people out of the water, and (3) egress/rescue efforts. The Safety Work Group has regularly been attended by eleven stakeholders. Key partners include the American Waterways Operators, Illinois River Carriers Association, Army Corps of Engineers Chicago District, Coast Guard Marine Safety Unit Chicago, Coast Guard Sector Lake Michigan/Captain of the Port Lake

Michigan, and the Ninth Coast Guard District. During the past twelve months, the Coast Guard has hosted five Safety Work Group meetings with full participation from stakeholders.

Based on the commercial significance and successful transit history of the Barrier I by thousands of barges since its inception in April 2002, and Barrier IIA during Fall 2008, the Coast Guard has not chosen to close the waterway despite the proven electrical discharge hazard and additional safety concerns. Tows spanning Barrier IIA and the coal fired power plant barge loading area just south of the RNA remain a concern. Accordingly, because of the safety risks involved, it is imperative that the Coast Guard implements increased safety measures for the operation of both Barriers I and IIA.

In addition to this temporary interim rule, the Coast Guard intends to publish a Notice of Proposed Rulemaking (NPRM). The NPRM will propose establishing a permanent regulated navigation area and safety zone that is identical to the regulated navigation area and safety zone established by this temporary interim rule. We encourage the public to participate in the rule proposed by our NPRM by submitting comments and related materials to the docket. The NPRM will contain information on how to submit comments and will be part of the docket number for this rulemaking (USCG–2008–1247). To view the NPRM, once published, as well as documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov> at any time, click on “Search for Dockets,” and enter the docket number for this rulemaking (USCG–2008–1247) in the Docket ID box, and click enter. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Discussion of Rule

This temporary interim rule will suspend 33 CFR 165.923 and will place additional restrictions on all vessels transiting through the navigable waters located adjacent to and over the electrical dispersal barriers located on the Chicago Sanitary and Ship Canal. The regulated navigation area encompasses all waters of the Chicago Sanitary and Ship Canal located between mile marker 295.0 (approximately 1.1 miles south of the Romeo Road Bridge) and mile marker 297.5 (approximately 1.3 miles

northeast of the Romeo Road Bridge). The requirements placed on commercial vessels include: (1) Vessels engaged in commercial service, as defined in 46 U.S.C. 2101(5), may not pass (meet or overtake) in the regulated navigation area and must make a SECURITE call when approaching the regulated navigation area to announce intentions and work out passing arrangements on either side; (2) commercial tows transiting the regulated navigation area must be made up with wire rope to ensure electrical connectivity between all segments of the tow; and (3) all up-bound and down-bound barge tows that contain one or more red flag barges must be assisted by a bow boat until the entire tow is clear of the regulated navigation area. Red flag barges are barges certificated to carry, in bulk, any hazardous material as defined in 46 CFR § 150.115. Currently, 46 CFR § 150.115 defines hazardous material as:

- (a) A flammable liquid as defined in 46 CFR 30.10–22 or a combustible liquid as defined in 46 CFR 30.10–15;
- (b) A material listed in Table 151.05, Table 1 of part 153, or Table 4 of part 154 of Title 46, CFR; or
- (c) A liquid, liquefied gas, or compressed gas listed in 49 CFR 172.101.

The Army Corps of Engineers has informed the Coast Guard that the Corps will continue to contract bow boat assistance for barge tows containing one or more red flag barges. The Army Corps of Engineers has also advised the Coast Guard that they have funds to contract bow boat assistance through September 30, 2009. Operators of tows containing one or more red flag barges should notify the bow boat contractor at least two hours prior to the need for assistance. The tow operator should then remain in contact with the contractor after the initial call for bow boat assistance and advise the contractor of any delays. Information on how to arrange for bow boat assistance may be obtained by contacting the Army Corps of Engineers at 312–846–5333, during normal working hours. The Coast Guard will also publish this information in its Local Notice to Mariners.

This temporary interim rule places additional restrictions and operating requirements on all vessels within a smaller portion of the regulated navigation area, specifically, the waters between the Romeo Road Bridge (approximate mile marker 296.18) and mile marker 296.7 (aerial pipeline located approximately 0.51 miles north east of Romeo Road Bridge). Within this smaller area, this temporary interim rule prohibits all vessels from loitering, mooring or laying up on the right or left

descending banks, or making or breaking tows on the waters between the Romeo Road Bridge (approximate mile marker 296.18) and mile marker 296.7 (aerial pipeline located approximately 0.51 miles north east of Romeo Road Bridge). In addition, vessels may only enter the waters between the Romeo Road Bridge (approximate mile marker 296.18) and mile marker 296.7 (aerial pipeline located approximately 0.51 miles north east of Romeo Road Bridge) for the sole purpose of transiting to the other side and must maintain headway throughout the transit. All vessels and persons are prohibited from dredging, laying cable, dragging, fishing, conducting salvage operations, or any other activity, which could disturb the bottom of the canal in the area located between the Romeo Road Bridge (approximate mile marker 296.18) and mile marker 296.7 (aerial pipeline located approximately 0.51 miles north east of Romeo Road Bridge). The temporary interim rule also requires all personnel on open decks to wear a Coast Guard approved Type I personal flotation device while on the waters between the Romeo Road Bridge (approximate mile marker 296.18) and mile marker 296.7 (aerial pipeline located approximately 0.51 miles north east of Romeo Road Bridge).

These restrictions are necessary for safe navigation of the regulated navigation area and to ensure the safety of vessels and their personnel as well as the public's safety due to the electrical discharges noted during safety tests conducted by the U.S. Army Corps of Engineers. Deviation from this temporary interim rule is prohibited unless specifically authorized by the Commander, Ninth Coast Guard District or his designated representatives. The Commander, Ninth Coast Guard District designates Captain of the Port Lake Michigan and Commanding Officer, Marine Safety Unit Chicago, as his designated representatives for the purposes of the regulated navigation area.

A safety zone will be enforced during tests of Barrier IIA at voltages higher than one-volt per inch. This safety zone, which encompasses all the waters of the Chicago Sanitary and Ship Canal located between mile marker 296.0 (approximately 958 feet south of the Romeo Road Bridge) and mile marker 296.7 (aerial pipeline located approximately 0.51 miles north east of Romeo Road Bridge), will be enforced by the Captain of the Port Lake Michigan, for such times before, during, and after barrier testing as he or she deems necessary to protect mariners and vessels from damage or injury. The

Captain of the Port Lake Michigan will cause notice of enforcement or suspension of enforcement of this safety zone to be made by all appropriate means to effect the widest publicity among the affected segments of the public. Such means of notification will include, but is not limited to, Broadcast Notice to Mariners and Local Notice to Mariners. The Captain of the Port will issue a Broadcast Notice to Mariners notifying the public when enforcement of the safety zone is suspended. In addition, Captain of the Port Lake Michigan maintains a telephone line that is manned 24 hours a day, seven days a week. The public can obtain information concerning enforcement of the safety zone by contacting the Captain of the Port Lake Michigan via the Coast Guard Sector Lake Michigan Command Center at (414) 747-7182.

Regulatory Analyses

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

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

We expect the economic impact of this rule to be so minimal that a full Regulatory Evaluation is unnecessary. This determination is based on the following: (1) Vessel traffic may continue to transit through the regulated navigation area; (2) the Army Corps of Engineers intends to pay the cost of the bow boat required by barge tows containing one or more red flag barges during the time this rule is effective; (3) the safety zone will only be enforced on an occasional basis; and (4) vessels may request permission from the Captain of the Port Lake Michigan to transit through the safety zone when the safety zone is enforced.

As discussed in the "Regulatory Information" section above, the Coast Guard has established and enforced temporary safety zones, which prohibited all vessels from entering the waters located over and adjacent to the electric dispersal barriers during testing. During past safety zone enforcement, the Coast Guard, in coordination with the Army Corps of Engineers, provided advance notice of the waterway closure

and monitored vessel traffic during closure of the waterway. During these prior tests, testing occurred during three, two-hour blocks of time. In between these two-hour blocks of time, vessel traffic was granted permission by the Captain of the Port to transit through the safety zone.

Exact dates, times and duration of tests have not yet been finalized by the Army Corps for testing Barrier IIA at peak field strength. Nevertheless, the Coast Guard will coordinate with the Army Corps and waterway users, as it has done during past testing. Coordination efforts will include providing as much advance notice as possible to waterway users of planned closures and working with the Army Corps to structure testing dates, times and duration so as to minimize delays to vessels that transit the area.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601-612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This rule would affect the following entities, some of which might be small: The owners and operators of vessels intending to transit or anchor in a portion of the Chicago Sanitary and Ship Canal.

This regulated navigation area and safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons: (1) Vessel traffic may continue to transit through the regulated navigation area; (2) the Army Corps of Engineers intends to pay the cost of the bow boat required by barge tows containing one or more red flag barges during the time this rule is effective; (3) the safety zone will only be enforced on an occasional basis; and (4) vessels may request permission from the Captain of the Port Lake Michigan to transit through the safety zone when the safety zone is enforced. The Coast Guard will give notice to the public, using all appropriate means to effect the widest publicity among the affected segments of the public, when the safety zone is enforced and when enforcement is suspended.

As noted above, the Coast Guard intends to publish an NPRM and specifically seek public comment as to a permanent regulated navigation area and safety zone. The Coast Guard encourages public comment regarding the potential economic impact of the regulated navigation area and safety zone.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

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

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

The Coast Guard recognizes the treaty rights of Native American Tribes. Moreover, the Coast Guard is committed to working with Tribal Governments to implement local policies and to mitigate tribal concerns. We have determined that these regulations and fishing rights protection need not be incompatible. We have also determined that this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Nevertheless, Indian Tribes that have questions concerning the provisions of this rule or options for compliance are encouraged to contact the point of contact listed under **FOR FURTHER INFORMATION CONTACT**.

Energy Effects

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

require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 5100.1 and Commandant Instruction M16475.ID, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that this action is one of the category of actions which do not individually or cumulatively have a significant effect on the human environment. Therefore, this rule is categorically excluded, under section 2.B.2 Figure 2–1, paragraph (34)(g), of the Instruction and neither an environmental assessment nor an environmental impact statement is required. This rule involves the establishing, disestablishing, or changing of regulated navigation areas and security or safety zones. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

§ 165.923 [Suspended]

■ 2. Section 165.923 is suspended from January 18, 2009 until September 30, 2009.

■ 3. A new temporary § 165.T09-1247 is added as follows:

§ 165.T09-1247 Regulated Navigation Area and Safety Zone, Chicago Sanitary and Ship Canal, Romeoville, IL.

(a) *Regulated Navigation Area.* The following is a Regulated Navigation Area: All waters of the Chicago Sanitary and Ship Canal, Romeoville, IL located between mile marker 295.0

(approximately 1.1 miles south of the Romeo Road Bridge) and mile marker 297.5 (approximately 1.3 miles northeast of the Romeo Road Bridge).

(1) *Definitions.* The following definitions apply to this section:

Designated representatives means the Captain of the Port Lake Michigan and Commanding Officer, Marine Safety Unit Chicago.

Red flag barge means any barge certificated to carry any hazardous material in bulk.

Hazardous material means any material as defined in 46 CFR 150.115.

Bow boat means a towing vessel capable of providing positive control of the bow of a tow containing one or more barges, while transiting the regulated navigation area. The bow boat must be capable of preventing a tow containing one or more barges from coming into contact with the shore and other moored vessels.

(2) *Regulations.* (i) The general regulations contained in 33 CFR 165.13 apply.

(ii) All up-bound and down-bound barge tows that contain one or more red flag barges transiting through the regulated navigation area must be assisted by a bow boat until the entire tow is clear of the regulated navigation area.

(iii) Vessels engaged in commercial service, as defined in 46 U.S.C. 2101(5), may not pass (meet or overtake) in the regulated navigation area and must make a SECURITE call when approaching the regulated navigation area to announce intentions and work out passing arrangements on either side.

(iv) Commercial tows transiting the regulated navigation area must be made up with wire rope to ensure electrical connectivity between all segments of the tow.

(v) All vessels are prohibited from loitering between the Romeo Road

Bridge (approximate mile marker 296.18) and mile marker 296.7 (aerial pipeline located approximately 0.51 miles north east of Romeo Road Bridge).

(vi) Vessels may enter the waters between the Romeo Road Bridge (approximate mile marker 296.18) and mile marker 296.7 (aerial pipeline located approximately 0.51 miles north east of Romeo Road Bridge) for the sole purpose of transiting to the other side and must maintain headway throughout the transit. All vessels and persons are prohibited from dredging, laying cable, dragging, fishing, conducting salvage operations, or any other activity, which could disturb the bottom of the canal in the area located between the Romeo Road Bridge (approximate mile marker 296.18) and mile marker 296.7 (aerial pipeline located approximately 0.51 miles north east of Romeo Road Bridge).

(vii) All personnel on open decks must wear a Coast Guard approved Type I personal flotation device while in the waters between the Romeo Road Bridge (approximate mile marker 296.18) and mile marker 296.7 (aerial pipeline located approximately 0.51 miles north east of Romeo Road Bridge).

(viii) Vessels may not moor or lay up on the right or left descending banks of the waters between the Romeo Road Bridge (approximate mile marker 296.18) and mile marker 296.7 (aerial pipeline located approximately 0.51 miles north east of Romeo Road Bridge).

(ix) Towboats may not make or break tows if any portion of the towboat or tow is located in the waters between the Romeo Road Bridge (approximate mile marker 296.18) and mile marker 296.7 (aerial pipeline located approximately 0.51 miles north east of Romeo Road Bridge).

(3) *Compliance.* All persons and vessels must comply with this section and any additional instructions or orders of the Ninth Coast Guard District Commander, or his designated representatives.

(4) *Waiver.* For any vessel, the Ninth Coast Guard District Commander, or his designated representatives, may waive any of the requirements of this section, upon finding that operational conditions or other circumstances are such that application of this section is unnecessary or impractical for the purposes of vessel and mariner safety.

(b) *Safety Zone.* (1) The following area is a safety zone: All waters of the Chicago Sanitary and Ship Canal located between mile marker 296.0 (approximately 958 feet south of the Romeo Road Bridge) and mile marker 296.7 (aerial pipeline located approximately 0.51 miles north east of Romeo Road Bridge).

(2) *Notice of enforcement or suspension of enforcement.* The Captain of the Port Lake Michigan will enforce the safety zone established by this section only upon notice. Captain of the Port Lake Michigan will cause notice of the enforcement of this safety zone to be made by all appropriate means to effect the widest publicity among the affected segments of the public including publication in the **Federal Register** as practicable, in accordance with 33 CFR § 165.7(a). Such means of notification may also include but are not limited to, Broadcast Notice to Mariners or Local Notice to Mariners. The Captain of the Port Lake Michigan will issue a Broadcast Notice to Mariners and Local Notice to Mariners notifying the public when enforcement of these safety zones is suspended.

(3) *Regulations.* (i) In accordance with the general regulations in section 165.23 of this part, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port Lake Michigan, or his on-scene representative.

(ii) This safety zone is closed to all vessel traffic, except as may be permitted by the Captain of the Port Lake Michigan or his on-scene representative.

(iii) The “on-scene representative” of the Captain of the Port is any Coast Guard commissioned, warrant or petty officer who has been designated by the Captain of the Port to act on his behalf. The on-scene representative of the Captain of the Port will be aboard either a Coast Guard or Coast Guard Auxiliary vessel. The Captain of the Port or his on-scene representative may be contacted via VHF Channel 16.

(4) Vessel operators desiring to enter or operate within the safety zone shall contact the Captain of the Port Lake Michigan or his on-scene representative to obtain permission to do so. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the Captain of the Port Lake Michigan or his on-scene representative.

Dated: January 16, 2009.

D.R. Callahan,

Captain, U.S. Coast Guard, Commander, Ninth Coast Guard District Acting.

[FR Doc. E9-2408 Filed 2-6-09; 8:45 am]

BILLING CODE 4910-15-P

**DEPARTMENT OF HOMELAND
SECURITY**

January 16, 2009 make the following
correction:

Coast Guard**§162.050–15 [Corrected]****46 CFR Part 162**

On page 3384, in §162.050–
15(f)(3)(iii), in the second line after the
equation, “paragraph b(f)(1)” should
read “paragraph (f)(1)”.

[Docket No. USCG–2004–18939]

RIN 1625–AA90

[FR Doc. Z9–802 Filed 2–6–09; 8:45 am]

Pollution Prevention Equipment

BILLING CODE 1505–01–D

Correction

In rule document E9–802 beginning
on page 3364 in the issue of Friday,

Proposed Rules

Federal Register

Vol. 74, No. 25

Monday, February 9, 2009

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.

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 210, 229, 230, 240, 244 and 249

[Release Nos. 33-9005; 34-59350; File No. S7-27-08]

RIN 3235-AJ93

Roadmap for the Potential Use of Financial Statements Prepared in Accordance With International Financial Reporting Standards by U.S. Issuers

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule; extension of comment period.

SUMMARY: The Securities and Exchange Commission ("Commission") is extending the comment period for a release proposing a Roadmap for the potential use of financial statements prepared in accordance with International Financial Reporting Standards ("IFRS") as issued by the International Accounting Standards Board by U.S. issuers for purposes of their filings with the Commission and amendments to various regulations, rules and forms that would permit early use of IFRS by a limited number of U.S. issuers [Release No. 33-8982; 73 FR 70816 (Nov. 21, 2008)]. The original comment period for Release No. 33-8982 is scheduled to end on February 19, 2009. The Commission is extending the time period in which to provide the Commission with comments on that release for 60 days until Monday, April 20, 2009. This action will allow interested persons additional time to analyze the issues and prepare their comments.

DATES: Comments should be received on or before April 20, 2009.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's *Internet comment form* (<http://www.sec.gov/rules/proposed.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-27-08 on the subject line; or
- Use the Federal Rulemaking ePortal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number S7-27-08. The file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/proposed.shtml>). Comments also are available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Craig Olinger, Deputy Chief Accountant, Division of Corporation Finance, at (202) 551-3400 or Michael D. Coco, Special Counsel, Office of International Corporate Finance, Division of Corporation Finance, at (202) 551-3450, or Liza McAndrew Moberg, Professional Accounting Fellow, Office of the Chief Accountant, at (202) 551-5300, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-3628.

SUPPLEMENTARY INFORMATION: The Commission has requested comment on a release proposing a Roadmap and amendments relating to the use of IFRS by U.S. issuers. The proposed Roadmap sets forth milestones that, if achieved, could lead to the required use of IFRS by U.S. issuers by 2014 if the Commission believes it to be in the public interest and for the protection of

investors. The proposed amendments to various regulations, rules and forms would permit early use of IFRS by a limited number of U.S. issuers where this would enhance the comparability of financial information to investors. This release was published in the **Federal Register** on November 21, 2008.

The Commission originally requested that comments on the release be received by February 19, 2009. The Commission has received requests for an extension of time for public comment on the proposed Roadmap and amendments to, among other things, improve the potential response rate and quality of responses,¹ and believes that it would be appropriate to do so in order to give the public additional time to consider thoroughly the matters addressed by the release. Therefore, the Commission is extending the comment period for Release No. 33-8982 "Roadmap for the Potential Use of Financial Statements Prepared in Accordance with International Financial Reporting Standards by U.S. Issuers" for sixty days, to Monday, April 20, 2009.

By the Commission.

Dated: February 3, 2009.

Elizabeth M. Murphy,
Secretary.

[FR Doc. E9-2607 Filed 2-6-09; 8:45 am]

BILLING CODE 8011-01-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[USCG-2008-1216]

RIN 1625-AA09

Drawbridge Operation Regulations; Potomac River, Between Maryland and Virginia

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

¹ See e.g., Northrop Grumman Corporation (Jan. 9, 2009), Raytheon Company (Jan. 12, 2009), Honeywell (Jan. 12, 2009), Aerospace Industries Association (Jan. 13, 2009), United Technologies Corporation (Jan. 19, 2009), and Financial Executives International (Jan. 23, 2009). Comments are available on the Commission's Internet Web site at <http://www.sec.gov/comments/s7-27-08/s72708.shtml>.

SUMMARY: The Coast Guard proposes to change the regulations governing the operation of the new Woodrow Wilson Memorial (I-95) Bridge, mile 103.8, across the Potomac River between Alexandria, Virginia and Oxon Hill, Maryland. This proposal aims to balance the number of required bridge openings based on the projected use by vehicular and marine traffic needs.

DATES: Comments and related material must reach the Coast Guard on or before March 26, 2009.

ADDRESSES: You may submit comments identified by Coast Guard docket number USCG-2008-1216 to the Docket Management Facility at the U.S. Department of Transportation. To avoid duplication, please use only one of the following methods:

(1) *Online:* <http://www.regulations.gov>.

(2) *Mail:* Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001.

(3) *Hand delivery:* Room W12-140 on the Ground Floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366-9329.

(4) *Fax:* (202) 493-2251.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call Waverly W. Gregory, Jr., Bridge Administrator, Fifth Coast Guard District, at (757) 398-6222. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366-9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted, without change, to <http://www.regulations.gov> and will include any personal information you have provided.

We have an agreement with the Department of Transportation (DOT) to use the Docket Management Facility. Please see DOT's "Privacy Act" paragraph below.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG-2008-1216), indicate the specific section of this

document to which each comment applies, and give the reason for each comment. We recommend that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission. You may submit your comments and material by electronic means, mail, fax, or delivery to the Docket Management Facility at the address under **ADDRESSES**; but please submit your comments and material by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov> at any time. Enter the docket number for this rulemaking (USCG-2008-1216) in the Search box, and click "Go>>." You may also visit either the Docket Management Facility in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays or at Commander (dpg), Fifth Coast Guard District, Federal Building, 1st Floor, 431 Crawford Street, Portsmouth, VA 23704-5004 between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the Department of Transportation's Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477), or you may visit <http://DocketsInfo.dot.gov>.

Public Meeting

Currently, no public meeting is scheduled. But you may submit a request for one to the Docket Management Facility at the address under **ADDRESSES** explaining why one

would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

On July 2, 2008, we published a temporary regulation entitled "Drawbridge Operation Regulations; Potomac River, Between Maryland and Virginia" in the **Federal Register** (73 FR 37806). While construction continues, the temporary rule allows the drawbridge to remain closed-to-navigation each day from 10 a.m. to 2 p.m. until and including March 1, 2009.

The Maryland State Highway Administration and the Virginia Department of Transportation, co-owners of the drawbridge, request to permanently maintain the Woodrow Wilson Bridge in the closed-to-navigation position each day from 10 a.m. to 2 p.m. This request is made in an effort to minimize the potential for major regional vehicular traffic impacts and consequences during bridge openings.

From a river-user standpoint, the coordinators for the construction of the new Woodrow Wilson Bridge Project have received no requests from boaters or mariners to open the bridge during the 10 a.m. to 2 p.m. timeframe since the first temporary deviation was issued in late June 2006. In fact, no requests have been received for an opening of the new bridge at all since July 3, 2006. Finally, the coordinators have received no complaints on the 10 a.m. to 2 p.m. restriction. This proposal will affect only vessels with mast heights of 75 feet or greater. Furthermore, all operators of affected vessels with mast heights greater than 75 feet will be able to request an opening of the drawbridge in the "off-peak" vehicle traffic hours (evening and overnight) in accordance with 33 CFR 117.255(a).

Discussion of Proposed Rule

Currently, 33 CFR 117.255(a)(2)(i) states (paraphrasing) that the drawbridge shall not open for the passage of a commercial vessel, Monday through Friday, 5 a.m. to 10 a.m. and 2 p.m. to 8 p.m. This proposed regulation will connect the two time periods by extending the operating regulation to span from 5 a.m. until 8 p.m.

The Coast Guard proposes to amend the operating regulations at 33 CFR 117.255 by revising paragraph (a)(2)(i) to read as follows: Shall open for the passage of a commercial vessel at any time except, Monday through Friday (except Federal holidays), 5 a.m. to 8 p.m.

Regulatory Analyses

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

Regulatory Evaluation

This proposed rule is not a “significant regulatory action” under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation is unnecessary. We reached this conclusion based on the fact that the proposed changes have only a minimal impact on maritime traffic transiting the bridge. All operators of affected vessels with mast heights greater than 75 feet will be able to request an opening of the drawbridge in the “off-peak” vehicle traffic hours (evening and overnight) in accordance with 33 CFR 117.255(a), and mariners can plan their trips in accordance with the scheduled bridge openings to minimize delays.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

This proposed rule would not have a significant economic impact on a substantial number of small entities because the rule only adds minimal restrictions to the movement of vessel navigation. All operators of affected vessels with mast heights greater than 75 feet will be able to request an opening of the drawbridge in the “off-peak” vehicle traffic hours (evening and overnight) in accordance with 33 CFR 117.255(a), and mariners who plan their transits in accordance with the scheduled bridge openings can minimize delay.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Waverly W. Gregory, Jr., Bridge Administrator, Fifth Coast Guard District, (757) 398–6222. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520.).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 or more in any one year. Though this proposed rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This proposed rule would not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with

Constitutionally Protected Property Rights.

Civil Justice Reform

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

Protection of Children

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling

procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

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

Environment

We have analyzed this proposed rule under Department of Homeland Security Directive 0023.1 and Commandant Instruction M16475.ID which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule involves the operating regulations or procedures for drawbridges. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

2. In § 117.255 revise paragraph (a)(2)(i) to read as follows:

§ 117.255 Potomac River.

* * * * *

(a)(2)(i) From Monday through Friday (except Federal holidays), 5 a.m. to 8 p.m.

Dated: January 18, 2009.

Fred M. Rosa, Jr.,

Rear Admiral, United States Coast Guard Commander, Fifth Coast Guard District.

[FR Doc. E9–2589 Filed 2–6–09; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Parts 1355 and 1356

Request for Public Comment Concerning Regulations for Transferring Children From the Placement and Care Responsibility of a State Title IV–E Agency to a Tribal Title IV–E Agency and Tribal Share of Title IV–E Administration and Training Expenditures

AGENCY: Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families.

ACTION: Proposed rule; notice of request for public comment and Tribal consultation meetings; withdrawal.

SUMMARY: The Administration on Children, Youth and Families (ACYF) intended to publish a request for public comment and Tribal consultation

meetings in the **Federal Register**. The action line of the document published in the **Federal Register** on January 26, 2009, labeled the document a proposed rule. This document withdraws the January 26, 2009, proposed rule.

DATES: The January 26th, 2009 document is withdrawn as of February 9, 2009.

FOR FURTHER INFORMATION CONTACT: Miranda Lynch, Children's Bureau, 1250 Maryland Ave., SW., 8th Floor, Washington, DC 20024, (202) 205–8138. miranda.lynch@acf.hhs.gov.

SUPPLEMENTARY INFORMATION: ACF is withdrawing a request for public comment and Tribal consultation meetings that appeared in the **Federal Register** on January 26, 2009. The document provided a written opportunity for comment to all interested persons and notified Tribal leaders of in-person opportunities to consult with the Children's Bureau on the development of interim final rules on the implementation of the tribal plan requirements in section 479B of the Act and other amendments made by the Tribal provisions in section 301 of Public Law 110–351. While the January 26th, 2009 notice is being withdrawn in its entirety at this time, information on future opportunities for Tribal consultation and solicitation of comments regarding the implementation of these provisions will be forthcoming.

Dated: January 29, 2009.

Maiso L. Bryant,

Acting Commissioner, Administration on Children, Youth and Families.

[FR Doc. E9–2236 Filed 2–6–09; 8:45 am]

BILLING CODE 4184–01–P

Notices

Federal Register

Vol. 74, No. 25

Monday, February 9, 2009

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

February 3, 2009.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104-13. Comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395-5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250-7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720-8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it

displays a currently valid OMB control number.

Natural Resources Conservation Service

Title: Long Term Contracting.

OMB Control Number: 0578-0013.

Summary of Collection: The Long Term Contracting regulations at 7 CFR part 630, and the Conservation program regulations at 7 CFR parts 624, 625, 636, 701, 633, 1415, 1469, 1465 and 1491 set forth the basic policies, program provisions, and eligibility requirements for owners and operators to enter into and carry out long-term conservation program contracts with technical assistance under the various program. These programs authorize federal technical and financial long term cost sharing assistance for conservation treatment with eligible land users and entities. The financial assistance is based on a conservation plan that is made a part of an agreement or contract for a period of no less than 5 years to not more than 15 years. Under the terms of the agreement, the participant agrees to apply, or arrange to apply, the conservation treatment specified in the conservation plan. In return for this agreement, federal cost-share payments are made to the land user, or third party, upon successful application of the conservation treatment.

Need and Use of the Information: Natural Resource and Conservation Service (NRCS) will collect information on cost sharing and technical assistance, making land use changes and install measure to conserve, develop and utilize soil, water, and related natural resources on participants land. NRCS uses the information to ensure the proper utilization of program funds, including application for participation, easement, and application for payment.

Description of Respondents: Individuals or households; Farms; Not-for-profit institutions; State, Local or Tribal Government.

Number of Respondents: 37,504.

Frequency of Responses: Reporting: Annually, Other (As required).

Total Burden Hours: 25,291.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. E9-2597 Filed 2-6-09; 8:45 am]

BILLING CODE 3410-16-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: Applications and Reports for Scientific Research and Enhancement Permits under the Endangered Species Act.

OMB Control Number: 0648-0402.

Form Number(s): None.

Type of Request: Regular submission.

Burden Hours: 1,400.

Number of Respondents: 100.

Average Hours per Response: Permit applications, 20 hours; requests for permit modifications and annual reports, 5 hours; and final reports, 10 hours.

Needs and Uses: The Endangered Species Act (ESA) prohibits the taking of endangered species. Section 10 of the ESA allows for certain exceptions to this prohibition, such as a taking for scientific research purposes or to enhance the propagation or survival of species listed as threatened or endangered under the ESA. National Oceanic and Atmospheric Administration (NOAA) has issued regulations to provide for application and reporting for exceptions related to scientific research or to enhance the propagation of threatened or endangered species. The information is used to evaluate the proposed activity (permits) and on-going activities (reports) and is necessary for National Marine Fisheries Service (NMFS) to ensure the conservation of the species under the ESA.

Affected Public: Business or other for-profit organizations; not-for profit institutions; State, Local or Tribal Government.

Frequency: One-time only, on occasion, and annually.

Respondent's Obligation: Mandatory.

OMB Desk Officer: David Rostker, (202) 395-3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance

Officer, (202) 482-0266, Department of Commerce, Room 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: February 4, 2009.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E9-2635 Filed 2-6-09; 8:45 am]

BILLING CODE 3510-22-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: Gear-Marking Requirement for Atlantic Large Whale Take Reduction Plan.

OMB Control Number: 0648-0364.

Form Number(s): None.

Type of Request: Regular submission.

Burden Hours: 10,235.

Number of Respondents: 1,470.

Average Hours per Response: 5 minutes.

Needs and Uses: Gear-marking requirements in accordance with the Atlantic Large Whale Take Reduction Plan, developed under Section 118 of the Marine Mammal Protection Act, assist National Marine Fisheries Service (NMFS) in obtaining detailed information about which fisheries or specific parts of fishing gear are responsible for the incidental mortality and serious injury of right, humpback, and fin whales. Generally, only a portion of gear is recovered from an entangled whale and it is almost impossible to link that portion of gear to a particular fishery. Therefore, requiring fishermen to mark surface buoys and the buoy line provides NMFS with an additional source of information, which could then be used to determine the gear responsible for and the location of the entanglement event. The following fisheries are affected by this information collection: Northeast and Mid-Atlantic lobster trap/pot fisheries; Atlantic blue

crab trap/pot fisheries; Atlantic mixed species trap/pot fisheries targeting crab (red, Jonah, and rock), hagfish, finfish (black sea bass, scup, tautog, cod, haddock, pollock, redfish, and white hake), conch/whelk, and shrimp; Northeast anchored gillnet; Northeast drift gillnet; Mid-Atlantic gillnet; Southeast Atlantic gillnet; and Southeastern United States Atlantic shark gillnet.

Affected Public: Business or other for-profit organizations.

Frequency: Annually.

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: February 4, 2009.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E9-2636 Filed 2-6-09; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1604]

Expansion of Foreign-Trade Zone 102, St. Louis County, MO

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a-81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the St. Louis County Port Authority, grantee of Foreign-Trade Zone 102, submitted an application to the Board for authority to expand FTZ 102 to include two sites at the NorthPark industrial park (Site 2—492 acres) and at three parcels located at and adjacent to the Lambert-St. Louis International Airport (Site 3—272 acres) in St. Louis County, Missouri, adjacent to the St. Louis Customs and Border Protection port of entry (FTZ Docket 32-2008, filed 5/9/08);

Whereas, notice inviting public comment was given in the **Federal**

Register (73 FR 28429, 5/16/08) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendation of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that the proposal is in the public interest;

Now, therefore, the Board hereby orders:

The application to expand FTZ 102 is approved, subject to the FTZ Act and the Board's regulations, including Section 400.28.

Signed at Washington, DC, this 30th day of January 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

[FR Doc. E9-2648 Filed 2-6-09; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1602]

Grant of Authority For Subzone Status, Dal-Tile Corporation (Flooring and Home Furnishings Warehousing and Distribution), Sunnyvale and Mesquite, Texas

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a-81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Foreign-Trade Zones Act provides for "... the establishment ... of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes," and authorizes the Foreign-Trade Zones Board to grant to qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs and Border Protection ports of entry;

Whereas, the Board's regulations (15 CFR Part 400) provide for the establishment of special-purpose subzones when existing zone facilities cannot serve the specific use involved, and when the activity results in a significant public benefit and is in the public interest;

Whereas, the Dallas/Fort Worth International Airport Board, grantee of FTZ 39, has made application to the Board for authority to establish special-purpose subzone status at the flooring and home furnishings warehousing and distribution facilities of Dal-Tile

Corporation, located in Sunnyvale and Mesquite, Texas (FTZ Docket 16–2008, filed 3/7/2008);

Whereas, notice inviting public comment has been given in the **Federal Register** (73 FR 14432, 3/18/2008); and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied, and that approval of the application is in the public interest;

Now, therefore, the Board hereby grants authority for subzone status for activity related to flooring and home furnishings warehousing and distribution at the Dal–Tile Corporation facilities located in Sunnyvale and Mesquite, Texas (Subzone 39K), as described in the application and **Federal Register** notice, and subject to the FTZ Act and the Board's regulations, including Section 400.28.

Signed at Washington, DC, this 30th day of January 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign–Trade Zones Board.

Attest:

Andrew McGilvray,

Executive Secretary.

[FR Doc. E9–2651 Filed 2–6–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–832]

Pure Magnesium from the People's Republic of China: Extension of Time for the Preliminary Results of the Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: February 9, 2009.

FOR FURTHER INFORMATION CONTACT: Laurel LaCivita, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–4243.

SUPPLEMENTARY INFORMATION:

Background

On May 5, 2008, the Department of Commerce (“the Department”) published in the **Federal Register** a notice for an opportunity to request an administrative review of the

antidumping duty order on pure magnesium from the People's Republic of China (“PRC”). See *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 73 FR 24532 (May 5, 2008). Respondent, Tianjin Magnesium International Co., Ltd. (“TMI”), requested a review on May 29, 2008, and Petitioner, US Magnesium LLC (“US Magnesium”), requested a review of TMI on May 30, 2008. The Department published in the **Federal Register** a notice of initiation of an administrative review of TMI for the period May 1, 2007, through April 30, 2008. See *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 73 FR 37409 (July 1, 2008). Currently, the preliminary results of review are due no later than January 31, 2009.

Extension of Time Limit of Preliminary Results.

Pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended (“the Act”), the Department shall make a preliminary determination in an administrative review of an antidumping duty order within 245 days after the last day of the anniversary month of the date of publication of the order. The Act further provides, however, that the Department may extend that 245-day period to 365 days if it determines it is not practicable to complete the review within the foregoing time period.

We determine that completion of the preliminary results of this review within the 245-day period is not practicable because the Department requires additional time to analyze information pertaining to the respondent's sales practices, factors of production, and to issue and review responses to supplemental questionnaires. Therefore, we require additional time to complete these preliminary results. As a result, in accordance with section 751(a)(3)(A) of the Act, the Department is extending the time period for completion of the preliminary results of this review by 120 days until May 31, 2009.

This notice is published in accordance with sections 751(a)(3)(A) and 777(i) of the Act.

Dated: January 30, 2009.

John M. Andersen,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. E9–2641 Filed 2–6–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

A–201–822

Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On August 6, 2008, the Department of Commerce (the Department) published the preliminary results of the administrative review of the antidumping duty order on stainless steel sheet and strip in coils from Mexico. See *Stainless Steel Sheet and Strip in Coils From Mexico; Preliminary Results of Antidumping Duty Administrative Review*, 73 FR 45708 (August 6, 2008) (*Preliminary Results*). This review covers sales of subject merchandise made by ThyssenKrupp Mexinox S.A. de C.V. (Mexinox) for the period July 1, 2006, to June 30, 2007. Based on our analysis of the comments received, we have made changes to the margin calculation; therefore, the final results differ from the preliminary results. The final weighted-average dumping margin for the reviewed firm is listed below in the section entitled “Final Results of Review.”

EFFECTIVE DATE: February 9, 2009.

FOR FURTHER INFORMATION CONTACT: Maryanne Burke or Robert James, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–5604 and (202) 482–0649, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 6, 2008, the Department published in the **Federal Register** the preliminary results of the administrative review of the antidumping duty order on stainless steel sheet and strip in coils from Mexico for the period July 1, 2006, to June 30, 2007. See *Preliminary Results*. In response to the Department's invitation to comment on the preliminary results of this review, Allegheny Ludlum Corporation, AK Steel Corporation, North American Stainless, United Auto Workers Local 3303, Zanesville Armco Independent Organization, Inc. and the United Steelworkers of America (collectively, petitioners) and Mexinox filed their case briefs on September 5, 2008. Mexinox and petitioners submitted rebuttal briefs on September 12, 2008.

On October 14, 2008, we published in the **Federal Register** our notice extending the time limit for this review until February 2, 2009. See *Stainless Steel Sheet and Strip in Coils From Mexico: Extension of Time Limit for Final Results of Antidumping Duty Administrative Review*, 73 FR 60679 (October 14, 2008).

Period of Review

The period of review (POR) is July 1, 2006 to June 30, 2007.

Scope of the Order

For purposes of this administrative review, the products covered are certain stainless steel sheet and strip in coils. Stainless steel is an alloy steel containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. The subject sheet and strip is a flat-rolled product in coils that is greater than 9.5 mm in width and less than 4.75 mm in thickness, and that is annealed or otherwise heat treated and pickled or otherwise descaled. The subject sheet and strip may also be further processed (*e.g.*, cold-rolled, polished, aluminized, coated, *etc.*) provided that it maintains the specific dimensions of sheet and strip following such processing. The merchandise subject to this order is currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) at subheadings: 7219.13.0031, 7219.13.0051, 7219.13.0071, 7219.13.0081, 7219.14.0030, 7219.14.0065, 7219.14.0090, 7219.32.0005, 7219.32.0020, 7219.32.0025, 7219.32.0035, 7219.32.0036, 7219.32.0038, 7219.32.0042, 7219.32.0044, 7219.33.0005, 7219.33.0020, 7219.33.0025, 7219.33.0035, 7219.33.0036, 7219.33.0038, 7219.33.0042, 7219.33.0044, 7219.34.0005, 7219.34.0020, 7219.34.0025, 7219.34.0030, 7219.34.0035, 7219.35.0005, 7219.35.0015, 7219.35.0030, 7219.35.0035, 7219.90.0010, 7219.90.0020, 7219.90.0025, 7219.90.0060, 7219.90.0080, 7220.12.1000, 7220.12.5000, 7220.20.1010, 7220.20.1015, 7220.20.1060, 7220.20.1080, 7220.20.6005, 7220.20.6010, 7220.20.6015, 7220.20.6060, 7220.20.6080, 7220.20.7005, 7220.20.7010, 7220.20.7015, 7220.20.7060, 7220.20.7080, 7220.20.8000, 7220.20.9030, 7220.20.9060, 7220.90.0010, 7220.90.0015, 7220.90.0060, and 7220.90.0080. Although the HTSUS subheadings are provided for

convenience and customs purposes, the Department's written description of the merchandise under review is dispositive.

Excluded from the scope are the following: (1) sheet and strip that is not annealed or otherwise heat treated and pickled or otherwise descaled; (2) sheet and strip that is cut to length; (3) plate (*i.e.*, flat-rolled stainless steel products of a thickness of 4.75 mm or more); (4) flat wire (*i.e.*, cold-rolled sections, with a prepared edge, rectangular in shape, of a width of not more than 9.5 mm); and (5) razor blade steel. Razor blade steel is a flat-rolled product of stainless steel, not further worked than cold-rolled (cold-reduced), in coils, of a width of not more than 23 mm and a thickness of 0.266 mm or less, containing, by weight, 12.5 to 14.5 percent chromium, and certified at the time of entry to be used in the manufacture of razor blades. See chapter 72 of the HTSUS, "Additional U.S. Note" 1(d).

Flapper valve steel is also excluded from the scope of the order. This product is defined as stainless steel strip in coils containing, by weight, between 0.37 and 0.43 percent carbon, between 1.15 and 1.35 percent molybdenum, and between 0.20 and 0.80 percent manganese. This steel also contains, by weight, phosphorus of 0.025 percent or less, silicon of between 0.20 and 0.50 percent, and sulfur of 0.020 percent or less. The product is manufactured by means of vacuum arc remelting, with inclusion controls for sulphide of no more than 0.04 percent and for oxide of no more than 0.05 percent. Flapper valve steel has a tensile strength of between 210 and 300 ksi, yield strength of between 170 and 270 ksi, plus or minus 8 ksi, and a hardness (Hv) of between 460 and 590. Flapper valve steel is most commonly used to produce specialty flapper valves in compressors.

Also excluded is a product referred to as suspension foil, a specialty steel product used in the manufacture of suspension assemblies for computer disk drives. Suspension foil is described as 302/304 grade or 202 grade stainless steel of a thickness between 14 and 127 microns, with a thickness tolerance of plus-or-minus 2.01 microns, and surface glossiness of 200 to 700 percent Gs. Suspension foil must be supplied in coil widths of not more than 407 mm, and with a mass of 225 kg or less. Roll marks may only be visible on one side, with no scratches of measurable depth. The material must exhibit residual stresses of 2 mm maximum deflection, and flatness of 1.6 mm over 685 mm length.

Certain stainless steel foil for automotive catalytic converters is also

excluded from the scope of the order. This stainless steel strip in coils is a specialty foil with a thickness used between 20 and 110 microns used to produce a metallic substrate with a honeycomb structure for use in automotive catalytic converters. The steel contains, by weight, carbon of no more than 0.030 percent, silicon of no more than 1.0 percent, manganese of no more than 1.0 percent, chromium of between 19 and 22 percent, aluminum of no less than 5.0 percent, phosphorus of no more than 0.045 percent, sulfur of no more than 0.03 percent, lanthanum of less than 0.002 or greater than 0.05 percent, and total rare earth elements of more than 0.06 percent, with the balance iron.

Permanent magnet iron-chromium-cobalt alloy stainless strip is also excluded from the scope of the order. This ductile stainless steel strip contains, by weight, 26 to 30 percent chromium, and 7 to 10 percent cobalt, with the remainder of iron, in widths 228.6 mm or less, and a thickness between 0.127 and 1.270 mm. It exhibits magnetic remanence between 9,000 and 12,000 gauss, and a coercivity of between 50 and 300 oersteds. This product is most commonly used in electronic sensors and is currently available under proprietary trade names such as "Arnokrome III."¹

Certain electrical resistance alloy steel is also excluded from the scope of the order. This product is defined as a non-magnetic stainless steel manufactured to American Society of Testing and Materials ("ASTM") specification B344 and containing, by weight, 36 percent nickel, 18 percent chromium, and 46 percent iron, and is most notable for its resistance to high temperature corrosion. It has a melting point of 1390 degrees Celsius and displays a creep rupture limit of 4 kilograms per square millimeter at 1000 degrees Celsius. This steel is most commonly used in the production of heating ribbons for circuit breakers and industrial furnaces, and in rheostats for railway locomotives. The product is currently available under proprietary trade names such as "Gilphy 36."²

Certain martensitic precipitation-hardenable stainless steel is also excluded from the scope of the order. This high-strength, ductile stainless steel product is designated under the Unified Numbering System ("UNS") as S45500-grade steel, and contains, by weight, 11 to 13 percent chromium, and 7 to 10 percent nickel. Carbon,

¹ "Arnokrome III" is a trademark of the Arnold Engineering Company.

² "Gilphy 36" is a trademark of Imphy, S.A.

manganese, silicon and molybdenum each comprise, by weight, 0.05 percent or less, with phosphorus and sulfur each comprising, by weight, 0.03 percent or less. This steel has copper, niobium, and titanium added to achieve aging, and will exhibit yield strengths as high as 1700 Mpa and ultimate tensile strengths as high as 1750 Mpa after aging, with elongation percentages of 3 percent or less in 50 mm. It is generally provided in thicknesses between 0.635 and 0.787 mm, and in widths of 25.4 mm. This product is most commonly used in the manufacture of television tubes and is currently available under proprietary trade names such as "Durphynox 17."³

Finally, three specialty stainless steels typically used in certain industrial blades and surgical and medical instruments are also excluded from the scope of the order. These include stainless steel strip in coils used in the production of textile cutting tools (e.g., carpet knives).⁴ This steel is similar to AISI grade 420 but containing, by weight, 0.5 to 0.7 percent of molybdenum. The steel also contains, by weight, carbon of between 1.0 and 1.1 percent, sulfur of 0.020 percent or less, and includes between 0.20 and 0.30 percent copper and between 0.20 and 0.50 percent cobalt. This steel is sold under proprietary names such as "GIN4 Mo." The second excluded stainless steel strip in coils is similar to AISI 420–J2 and contains, by weight, carbon of between 0.62 and 0.70 percent, silicon of between 0.20 and 0.50 percent, manganese of between 0.45 and 0.80 percent, phosphorus of no more than 0.025 percent and sulfur of no more than 0.020 percent. This steel has a carbide density on average of 100 carbide particles per 100 square microns. An example of this product is "GIN5" steel. The third specialty steel has a chemical composition similar to AISI 420 F, with carbon of between 0.37 and 0.43 percent, molybdenum of between 1.15 and 1.35 percent, but lower manganese of between 0.20 and 0.80 percent, phosphorus of no more than 0.025 percent, silicon of between 0.20 and 0.50 percent, and sulfur of no more than 0.020 percent. This product is supplied with a hardness of more than Hv 500 guaranteed after customer processing, and is supplied as, for example, "GIN6."⁵

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by interested parties in this administrative review are addressed in the Issues and Decision Memorandum (Decision Memorandum) from John M. Andersen, Acting Deputy Assistant Secretary for Import Administration, to Ronald K. Lorentzen, Acting Assistant Secretary for Import Administration, dated February 2, 2009, which is hereby adopted by this notice. A list of the issues which parties have raised and to which we have responded, all of which are in the Decision Memorandum, is attached to this notice as an appendix. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum, which is on file in the Central Records Unit in room 1117 of the main Department building. In addition, a complete version of the Decision Memorandum can be accessed directly via the Internet at www.ia.ita.doc.gov/fm/index.html. The paper copy and electronic version of the Decision Memorandum are identical in content.

Changes Since the Preliminary Results

Based on our analysis of the comments received, we have made the following changes to the margin calculation:

- We revised the numerator of Mexinox's and Ken-Mac Metal Inc.'s financial expense ratio to include a certain short-term interest income offset. See "Cost of Production and Constructed Value Calculation Adjustments for the Final Results - ThyssenKrupp Mexinox S.A. de C.V." (Final Results Cost Calculation Memorandum), dated February 2, 2009

- We have corrected clerical errors identified by parties in the *Preliminary Results*: (1) we modified SAS language in the All-Macros Program where we perform the sales below cost test on a quarterly basis to avoid overwriting certain transaction-specific data; (2) we revised our calculation of Mexinox's home market credit expenses; (3) we adjusted the denominators of Mexinox's general and administrative expense ratio and financial expense ratio to include a certain depreciation expense.

These changes are discussed in the relevant sections of the Decision Memorandum and Final Results Cost Calculation Memorandum. See also Memorandum to the File, "Analysis of Data Submitted by ThyssenKrupp Mexinox S.A. de C.V (Mexinox) for the Final Results of Stainless Steel Sheet

and Strip in Coils from Mexico (A-201-822)," dated February 2, 2009.

Final Results of Review

We determine the following weighted-average percentage margin exists for the period July 1, 2006 to June 30, 2007:

Manufacturer / Exporter	Weighted Average Margin (percentage)
ThyssenKrupp Mexinox S.A. de C.V.	2.86 percent

Assessment

The Department will determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries, pursuant to section 751(a)(1) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.212(b). The Department calculated an assessment rate for each importer of the subject merchandise covered by the review. Upon issuance of the final results of this review, for any importer-specific assessment rates calculated in the final results that are above *de minimis* (i.e., at or above 0.50 percent), we will issue appraisal instructions directly to CBP to assess antidumping duties on appropriate entries by applying the assessment rate to the entered value of the merchandise. Pursuant to 19 CFR 356.8(a), the Department intends to issue assessment instructions to CBP 41 days after the date of publication of these 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). This clarification will apply to entries of subject merchandise during the POR produced by Mexinox for which Mexinox did not know the merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the 30.85 percent all-others rate if there is no company-specific rate for an intermediary involved in the transaction. See *id.* for a full discussion of this clarification.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of these final results for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of these final results of administrative review, consistent with

³ "Durphynox 17" is a trademark of Imphy, S.A.

⁴ This list of uses is illustrative and provided for descriptive purposes only.

⁵ "GIN4 Mo," "GIN5" and "GIN6" are the proprietary grades of Hitachi Metals America, Ltd.

section 751(a)(1) of the Act: (1) the cash deposit rate for the reviewed company will be the rate listed above; (2) if the exporter is not a firm covered in this review, but was covered in a previous review or the original less-than-fair-value (LTFV) investigation, 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 original LTFV 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; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 30.85 percent, the all-others rate established in the LTFV investigation. *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order; Stainless Steel Sheet and Strip in Coils From Mexico*, 64 FR 40560 (July 27, 1999). These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Interested Parties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Department's presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective orders (APOs) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: February 2, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

Appendix — Issues in Decision Memorandum

General Issues

Comment 1: Clerical Errors

Comment 2: Offsetting for U.S. Sales that Exceed Normal Value Adjustments to U.S. Price

Comment 3: U.S. Indirect Selling Expenses

Adjustments to Normal Value

Comment 4: Circumstances-of-Sale Adjustment

Cost of Production

Comment 5: Whether to Apply an Alternative Cost Averaging

Methodology

Comment 6: Depreciation for the Bright-Annealing Line

Comment 7: General and

Administrative Expense Ratio

Comment 8: Financial Expense Ratio

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DEPARTMENT OF COMMERCE

International Trade Administration

(A-489-501)

Certain Welded Carbon Steel Pipe and Tube from Turkey: Notice of Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, U.S. Department of Commerce.

SUMMARY: In response to a request by domestic interested party, Allied Tube and Conduit Corporation (“Allied Tube”), the Department of Commerce (“the Department”) is conducting an administrative review of the antidumping duty order on certain welded carbon steel pipe and tube (“welded pipe and tube”) from Turkey. *See Antidumping Duty Order; Welded Carbon Steel Standard Pipe and Tube Products From Turkey*, 51 FR 17784 (May 15, 1986) (“*Antidumping Duty Order*”). This review covers the Borusan Group¹ (“Borusan”) and Toscelik Profil ve Sac Endustrisi A.S. (“Toscelik”), each a producer and exporter of the subject merchandise. We preliminarily determine that Borusan made sales below normal value (“NV”). If these preliminary results are adopted in our final results, we will instruct U.S.

Customs and Border Protection (“CBP”) to assess antidumping duties based on the difference between the export price (“EP”) and the NV.

EFFECTIVE DATE: February 9, 2009.

FOR FURTHER INFORMATION CONTACT:

Dennis McClure or Christopher Hargett, at (202) 482-5973 or (202) 482-4161, respectively; AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On May 15, 1986, the Department published in the **Federal Register** the antidumping duty order on welded pipe and tube from Turkey. *See Antidumping Duty Order*. On May 5, 2008, the Department published a notice of opportunity to request an administrative review of this order. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 73 FR 24532 (May 5, 2008). On May 30, 2008, in accordance with 19 CFR 351.213(b), domestic interested parties Allied Tube requested a review of Borusan and Toscelik.

On July 1, 2008, the Department published a notice of initiation of administrative review of the antidumping duty order on welded pipe and tube from Turkey, covering the period May 1, 2007, through April 30, 2008. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 73 FR 37409 (July 1, 2008).

On July 1, 2008, the Department sent an antidumping duty administrative review questionnaire to Borusan and Toscelik.² On July 8, 2008, Toscelik informed the Department that it had no sales, shipments or entries of subject merchandise in or to the United States, during the period of review (“POR”). On October 10, 2008, the Department published a notice of intent to rescind the administrative review in part. *See Welded Carbon Steel Pipe and Tube from Turkey: Notice of Intent to Rescind Antidumping Duty Administrative Review, In Part*, 73 FR 60240 (October 10, 2008).

On August 29, 2008, the Department received Borusan's Sections A–D questionnaire response. On October 23,

² The questionnaire consists of sections A (general information), B (sales in the home market or to third countries), C (sales to the United States), D (cost of production/constructed value), and E (cost of further manufacturing or assembly performed in the United States).

¹ The Borusan Group includes Borusan Mannesmann Boru Sanayi ve Ticaret A.S. and Borusan Istikbal Ticaret T.A.S. and other affiliated companies.

2008, and November 3, 2008, the Department issued supplemental Section D and Sections A–C questionnaires, respectively, to Borusan. On November 14, 2008, Borusan file a supplemental response to the Department's supplemental Section D questionnaire. On December 8, 2008, the Department received Borusan's supplemental response to the Department's supplemental Sections A–C questionnaire. On December 10, 2008, the Department issued additional questions regarding Section D of the questionnaire. On December 11, 2008, the Department issued additional questions concerning Sections A–C of the questionnaire. The Department received Borusan's supplemental response to the Departments supplemental questions issued on December 10 and December 11, 2008, on January 7, 2009.

Scope of the Order

The products covered by this order include circular welded non-alloy steel pipes and tubes, of circular cross-section, not more than 406.4 millimeters (16 inches) in outside diameter, regardless of wall thickness, surface finish (black, or galvanized, painted), or end finish (plain end, beveled end, threaded and coupled). Those pipes and tubes are generally known as standard pipe, though they may also be called structural or mechanical tubing in certain applications. Standard pipes and tubes are intended for the low pressure conveyance of water, steam, natural gas, air, and other liquids and gases in plumbing and heating systems, air conditioner units, automatic sprinkler systems, and other related uses. Standard pipe may also be used for light load-bearing and mechanical applications, such as for fence tubing, and for protection of electrical wiring, such as conduit shells.

The scope is not limited to standard pipe and fence tubing, or those types of mechanical and structural pipe that are used in standard pipe applications. All carbon steel pipes and tubes within the physical description outlined above are included in the scope of this order, except for line pipe, oil country tubular goods, boiler tubing, cold-drawn or cold-rolled mechanical tubing, pipe and tube hollows for redraws, finished scaffolding, and finished rigid conduit.

Imports of these products are currently classifiable under the following Harmonized Tariff Schedule of the United States (“HTSUS”) subheadings: 7306.30.10.00, 7306.30.50.25, 7306.30.50.32, 7306.30.50.40, 7306.30.50.55, 7306.30.50.85, and 7306.30.50.90.

Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive.

Product Comparisons

We compared the EP to the NV, as described in the *Export Price* and *Normal Value* sections of this notice. In accordance with section 771(16) of the Tariff Act of 1930, as amended (“the Act”), we first attempted to match contemporaneous sales of products sold in the United States and comparison market that were identical with respect to the following characteristics: (1) grade; (2) nominal pipe size; (3) wall thickness; (4) surface finish; and (5) end finish. When there were no sales of identical merchandise in the home market to compare with U.S. sales, we compared U.S. sales with the most similar merchandise based on the characteristics listed above in order of priority listed.

Export Price

Because Borusan sold subject merchandise directly to the first unaffiliated purchaser in the United States prior to importation, and constructed export price (“CEP”) methodology was not otherwise warranted based on the record facts of this review, in accordance with section 772(a) of the Act, we used EP as the basis for all of Borusan's sales.

We calculated EP using, as starting price, the packed, delivered price to unaffiliated purchasers in the United States. In accordance with section 772(c)(2)(A) of the Act, we made the following deductions from the starting price (gross unit price), where appropriate: foreign inland freight from the mill to port, foreign brokerage and handling, international freight, marine insurance, U.S. brokerage, U.S. duty, and other related movement charges.

In addition, Borusan reported an amount for duty drawback which represents the amount of duties on imported raw materials associated with a particular shipment of subject merchandise to the United States that is exempted upon export. Borusan requested that we add the amount to the starting price. See page C–34 of Borusan's August 29, 2009, original response. To determine if a duty drawback adjustment is warranted, the Department has employed a two-prong test which determines whether: (1) the rebate and import duties are dependent upon one another, or in the context of an exemption from import duties, if the exemption is linked to the exportation of the subject merchandise; and (2) the respondent has demonstrated that there

are sufficient imports of the raw material to account for the duty drawback on the exports of the subject merchandise. See *Allied Tube and Conduit Corp. v. United States*, Slip Op. 05–56 (May 12, 2005).

Borusan provided specific documents to demonstrate that its exemption from import duties is linked to the exportation of subject merchandise, such as a table linking the consumption of hot-rolled steel sheet to the exportation of welded pipe and tube. See Exhibit C–8 of Borusan's August 29, 2009, original response. Furthermore, Borusan provided documentation to demonstrate that there are sufficient imports of the raw material to account for the duty drawback on the exports of the subject merchandise. See *id.* Therefore, in accordance with our practice and determination in prior reviews, we are adding duty drawback to the starting price. See *Notice of Final Results of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube From Turkey*, 70 FR 73447 (December 12, 2005) (“2003–04 Administrative Review”). See also the Department's “Analysis Memorandum for the Borusan Group” (“Borusan's calculation memo”), dated February 2, 2009, available in the Central Records Unit in Room 1117 of the Main Commerce Building.

Normal Value

A. Selection of Comparison Market

In order to determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating NV, we compared Borusan's volume of home market sales of the foreign like product to the volume of its U.S. sales of the subject merchandise, in accordance with section 773(a)(1)(C) of the Act. Because Borusan's aggregate volume of home market sales of the foreign like product was greater than five percent of its aggregate volume of U.S. sales of the subject merchandise, we determined that the home market was viable. We calculated NV as noted in the “Calculation of NV Based on Comparison Market Prices” section of this notice. See also Borusan's calculation memo.

Cost of Production Analysis

Because the Department disregarded sales below the cost of production (“COP”) in the last completed review of Borusan, we have reasonable grounds to believe or suspect that sales of the foreign like product under consideration for the determination of NV in this

review may have been made at prices below the COP as provided by section 773(b)(2)(A)(ii) of the Act. Therefore, pursuant to section 773(b)(1) of the Act, we initiated a COP investigation of sales by Borusan in the home market. *See 2003–04 Administrative Review.*

1. Calculation of COP

In accordance with section 773(b)(3) of the Act, we calculated the COP based on the sum of Borusan's costs of materials and fabrication employed in producing the foreign like product, plus selling, general, and administrative expenses and the cost of all expenses incidental to packing and preparing the foreign like product for shipment.

2. Test of Comparison Market Sales Prices

We compared the weighted-average COP figures to home market sales of the foreign like product as required by section 773(b) of the Act, in order to determine whether these sales had been made at prices below the COP. On a product-specific basis, we compared the COP to the home market prices, less any applicable movement charges, rebates, discounts, packing, and direct selling expenses.

3. Results of the COP Test

Pursuant to section 773(b)(2)(C)(i) of the Act, where less than 20 percent of 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." Where 20 percent or more of sales of a given product during the POR were at prices less than the COP we determined such sales to have been made in "substantial quantities." *See* section 773(b)(2)(C) of the Act. Further, we determined that the sales were made within an extended period of time, in accordance with section 773(b)(2)(B) of the Act, because they were made over the course of the POR. In such cases, because we compared prices to POR-average costs, we also determined that such sales were not made 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. Therefore, we disregarded below-cost sales of a given product where more than 20 percent were sold at prices below the COP and used the remaining sales as the basis for determining NV, in accordance with section 773(b)(1) of the Act. *See* Borusan's calculation memo.

Calculation of NV Based on Comparison Market Prices

For Borusan, for those comparison products for which there were sales at prices above the COP, we based NV on home market prices. In these preliminary results, we were able to match all U.S. sales to contemporaneous sales, made in the ordinary course of trade, of either an identical or a similar foreign like product, based on matching characteristics. In accordance with section 773(a)(1)(B)(i) of the Act, we have excluded certain sales sold in the comparison market which were exported to a third country.³ We calculated NV based on free on board ("FOB") mill or delivered prices to unaffiliated customers, or prices to affiliated customers which were determined to be at arm's length (*see* discussion below regarding these sales). We made deductions, where appropriate, from the starting price for billing adjustments, discounts, rebates, and inland freight. Additionally, we added interest revenue. In accordance with section 773(a)(6) of the Act, we deducted home market packing costs and added U.S. packing costs.

In accordance with section 773(a)(6)(C)(iii) of the Act, we adjusted for differences in the circumstances of sale. These circumstances included differences in imputed credit expenses and other direct selling expenses, such as the expense related to bank charges and factoring.⁴ We also made adjustments, where appropriate, for physical differences in the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act.

Calculation of Arm's-Length Sales

We included in our analysis Borusan's home market sales to affiliated customers only where we determined that such sales were made at arm's-length prices, i.e., at prices comparable to prices at which Borusan sold identical merchandise to their unaffiliated customers. Borusan's sales

³In Borusan's original response submitted on August 29, 2008, Borusan explained that it knows its domestic customer is going to export the foreign like product without modification. In the Department's November 3, 2008, supplemental questionnaire, the Department requested Borusan to identify these sales.

⁴In the Department's November 3, 2008, supplemental questionnaire the Department requested Borusan to explain how it accounted for all expenses related to factoring. On pages 20 and 21 of Borusan's December 8, 2008, supplemental response, Borusan explained that it revised the database to account for the difference between the invoice value and the funds received from the factoring institution. Borusan also explained that it adjusted the payment date and recalculated credit expense for these particular sales, since it reported a separate field for factoring expenses.

to affiliates constituted less than five percent of overall home market sales. To test whether the sales to affiliates were made at arm's-length prices, we compared the starting prices of sales to affiliated and unaffiliated customers net of all movement charges, direct selling expenses, discounts, and packing. Where the price to that affiliated party was, on average, within a range of 98 to 102 percent of the price of the same or comparable merchandise sold to the unaffiliated parties, we determined that the sales made to the affiliated party were at arm's length. *See Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 FR 69186 (November 15, 2002).

Level of Trade

As set forth in section 773(a)(1)(B)(i) of the Act and in the Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act, at 829–831 (*see* H.R. Doc. No. 316, 103d Cong., 2d Sess. 829–831 (1994)), to the extent practicable, the Department calculates NV based on sales at the same level of trade ("LOT") as U.S. sales, either EP or CEP. When the Department is unable to find sale(s) in the comparison market at the same LOT as the U.S. sale(s), the Department may compare sales in the U.S. and foreign markets at different LOTs. The NV LOT is that of the starting-price sales in the home market. To determine whether home market sales are at a different LOT than U.S. sales, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. *See Honey from Argentina: Preliminary Results of Antidumping Duty Administrative Review and Intent to Revoke Order in Part*, 73 FR 79802, 79805 (December 30, 2008) ("*Honey from Argentina*"). 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 the sales on which NV is based and comparison-market sales at the LOT of the export transaction, we make an LOT adjustment under section 773(a)(7)(A) of the Act. *See Honey from Argentina*, 73 FR at 79805.

In implementing these principles, we examined information from Borusan regarding the marketing stages involved in the reported home market and EP sales, including a description of the selling functions performed by Borusan for the channels of distribution in the home market and U.S. market. In our analysis, we grouped the reported selling functions into the following sales function category: sales process and

marketing support, freight and delivery, inventory maintenance, and quality assurance/warranty service.

For home market sales, we found that Borusan's mill-direct sales comprised one LOT. Furthermore, Borusan provided similar selling functions to each type of customer (*i.e.* trading companies/distributors and industrial end-users/construction companies), with the exception of rebates grouped into the sales process and marketing category which were given to trading companies/distributors. *See* pages A-18 and A-21 of Borusan's August 29, 2008, response.

We found that Borusan's U.S. sales were also made at only one LOT. Borusan reports one channel of distribution, and sales are negotiated on an order-by-order basis with an unaffiliated trading company. *See* page A-17 of Borusan's August 29, 2008, response.

We then compared Borusan's home market LOT and with the U.S. LOT. We note the selling functions do not differ for the activities falling under inventory maintenance (*i.e.*, forward inventory maintenance and sales from warehouse), quality assurance/warranty service (*i.e.*, provide warranty service), and freight and delivery (*i.e.*, act as agent or coordinate production/delivery for customer with mill and coordinate freight and delivery arrangement). Furthermore, we note that the selling functions grouped under sales process and marketing, such as customer advice/product information, discounts, advertising, and rebates only differ somewhat between the home market LOT and U.S. LOT. *See* page A-20 of Borusan's August 29, 2008, response. Therefore, we compared all U.S. sales to an identical home market LOT and did not find it necessary to make a LOT adjustment.

Currency Conversion

The Department's preferred source for daily exchange rates is the Federal Reserve Bank. However, the Federal Reserve Bank does not track or publish exchange rates for the Turkish lira. Therefore, we made currency conversions based on the daily exchange rates from the Dow Jones Business Information Services.

Section 773A(a) directs the Department to use a daily exchange rate in order to convert foreign currencies into U.S. dollars, unless the daily rate involves a "fluctuation." It is the Department's practice to find that a fluctuation exists when the daily exchange rate differs from a benchmark rate by 2.25 percent. The benchmark rate is defined as the rolling average of

the rates for the past 40 business days. When we determine that a fluctuation existed, we generally utilize the benchmark rate instead of the daily rate, in accordance with established practice.

Preliminary Results of Review

As a result of this review, we preliminarily determine that the following margin exists for the period May 1, 2007, through April 30, 2008:

Manufacturer/Exporter	Margin (percent)
Borusan ⁵	7.64

⁵The cash deposit rate calculated for Borusan applies to The Borusan Group, Borusan Mannesmann Boru Sanayi Ve Ticaret, A.S. and Borusan Istikbal Ticaret T.A.S. for CBP purposes. The Department formerly referred to Borusan Istikbal Ticaret T.A.S. as Istikbal Ticaret T.A.S. *See Notice of Final Results of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube from Turkey*, 70 FR 73447 (December 12, 2005). We note that Borusan's response does not identify a company by the name Istikbal Ticaret T.A.S. Instead, Borusan's response identified their affiliate, Borusan Istikbal Ticaret T.A.S., which was not involved in sales of subject merchandise to the United States during the POR. *See* Borusan's August 29, 2008, response at 33. Borusan also explained in its August 29, 2008, response at 5, that Borusan Birlesik Boru Fabrikalari San ve Tic. ("BBBF") was renamed Borusan Mannesmann Boru Sanayi Ve Ticaret, A.S. prior to BBBF's name change.

We will disclose the calculations used in our analysis to parties to this proceeding within five days of the publication date of this notice. *See* section 351.224(b) of the Department's regulations. Interested parties are invited to comment on the preliminary results. Interested parties may submit case briefs within 30 days of the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than 37 days after the date of publication of this notice. Parties who submit arguments are requested to submit with each argument: (1) a statement of the issue, (2) a brief summary of the argument, and (3) a table of authorities. Further, parties submitting written comments should provide the Department with an additional copy of the public version of any such comments on a diskette. Any interested party may request a hearing within 30 days of publication of this notice. *See* section 351.310(c) of the Department's regulations. If requested, a hearing will be held 44 days after the publication of this notice, or the first workday thereafter. The Department will publish a notice of the final results of this administrative review, which will include the results of its analysis of issues raised in any written comments

or hearing, within 120 days from publication of this notice.

Assessment

The Department will determine, and CBP shall assess, antidumping duties on all appropriate entries, pursuant to section 751(a)(1)(B) of the Act and 19 CFR 351.212(b). The Department calculated importer-specific duty assessment rates on the basis of the ratio of the total antidumping duties calculated for the examined sales to the total entered value of the examined sales for that importer. Where the assessment rate is above *de minimis*, we will instruct CBP to assess duties on all entries of subject merchandise by that importer. The Department intends to issue assessment instructions to CBP 15 days after the date of 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). This clarification will apply to entries of subject merchandise during the period of review produced by companies included in these preliminary results of review for which the reviewed companies did not know their merchandise 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 intermediate company(ies) involved in the transaction. For a full discussion of this clarification, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003).

Cash Deposit Requirements

The following cash deposit rates will be effective upon publication of the final results of this administrative review for all shipments of welded pipe and tube from Turkey entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(1) of the Act: (1) the cash deposit rate for the company listed above 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 ("LTFV") 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; and (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous review or the LTFV investigation conducted by the Department, the cash deposit rate will be 14.74 percent, the "All Others" rate established in the LTFV investigation. These cash deposit requirements, when imposed, shall remain in effect until further notice.

This notice serves as a preliminary reminder to importers of their responsibility under section 351.402(f)(2) of the Department's regulations to file a certificate regarding the reimbursement of antidumping and/or countervailing 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 and/or countervailing duties occurred and the subsequent assessment of double antidumping duties.

This determination is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: February 2, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

[FR Doc. E9-2644 Filed 2-6-09; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A-570-890]

Wooden Bedroom Furniture From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative and New Shipper Reviews and Partial Rescission of Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In response to requests from interested parties, the Department of Commerce ("Department") is conducting an administrative review of the antidumping duty order on wooden bedroom furniture ("WBF") from the People's Republic of China ("PRC"). The period of review ("POR") is January 1, 2007 through December 31, 2007. This administrative review covers multiple exporters of the subject merchandise, two of which are being individually reviewed as mandatory respondents. The Department is also conducting two new shipper reviews for exporters/producers. The POR for the new shipper reviews is also January 1, 2007, through December 31, 2007.

We preliminarily determine that the mandatory respondents in the administrative review made sales in the United States at prices below normal value ("NV"). With respect to the remaining respondents in the administrative review, we preliminarily determine that 16 entities have provided sufficient evidence that they are separate from the state-controlled entity, and we have established a weighted-average margin based on the rates we have calculated for the mandatory respondents, excluding any rates that are zero, *de minimis*, or based entirely on adverse facts available, to be applied to these separate rate entities.¹ Further, we preliminarily determine that the remaining six respondents in the administrative review have not demonstrated that they are entitled to a separate rate, and thus are considered part of the PRC entity. Finally, we preliminarily determine that the new shippers have not made sales in the United States at less than NV. If these preliminary results are adopted in our final results of review, we will instruct U.S. Customs and Border Protection ("CBP") to assess antidumping duties on entries of subject merchandise during the POR for which the importer-specific assessment rates are above *de minimis*.

We invite interested parties to comment on these preliminary results. Parties who submit comments are requested to submit with each argument a statement of the issue and a brief summary of the argument. We intend to issue the final results of this review no later than 120 days from the date of publication of this notice.

DATES: *Effective Date:* February 9, 2009.
FOR FURTHER INFORMATION CONTACT: Paul Stolz, or Sergio Balbontín, AD/CVD Operations, Office 8, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482-4474 and (202) 482-6478, respectively.

Background

On January 4, 2005, the Department published in the **Federal Register** the antidumping duty order on wooden bedroom furniture from the PRC. See *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden*

¹ These 16 entities do not include the two new shipper respondents, one of whom is also subject to the administrative review. Both new shipper respondents have demonstrated that they are separate from the state-controlled entity; however, their margins will be based on the results of their respective new shipper reviews.

Bedroom Furniture from the People's Republic of China, 70 FR 329 (January 4, 2005) ("Order"). Our first notice to the public that we were initiating an administrative review with respect to wooden bedroom furniture was published on February 27, 2008, wherein we stated, in a footnote, that we would subsequently publish a separate initiation notice identifying all the exporters under review. See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 73 FR 10422 (February 27, 2008). On March 7, 2008, the Department published in the **Federal Register** this subsequent notice of initiation of administrative review, wherein we identified the exporters under review by name. See *Notice of Initiation of Administrative Review of the Antidumping Duty Order on Wooden Bedroom Furniture from the People's Republic of China*, 73 FR 12387 (March 7, 2008) ("AR Initiation Notice"). Additionally on March 7, 2008, the Department initiated new shipper reviews with respect to the following exporter/producer combinations: 1) Golden Well International (HK), Ltd./Zhangzhou XYM Furniture Product Co., Ltd. (collectively "Golden Well"); and 2) Dongguan Sunshine Furniture Co., Ltd./Dongguan Sunshine Furniture Co., Ltd. ("Sunshine"). See *Wooden Bedroom Furniture from the People's Republic of China; Initiation of New Shipper Reviews*, 73 FR 12392 (March 7, 2008) ("NS Initiation Notice").

In the *AR Initiation Notice*, parties were notified that, due to the large number of firms requested for this administrative review and the resulting administrative burden of reviewing each company, the Department considered exercising its authority to limit the number of respondents selected for review in accordance with section 777A(c)(2) of the Tariff Act of 1930, as amended ("the Act"). Accordingly, the Department requested that all companies listed in the *AR Initiation Notice* wishing to qualify for separate rate status in this administrative review complete, as appropriate, either a separate rate application or certification.² The Department also

² In order to demonstrate separate rate eligibility, the Department requires companies for which a review was requested that were assigned a separate rate in the previous segment of this proceeding to certify that they continue to meet the criteria for obtaining a separate rate. See *Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People's Republic of China: Final Results of 2005-2006 Administrative Review and Partial Rescission of Review*, 72 FR 56724 (October 4, 2007) ("TRBs 2007") which was upheld by the Court of International Trade ("CIT") in *Peer Bearing Co. v. United States*, Slip Op. 08-134 (Ct. Int'l Trade 2008)

stated in the *AR Initiation Notice* its intention to select respondents based on CBP data for U.S. imports for the POR. As such, the Department stated that companies for which a review was initiated should notify the Department within 30 days of publication of this notice if they had no shipments, entries, or sales of the subject merchandise under consideration during the POR.

For this administrative review, the Department determined to use value of exports instead of volume of exports in selecting the largest exporters. The Department based this determination on the fact that CBP data for volume of imports were reported in differing units of measure (e.g., pieces, cubic meters, etc.) across the exporters and the Department did not have the information to convert the data into an equivalent unit of measure for all relevant imports. See *Antidumping Duty Administrative Review of Wooden Bedroom Furniture from the People's Republic of China: Selection of Respondents*, dated July 31, 2008 ("Selection of Respondents Memorandum"). On July 31, 2008, the Department selected: (1) Guangdong Yihua Timber Industry Co., Ltd., (a.k.a., Yihua Timber Industry Co., Ltd.) ("Yihua Timber"); and (2) Orient International Holding Shanghai Foreign Trading Co., Ltd. ("Orient International") as mandatory respondents in this administrative review. See *Selection of Respondents Memorandum*.

On August 21, 2008, the Department issued its questionnaire to Yihua Timber and Orient International. See below for mandatory respondent-specific chronologies. On September 18, 2008, Orient International stated that it would no longer be participating in this administrative review, except with respect to briefing and a hearing, if held. See *Letter from Orient International*, dated September 18, 2008.

On August 22, 2008, the Department aligned the deadlines and the time limits of the new shipper reviews of WBF with the administrative review of WBF. See *Memorandum to the File*, "Wooden Bedroom Furniture from the People's Republic of China: Alignment of the 1/1/2007–12/31/2007 Annual Administrative Review and the 1/1/2007–12/31/2007 New Shipper Review," dated August 22, 2008.

Between March 7, 2008, and June 5, 2008, several parties withdrew their requests for administrative review. On

("Peer Bearing"). For companies that have not previously been assigned a separate rate, the Department requires that they demonstrate eligibility for a separate rate by submitting a separate rate application.

August 25, 2008, the Department published a notice rescinding the review with respect to the entities for which all review requests had been withdrawn. See *Wooden Bedroom Furniture from the People's Republic of China: Notice of Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 49990 (August 25, 2008).

On September 16, 2008, the Department requested comments on surrogate country selection from all interested parties. On September 30, 2008, domestic interested parties, the American Furniture Manufacturers Committee for Legal Trade and Vaughan-Bassett Furniture Company, Inc. ("Petitioners") provided information regarding the selection of a surrogate country.³ Also, on September 30, 2008, Yihua Timber submitted comments regarding the selection of a surrogate country.⁴ On October 7, 2008, the Department received rebuttal surrogate country comments from both the Petitioners⁵ and Yihua Timber.⁶ On October 17, 2008, Petitioners' submitted a reply to Yihua Timber's October 7, 2008, rebuttal comments.⁷ Also, on October 17, 2008, Yihua Timber responded to Petitioner's October 7, 2008, rebuttal comments.⁸ On October 27, 2008, Petitioners submitted further rebuttal comments to Yihua Timber's October 17, 2008, submission.⁹ No other party to the proceeding submitted information or comments concerning the selection of a surrogate country.

On October 6, 2008, the Department extended the deadline for the issuance of the preliminary results of the administrative review and new shipper reviews until January 30, 2008. See

³ See *Letter from Petitioners* titled, "Wooden Bedroom Furniture From China Surrogate Country Comments," dated September 30, 2008.

⁴ See *Letter from Yihua Timber* titled, "Wooden Bedroom Furniture from the People's Republic of China, A-570-890: Comments on Surrogate Country Selection," dated September 30, 2008.

⁵ See *Letter from Petitioners* titled, "Wooden Bedroom Furniture From China: Rebuttal Surrogate Country Comments," dated October 7, 2008.

⁶ See *Letter from Yihua Timber* titled, "Wooden Bedroom Furniture from the People's Republic of China, A-570-890: Rebuttal Comments on Surrogate Country Selection," dated October 7, 2008.

⁷ See *Letter from Petitioners* titled, "Wooden Bedroom Furniture from China: Petitioners' Reply To Yihua Timber's Rebuttal Comments On Surrogate Country Selection," dated October 17, 2008.

⁸ See *Letter from Yihua Timber* titled, "Wooden Bedroom Furniture from the People's Republic of China, A-570-890: Further Rebuttal Comments on Surrogate Country Selection," dated October 17, 2008.

⁹ See *Letter from Petitioners* titled, "Wooden Bedroom Furniture from China: Petitioners' Reply To Yihua Timber's Further Rebuttal Comments On Surrogate Country Selection," dated October 27, 2008.

Wooden Bedroom Furniture from the People's Republic of China: Extension of Time Limits for the Preliminary Results of the Antidumping Duty Administrative Review and New Shipper Reviews, 73 FR 58113 (October 6, 2008).

Between March 13, 2008 and April 4, 2008, Petitioners and Kimball International, Inc., Kimball Furniture Group, Inc., and Kimball Hospitality Inc. (collectively "Kimball") submitted numerous comments pertaining to Kimball's standing as a domestic interested party. On November 4, 2008, the Department found that Kimball is a U.S. producer of wooden bedroom furniture for purposes of this antidumping administrative review and thus has standing as a U.S. producer of the like product to request administrative reviews of foreign exporters. See *Memorandum to the File* "Whether Kimball International, Inc., Kimball Furniture Group, Inc. and Kimball Hospitality, Inc. (collectively, "Kimball") is a U.S. Domestic Producer of Wooden Bedroom Furniture: Administrative Review of Wooden Bedroom Furniture from the People's Republic of China" (November 4, 2008).

On January 9, 2009, Lifestyle Enterprise, Inc. ("Lifestyle") and Trade Masters of Texas, Inc. ("Trade Masters") submitted comments arguing that the Department's current WBF administrative review is unlawful and must therefore be rescinded. See *Letter from Lifestyle and Trade Masters*, dated January 9, 2009. Lifestyle and Trade Masters asserted that the Department's administrative review is unlawful because, pursuant to 19 CFR 351.221(c)(1)(i), the Department is required to "publish notice of initiation of the review no later than the last day of the month following the anniversary month." Lifestyle and Trade Masters further stated that 19 CFR 351.102(b) defines the "anniversary month" as "the calendar month in which the anniversary of the date of publication of an order or suspension of investigation occurs," and thus, in this case the Department should have published its initiation notice by February 29, 2008. Additionally, Lifestyle and Trade Masters state that, on February 27, 2008, the Department published a notice in the **Federal Register** indicating that it was initiating a review, but then, in contradiction, stated that "the administrative review for {case A-570-890} will be published in a separate initiation notice." Lifestyle and Trade Masters contend that on March 7, 2008, eight days after the deadline for initiating the review according to its own regulations, the Department published its initiation notice for this

review. Lifestyle and Trade Masters therefore assert that the Department failed to initiate this review by the deadline in its own regulations, and accordingly, the review is unlawful and must be rescinded and terminated.

On January 16, 2009, Petitioners rebutted Lifestyle and Trade Masters submission. Petitioners stated the following: (1) The Department notice was timely filed; (2) the Act mandates an administrative review; and (3) the Department's practice has been to initiate a review, even if past the regulations deadline. See Letter from Petitioners, "Pre-Preliminary Comments," dated January 16, 2009.

We have determined that our notice was timely and complied with our regulations for the following reasons. Our first notice to the public that we were initiating an administrative review with respect to wooden bedroom furniture published on February 27, 2008, prior to the close of the month following the anniversary month of the order. See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 73 FR 10422 (February 27, 2008). Although this notice did not contain the list of all of the exporters under review, a footnote to this notice stated that we would publish a separate initiation notice for this review. That subsequent notice, which listed all of the exporters under review, was published on March 7, 2008.

Additionally, section 751 of the Act requires the Department to conduct an administrative review when timely and properly requested, as was done by multiple parties for this review. Thus, the Department was under an obligation to conduct an administrative review. Further, the Department has established its practice in regards to this proceeding; in two prior administrative reviews, the Department has published its initiation notice after the last day of the month following the anniversary month. See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 72 FR 8969 (February 28, 2007); *Notice of Initiation of Administrative Review of the Antidumping Duty Order on Wooden Bedroom Furniture from the People's Republic of China*, 72 FR 10159 (March 7, 2007); *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 71 FR 9519 (February 24, 2006); *Notice of Initiation of Administrative Review of the Antidumping Duty Order on Wooden Bedroom Furniture from the People's Republic of China*, 71 FR 11394 (March 7, 2006). Furthermore, the Department has, on occasion, initiated an administrative review after the close of

the month following the anniversary month of the relevant antidumping duty order. For example, when the Department has inadvertently omitted a case from the appropriate monthly initiation notice, the Department has initiated the review in the subsequent monthly initiation notice, notifying the public of its inadvertent omission from the prior month's initiation notice (*i.e.*, first publishing the notice of initiation for that review after the close of the month following the anniversary month of the respective order). See, *e.g.*, *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 69 FR 56745 (September 22, 2004); *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 69 FR 30282 (May 27, 2004). Therefore, consistent with Department practice, we have determined to continue with this administrative review.

Moreover, Lifestyle and Trade Masters do not claim that they were prejudiced by the alleged untimely notice. See Letter from Lifestyle and Trade Masters, dated January 9, 2009. Although their February 29, 2008, application for confidential information under Administrative Protective Order ("APO") was rejected by the Department on the grounds that the application was untimely, Lifestyle and Trade Masters' subsequent application for APO access, submitted November 25, 2008, was granted by the Department on December 3, 2008. Thus, there is no evidence that Lifestyle and Trade Masters were denied due process because their initial APO application was rejected, nor is there evidence that Lifestyle and Trade Masters suffered any actual harm due to the Department's allegedly untimely initiation of this review.

As noted above, the Department issued its antidumping questionnaire to the two mandatory respondents and two new shippers. Upon receipt of the various responses, the Department issued supplemental questionnaires. Yihua Timber, Golden Well, and Sunshine timely responded to the original and supplemental questionnaires.

On September 11, 2008, Orient International timely submitted its response to section A of the original questionnaire. However, on September 18, 2008, Orient International submitted a statement that it would no longer participate in this administrative review and did not respond to either sections C or D of the antidumping duty questionnaire.

On January 14, 2009, the Department requested that Golden Well place its new shipper review response to section A of the original questionnaire and its response to the section A supplemental questionnaires on the administrative review record. See Memorandum to the File: Antidumping Duty New Shipper Review on Wooden Bedroom Furniture from the People's Republic of China: Request for Greenberg Traurig to Place Responses to Section A and Section A Supplemental Questionnaires on the Administrative Review Record, dated January 14, 2009.

Period of Review

The POR is January 1, 2007, through December 31, 2007.

Scope of the Order

The product covered by the order is wooden bedroom furniture. Wooden bedroom furniture is generally, but not exclusively, designed, manufactured, and offered for sale in coordinated groups, or bedrooms, in which all of the individual pieces are of approximately the same style and approximately the same material and/or finish. The subject merchandise is made substantially of wood products, including both solid wood and also engineered wood products made from wood particles, fibers, or other wooden materials such as plywood, strand board, particle board, and fiberboard, with or without wood veneers, wood overlays, or laminates, with or without non-wood components or trim such as metal, marble, leather, glass, plastic, or other resins, and whether or not assembled, completed, or finished.

The subject merchandise includes the following items: (1) Wooden beds such as loft beds, bunk beds, and other beds; (2) wooden headboards for beds (whether stand-alone or attached to side rails), wooden footboards for beds, wooden side rails for beds, and wooden canopies for beds; (3) night tables, night stands, dressers, commodes, bureaus, mule chests, gentlemen's chests, bachelor's chests, lingerie chests, wardrobes, vanities, chessers, chifferobes, and wardrobe-type cabinets; (4) dressers with framed glass mirrors that are attached to, incorporated in, sit on, or hang over the dresser; (5) chests-

on-chests,¹⁰ highboys,¹¹ lowboys,¹² chests of drawers,¹³ chests,¹⁴ door chests,¹⁵ chiffoniers,¹⁶ hutches,¹⁷ and armoires;¹⁸ (6) desks, computer stands, filing cabinets, book cases, or writing tables that are attached to or incorporated in the subject merchandise; and (7) other bedroom furniture consistent with the above list.

The scope of the order excludes the following items: (1) Seats, chairs, benches, couches, sofas, sofa beds, stools, and other seating furniture; (2) mattresses, mattress supports (including box springs), infant cribs, water beds, and futon frames; (3) office furniture, such as desks, stand-up desks, computer cabinets, filing cabinets, credenzas, and bookcases; (4) dining room or kitchen furniture such as dining tables, chairs, servers, sideboards, buffets, corner cabinets, china cabinets, and china hutches; (5) other non-bedroom furniture, such as television cabinets, cocktail tables, end tables, occasional tables, wall systems, book cases, and entertainment systems; (6) bedroom furniture made primarily of wicker, cane, osier, bamboo or rattan; (7) side rails for beds made of metal if sold separately from the headboard and footboard; (8) bedroom furniture in which bentwood parts predominate;¹⁹

¹⁰ A chest-on-chest is typically a tall chest-of-drawers in two or more sections (or appearing to be in two or more sections), with one or two sections mounted (or appearing to be mounted) on a slightly larger chest; also known as a tallboy.

¹¹ A highboy is typically a tall chest of drawers usually composed of a base and a top section with drawers, and supported on four legs or a small chest (often 15 inches or more in height).

¹² A lowboy is typically a short chest of drawers, not more than four feet high, normally set on short legs.

¹³ A chest of drawers is typically a case containing drawers for storing clothing.

¹⁴ A chest is typically a case piece taller than it is wide featuring a series of drawers and with or without one or more doors for storing clothing. The piece can either include drawers or be designed as a large box incorporating a lid.

¹⁵ A door chest is typically a chest with hinged doors to store clothing, whether or not containing drawers. The piece may also include shelves for televisions and other entertainment electronics.

¹⁶ A chiffonier is typically a tall and narrow chest of drawers normally used for storing undergarments and lingerie, often with mirror(s) attached.

¹⁷ A hutch is typically an open case of furniture with shelves that typically sits on another piece of furniture and provides storage for clothes.

¹⁸ An armoire is typically a tall cabinet or wardrobe (typically 50 inches or taller), with doors, and with one or more drawers (either exterior below or above the doors or interior behind the doors), shelves, and/or garment rods or other apparatus for storing clothes. Bedroom armoires may also be used to hold television receivers and/or other audio-visual entertainment systems.

¹⁹ As used herein, bentwood means solid wood made pliable. Bentwood is wood that is brought to a curved shape by bending it while made pliable with moist heat or other agency and then set by cooling or drying. See Customs' Headquarters' Ruling Letter 043859, dated May 17, 1976.

(9) jewelry armoires;²⁰ (10) cheval mirrors;²¹ (11) certain metal parts;²² (12) mirrors that do not attach to, incorporate in, sit on, or hang over a dresser if they are not designed and marketed to be sold in conjunction with a dresser as part of a dresser-mirror set; and (13) upholstered beds.²³

Imports of subject merchandise are classified under subheading 9403.50.9040 of the HTSUS as "wooden * * * beds" and under subheading 9403.50.9080 of the HTSUS as "other * * * wooden furniture of a kind used in the bedroom." In addition, wooden headboards for beds, wooden footboards

²⁰ Any armoire, cabinet or other accent item for the purpose of storing jewelry, not to exceed 24" in width, 18" in depth, and 49" in height, including a minimum of 5 lined drawers lined with felt or felt-like material, at least one side door (whether or not the door is lined with felt or felt-like material), with necklace hangers, and a flip-top lid with inset mirror. See Issues and Decision Memorandum from Laurel LaCivita to Laurie Parkhill, Office Director, Concerning Jewelry Armoires and Cheval Mirrors in the Antidumping Duty Investigation of Wooden Bedroom Furniture from the People's Republic of China, dated August 31, 2004. See also *Wooden Bedroom Furniture from the People's Republic of China: Notice of Final Results of Changed Circumstances Review and Revocation in Part*, 71 FR 38621 (July 7, 2006).

²¹ Cheval mirrors are any framed, tiltable mirror with a height in excess of 50" that is mounted on a floor-standing, hinged base. Additionally, the scope of the order excludes combination cheval mirror/jewelry cabinets. The excluded merchandise is an integrated piece consisting of a cheval mirror, *i.e.*, a framed tiltable mirror with a height in excess of 50 inches, mounted on a floor-standing, hinged base, the cheval mirror serving as a door to a cabinet back that is integral to the structure of the mirror and which constitutes a jewelry cabinet lined with fabric, having necklace and bracelet hooks, mountings for rings and shelves, with or without a working lock and key to secure the contents of the jewelry cabinet back to the cheval mirror, and no drawers anywhere on the integrated piece. The fully assembled piece must be at least 50 inches in height, 14.5 inches in width, and 3 inches in depth. See *Wooden Bedroom Furniture From the People's Republic of China: Final Results of Changed Circumstances Review and Determination To Revoke Order in Part*, 72 FR 948 (January 9, 2007).

²² Metal furniture parts and unfinished furniture parts made of wood products (as defined above) that are not otherwise specifically named in this scope (*i.e.*, wooden headboards for beds, wooden footboards for beds, wooden side rails for beds, and wooden canopies for beds) and that do not possess the essential character of wooden bedroom furniture in an unassembled, incomplete, or unfinished form. Such parts are usually classified under the Harmonized Tariff Schedule of the United States ("HTSUS") subheading 9403.90.7000.

²³ Upholstered beds that are completely upholstered, *i.e.*, containing filling material and completely covered in sewn genuine leather, synthetic leather, or natural or synthetic decorative fabric. To be excluded, the entire bed (headboards, footboards, and side rails) must be upholstered except for bed feet, which may be of wood, metal, or any other material and which are no more than nine inches in height from the floor. See *Wooden Bedroom Furniture from the People's Republic of China: Final Results of Changed Circumstances Review and Determination To Revoke Order in Part*, 72 FR 7013 (February 14, 2007).

for beds, wooden side rails for beds, and wooden canopies for beds may also be entered under subheading 9403.50.9040 of the HTSUS as "parts of wood" and framed glass mirrors may also be entered under subheading 7009.92.5000 of the HTSUS as "glass mirrors * * * framed." This order covers all wooden bedroom furniture meeting the above description, regardless of tariff classification. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive.

Bona Fide Analysis

Consistent with the Department's practice, the Department investigated the *bona fide* nature of the sales made by Golden Well and Sunshine for these reviews. In evaluating whether or not sales in an NSR are commercially reasonable, and therefore *bona fide*, the Department considers, *inter alia*, such factors as: (1) The timing of the sale(s); (2) the price and quantity of the sale(s); (3) the expenses arising from the transaction(s); (4) whether the goods were resold at a profit; and (5) whether the transaction(s) was (were) made on an arm's-length basis. See, e.g., *Tianjin Tiancheng Pharmaceutical Co., Ltd. v. United States*, 366 F. Supp. 2d 1246, 1250 (Ct. Int'l Trade 2005). Accordingly, the Department considers a number of factors in its *bona fide* analysis, "all of which may speak to the commercial realities surrounding an alleged sale of subject merchandise." See *Hebei New Donghua Amino Acid Co., Ltd. v. United States*, 374 F. Supp. 2d 1333, 1342 (Ct. Int'l Trade 2005) (citing *Fresh Garlic From the People's Republic of China: Final Results of Antidumping Administrative Review and Rescission of New Shipper Review*, 67 FR 11283 (March 13, 2002), and accompanying Issues and Decision Memorandum).

The Department preliminarily finds that the new shipper sales made by Golden Well and Sunshine are *bona fide* for antidumping purposes. Specifically, the Department finds that: (1) The price and quantity of each new shipper sale was within the range of the prices and quantities of other entries of subject merchandise from the PRC into the United States during the POR; (2) the new shippers and their respective customers did not incur any extraordinary expenses arising from the transactions; (3) each new shipper sale was made between unaffiliated parties at arm's length; (4) the record evidence indicates that each new shipper sale was based on commercial principles; (5) the merchandise was resold at a profit; and (6) the timing of each of the new

shipper sales does not indicate the sales were made on a non-*bona fide* basis. See Memorandum to the File “Antidumping Duty New Shipper Reviews of Wooden Bedroom Furniture from the People’s Republic of China: *Bona Fide* Nature of the Sales Under Review for Dongguan Sunshine Furniture Co., Ltd. and Golden Well International (HK), Ltd.,” dated January 30, 2009. Therefore, the Department has preliminarily found that Golden Well’s and Sunshine’s sales of subject merchandise to the United States were *bona fide* for purposes of these NSRs.

Partial Rescission of Administrative Review

On October 8 and 10, 2008, RiZhao SanMu Woodworking Co., Ltd. (“SanMu”) and Petitioners, respectively, withdrew their administrative review requests with respect to SanMu. Although both parties submitted their withdrawal requests after the 90-day regulatory deadline at 19 CFR 351.213(d)(1), the Department had already completed its selection of mandatory respondents and SanMu was not selected as a mandatory respondent in this administrative review. Therefore, the Department’s selection process of the mandatory respondents for this administrative review was not compromised by the timing of the review request withdrawals. Furthermore, the Department had not expended any resources in its review of SanMu as of the date the parties withdrew their requests for review. Therefore, the Department is rescinding the administrative review with respect to SanMu.

The Department is also rescinding this review with respect to Shanghai Aosen Furniture Co., Ltd., and Yeh Brothers World Trade Inc. as each submitted “no shipment” letters on April 7, 2008, and the Department’s review of the CBP import data did not reveal any contradictory information. See “No Shipment” Letters from Shanghai Aosen Furniture Co., Ltd., and Yeh Brothers World Trade Inc., dated April 7, 2008.

Non-Market Economy Country Status

In every case conducted by the Department involving the PRC, the PRC has been treated as a non-market economy (“NME”) country. In accordance with section 771(18)(C)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by the administering authority. See, e.g., *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People’s Republic of China:*

Preliminary Results 2001–2002 Administrative Review and Partial Rescission of Review, 68 FR 7500 (February 14, 2003). None of the parties to this proceeding have contested such treatment. Accordingly, the Department calculated NV in accordance with section 773(c) of the Act, which applies to NME countries.

Surrogate Country

When investigating imports from an NME country, section 773(c)(1) of the Act directs the Department to base NV on the NME producer’s factors of production (“FOP”). The Act further instructs that valuation of the FOPs is to be based on the best available information in a surrogate market economy country or countries considered to be appropriate by the Department. See section 773(c)(1) of the Act. When valuing the FOPs, the Department utilizes, to the extent possible, the prices or costs of FOPs in one or more market economy countries that is: (1) At a level of economic development comparable to that of the NME country; and (2) has significant production of comparable merchandise. See Section 773(c)(4) of the Act. Further, the Department typically values all FOPs in a single surrogate country. See 19 CFR 351.408(c)(2). The sources of the surrogate values (“SV”) are discussed under the NV section below and in the Memorandum to the File, “2007 Administrative and New Shipper Reviews of Wooden Bedroom Furniture from the People’s Republic of China: Surrogate Value Memorandum for the Preliminary Results” (“Factor Valuation Memorandum”), which is on file in the Central Records Unit (“CRU”), Room 1117 of the main Department building.

In examining which country to select as its primary surrogate for this proceeding, the Department first determined that India, Indonesia, the Philippines, Colombia, and Thailand are at a level of economic development comparable to the PRC. See “Administrative Review of the Antidumping Duty Order on Wooden Bedroom Furniture from the People’s Republic of China: Request for a List of Surrogate Countries,” dated September 2, 2008 (“Surrogate Country Memo”). As stated, both Petitioners and Yihua Timber submitted comments on surrogate country selection. Petitioners argue that India is the appropriate surrogate country, while Yihua Timber argues that the Philippines should be used.

After evaluating the interested parties’ comments, the Department determined that the Philippines and India are both: (1) At a level of economic development

comparable to the PRC; (2) significant producers of comparable merchandise; and (3) provide contemporaneous publicly available data to value FOPs. Because the data from both India and the Philippines is relatively equal in terms of quality, availability, and general contemporaneity, we have broadened our analysis. Specifically, we have determined that the Philippine surrogate financial data provide for greater contemporaneity with the POR than the Indian surrogate financial data. Further, we note that we selected the Philippines as the primary surrogate country in the prior segment of this proceeding. For a complete discussion, see Memorandum to the File: Third Administrative Review and Fifth New Shipper Reviews of the Antidumping Duty Order on Wooden Bedroom Furniture from the People’s Republic of China: Surrogate Country Selection—Period of Review 1/1/07–12/31/07 (January 30, 2009). Accordingly, the Department has calculated NV using Philippine prices to value the respondents’ FOPs, when available and appropriate. The Department has obtained and relied upon publicly available information wherever possible. See Factor Valuation Memorandum. In accordance with 19 CFR 351.301(c)(3)(ii), interested parties may submit publicly available information to value FOPs until 20 days after the date of publication of these preliminary results.

Separate Rates

In the *AR Initiation Notice*, the Department notified parties of the recent application process by which exporters and producers may obtain separate-rate status in NME investigations. See *AR Initiation Notice*. The process requires exporters and producers to submit a separate-rate status application.²⁴

²⁴ See also *Policy Bulletin 05.1: Separate-Rate Practice and Application of Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries*, (April 5, 2005), at 6, available at <http://ia.ita.doc.gov/policy/bull05-1.pdf>. (“*Policy Bulletin 05.1*”). *Policy Bulletin 05.1* states, in relevant part, “* * * while continuing the practice of assigning separate rates only to exporters, all separate rates that the Department will now assign in its NME investigations will be specific to those producers that supplied the exporter during the period of investigation. Note, however, that one rate is calculated for the exporter and all of the producers which supplied subject merchandise to it during the period of investigation. This practice applied both to mandatory respondents receiving an individually calculated separate rate as well as the pool of non-investigated firms receiving the weighted-average of the individually calculated rates. This practice is referred to as the application of “combination rates” because such rates apply to specific combinations of exporters and one or more producers. The cash-deposit rate assigned to an exporter will apply only to merchandise both

However, the standard for separate rate eligibility has not changed.

In proceedings involving NME countries, the Department has a rebuttable presumption that all companies within the country are subject to government control and thus should be assessed a single antidumping duty rate. It is the Department's policy to assign all exporters of subject merchandise in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate. Exporters can demonstrate this independence through the absence of both *de jure* and *de facto* governmental control over export activities. The Department analyzes each entity exporting the subject merchandise under a test arising from the *Notice of Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China*, 56 FR 20588 (May 6, 1991) ("*Sparklers*"), as further developed in *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 FR 22585 (May 2, 1994) ("*Silicon Carbide*"). However, if the Department determines that a company is wholly foreign-owned or located in a market economy, then a separate rate analysis is not necessary to determine whether it is independent from government control.

A. Separate Rate Recipients

1. Wholly Foreign-Owned

Nine separate-rate applicants in the administrative review and one new shipper respondent provided evidence that they are wholly owned by individuals or companies located in a market economy in their separate-rate applications/certifications (collectively "Foreign-owned SR Applicants"). Therefore, because they are wholly foreign-owned and the Department has no evidence indicating that they are under the control of the PRC, a separate rates analysis is not necessary to determine whether these companies are independent from government control. See *Notice of Final Determination of Sales at Less Than Fair Value: Creatine Monohydrate from the People's Republic of China*, 64 FR 71104 (December 20, 1999) (where the respondent was wholly foreign-owned, and thus, qualified for a separate rate). Accordingly, the Department has preliminarily granted a separate rate to these Foreign-owned SR Applicants. See *Preliminary Results of Review* section

exported by the firm in question and produced by a firm that supplied the exporter during the period of investigation." See *Policy Bulletin 05.1*, at 6.

below for companies marked See Preliminary Results of Review with a "Λ" designating these companies as wholly foreign-owned (collectively "Foreign-owned SR Recipients").

2. Located in a Market Economy With No PRC Ownership

None of the separate-rate applicants in this administrative review are located outside the PRC.

3. Joint Ventures Between Chinese and Foreign Companies or Wholly Chinese-Owned Companies

Seven of the separate-rate applicants in this administrative review and one of the new shipper respondents stated that they are either joint ventures between Chinese and foreign companies or are wholly Chinese-owned companies (collectively *PRC SR Applicants*). The Department has analyzed whether each PRC SR Applicant has demonstrated the absence of *de jure* and *de facto* governmental control over its respective export activities.

a. Absence of De Jure Control

The Department considers the following *de jure* criteria in determining whether an individual company may be granted a separate rate: (1) An absence of restrictive stipulations associated with an individual exporter's business and export license; (2) legislative enactments decentralizing control of companies; and (3) other formal measures by the government decentralizing control of companies. See *Sparklers*, 56 FR at 20589.

The evidence provided by the eight PRC SR Applicants supports a preliminary finding of *de jure* absence of governmental control based on the following: (1) An absence of restrictive stipulations associated with the individual exporters' business and export licenses; (2) there are applicable legislative enactments decentralizing control of PRC companies; and (3) there are formal measures by the government decentralizing control of PRC companies.

b. Absence of De Facto Control

The Department considers four factors in evaluating whether each respondent is subject to *de facto* governmental control of its export functions: (1) Whether the export prices are set by or are subject to the approval of a governmental agency; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4)

whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses. See *Silicon Carbide*, 59 FR at 22586–87; see also *Notice of Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol From the People's Republic of China*, 60 FR 22544, 22545 (May 8, 1995). The Department has determined that an analysis of *de facto* control is critical in determining whether respondents are, in fact, subject to a degree of governmental control which would preclude the Department from assigning separate rates.

The evidence provided by the eight SR Applicants supports a preliminary finding of *de facto* absence of governmental control based on the following: (1) An absence of restrictive governmental control on the PRC SR Applicants' export prices; (2) a showing of the PRC SR Applicants' authority to negotiate and sign contracts and other agreements; (3) a showing that the PRC SR Applicants maintain autonomy from the government in making decisions regarding the selection of management; and (4) a showing that the PRC SR Applicants retain the proceeds of their respective export sales and make independent decisions regarding disposition of profits or financing of losses.

In all, the evidence placed on the record of this investigation by the eight PRC SR Applicants demonstrates an absence of *de jure* and *de facto* government control, in accordance with the criteria identified in *Sparklers* and *Silicon Carbide*. Accordingly, the Department has preliminarily granted a separate rate to the PRC SR Applicants. See "*Preliminary Results of Review*" section below for companies marked with an "*" designating these companies as joint ventures between Chinese and foreign companies or wholly Chinese-owned companies (collectively referred to as "PRC SR Recipients").

B. Companies Not Receiving a Separate Rate

In the *AR Initiation Notice*, we requested that all companies listed therein wishing to qualify for separate rate status in this administrative review submit, as appropriate, either a separate rate status application or certification. See *AR Initiation Notice*. The following five exporters did not provide, as appropriate, either a separate rate application or certification: (1) Dongguan Bon Ten Furniture Co., Ltd. ("Bon Ten"); (2) Dongguan Qingxi Xinyi Craft Furniture Factory (Joyce Art

Factory) (“Joyce Art”); (3) Tianjin Sande Fairwood Furniture Co. Ltd. (“Sande”); (4) Yida Co. Ltd., Yitai Worldwide Ltd., Yili Co., Ltd., and Yetbuild Co., Ltd. (collectively “Yida”); and (5) Hamilton & Spill, Ltd. (“Hamilton”), and therefore have not demonstrated their eligibility for separate rate status in this administrative review.

Therefore, the Department preliminarily determines that there were exports of merchandise under review from PRC exporters that did not demonstrate their eligibility for separate-rate status. As a result, the Department is treating these PRC exporters as part of the PRC-wide entity.

Further, on April 4, 2008, Dream Rooms Furniture (Shanghai) Co., Ltd. (“Dream Rooms”) submitted a separate rate certification to the Department. See Letter from Dream Rooms, dated April 4, 2008. On June 24, 2008, White & Case LLP (“White & Case”) withdrew its notice of appearance on behalf of Dream Rooms. See Letter from White & Case, dated June 14, 2008. On January 7, 2009, the Department issued a supplemental questionnaire to Dream Rooms requiring clarification of the information that Dream Rooms submitted in its separate rate certification. See the Department’s January 7, 2009, supplemental questionnaire to Dream Rooms. In the absence of legal representation in the United States, the Department attempted to contact Dream Rooms via direct mail. However, Dream Rooms failed to respond to this supplemental questionnaire.

Because Dream Rooms did not respond to the Department’s request for clarification regarding its separate rate certification on the record of this review, the Department is unable to determine if Dream Rooms operates free from PRC government control for purposes of this review. It is the Department’s practice to require a party to submit the evidence necessary for the Department to determine that it operates independently of the state-controlled entity in each segment of a proceeding in which it requests separate rate status. See *TRBs 2007* and *Peer Bearing*. Thus, because Dream Rooms’ separate-rate certification is deficient, Dream Rooms has not demonstrated its eligibility for separate-rate status in this administrative review. See section 776(a)(2)(D) of the Act. Consequently, the Department is treating Dream Rooms as part of the PRC-wide entity.

Margins for Separate-Rate Recipients

For the Separate Rate Recipients subject to this administrative review that were not selected as mandatory respondents, we have established a

weighted-average margin based on an average of the rates we calculated for the mandatory respondents, excluding any rates that are zero, *de minimis*, or based entirely on adverse facts available. That rate is 124.31 percent. Entities receiving this rate are identified by name in the “Preliminary Results of Review” section of this notice.

Use of Facts Available and Adverse Facts Available

Section 776(a) of the Act provides that the Department shall apply “facts otherwise available” if (1) necessary information is not on the record, or (2) an interested party or any other person (A) Withholds information that has been requested, (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified as provided by section 782(i) of the Act.

Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department will so inform the party submitting the response and will, to the extent practicable, provide that party the opportunity to remedy or explain the deficiency. If the party fails to remedy the deficiency within the applicable time limits and subject to section 782(e) of the Act, the Department may disregard all or part of the original and subsequent responses, as appropriate.

Section 782(e) of the Act provides that the Department “shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all applicable requirements established by the administering authority” if the information is timely, can be verified, is not so incomplete that it cannot be used, and if the interested party acted to the best of its ability in providing the information. Where all of these conditions are met, the statute requires the Department to use the information supplied if it can do so without undue difficulties.

Section 776(b) of the Act further provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information. Such an adverse inference may include reliance on information derived from the petition, the final determination, a previous

administrative review, or other information placed on the record.

Section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. Secondary information is defined as “{i}nformation derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise.” See *Statement of Administrative Action*, reprinted in H.R. Doc. No. 103–216, at 870 (1994) (“SAA”). Corroborate means that the Department will satisfy itself that the secondary information to be used has probative value. *Id.* To corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information to be used.

A. Application of Partial Facts Available for Yihua Timber

Yihua Timber reported both gross weights (on a finished, packed per-product basis) and FOP weights on a per-product basis.²⁵ FOP weights represent the weight of the inputs that went into making the finished, packed product. In furniture production, the FOP weights should be higher than the gross weight of the finished product because, generally, there is a yield loss associated with WBF production. However, in its supplemental questionnaire response, Yihua Timber’s reported product-specific FOP weights appeared to be insufficient to account for its reported product-specific gross weights. Yihua Timber provided a subsequent submission, stating that: (1) Its reported gross weights are estimates that came from its packing lists; and (2) while the gross weights are estimates and may not be accurate, the reported FOP input weights are accurate and, thus, there is no need to adjust them in the margin calculation. To demonstrate its claim with respect to the gross weights, Yihua Timber weighed two products and provided revised gross weights for these two products. Yihua Timber concludes that although the revised gross weights are still higher than the FOP weights, these differences are minor and stem from the application of an overall variance to individual

²⁵ Yihua Timber reported certain inputs on a cubic meter basis with information to convert the data to a kilogram basis.

product standards in deriving its FOP weights. Yihua Timber concludes that while for some products the FOP weights will be lower than the actual gross weight, for other products, the FOP weights will be greater than the actual gross weights and, therefore, we should continue to rely on its reported data. Further, Yihua Timber claims that while the absolute product-specific gross weights (as originally reported) are not accurate, the relative weight differences among products are valid, and therefore, the Department should use the reported gross weights as the allocation basis for Yihua Timber's reported movement expenses. We do not agree with Yihua Timber's conclusions with respect to its reported data.

With respect to the two products Yihua Timber weighed, as it noted, the FOP weights are insufficient to account for the revised gross weights reported. However, we do not agree that the differences are minor. Moreover, because Yihua Timber weighed only two products, based on the record data, we are unable to determine the extent of underreported FOP weights or confirm Yihua Timber's contention that the reported FOP weights are greater than the actual gross weights for some products. Accordingly, we preliminarily determine to base the FOPs for all products on facts otherwise available in accordance with section 776(a) of the Act. Therefore, as facts available, we will increase the reported FOP weights for each product by the average of the differences between the reported FOP weights and the actual gross weights of the two products that Yihua Timber weighed. We are also not preliminarily granting the by-product offset because any such offset appears to result in FOP weights that are insufficient to produce the merchandise under review.

In addition, with respect to movement charges being valued with surrogate values, we are preliminarily applying the movement charges to the revised FOP weights discussed above. With regard to movement charges being valued based on market economy purchases, because we do not have the aggregate movement expense data, we are unable to reallocate it over the revised weights. Therefore, we will continue to use those expenses as reported for purposes of the preliminary determination.

We intend to issue a post-preliminary results supplemental questionnaire to Yihua Timber, to address each of these issues. As appropriate, we will consider any additional data and the results of verification for purposes of completing the final results of review.

B. Application of Partial Adverse Facts Available for Yihua Timber

In our original questionnaire, consistent with our standard practice, we requested that each respondent report all of its U.S. sales to the first unaffiliated U.S. customer. In Yihua Timber's initial questionnaire response, some of the sales reported in Yihua Timber's U.S. sales database were transactions between one of Yihua Timber's affiliated U.S. companies, New Classic Home Furnishings Inc. ("New Classic"), and another affiliated U.S. company (*i.e.*, Company A).²⁶ See Yihua Timber's Section C response, dated October 15, 2008.

The Department issued a supplemental section C questionnaire to Yihua Timber requesting, among other things, that Yihua Timber "revise {its} U.S. sales database so that it reflects sales * * * to the first unaffiliated customer," and "provide complete section C responses (including sales reconciliations). * * *" See the Department's December 12, 2008, supplemental questionnaire. In response to the Department's supplemental questionnaire, Yihua Timber provided incomplete information regarding Company A's downstream sales to unaffiliated parties. Specifically, Yihua Timber did not provide sufficient evidence (*e.g.*, a sales reconciliation) to support its contention that only a portion of the sales reported in Company A's financial statements reflected sales of subject merchandise. Thus, Yihua Timber has not successfully demonstrated that it appropriately excluded the non-reported sales, which represent a significant portion of the sales on Company A's financial statements, and thereby failed to demonstrate that it had accounted for all of Company A's sales of wooden bedroom furniture in that databases.

Further, Yihua Timber failed to provide certain costs and expenses associated with Company A sales that it did report. Consequently, we do not have complete and appropriate data on the record to calculate accurate dumping margins with respect to Yihua Timber's U.S. sales through its affiliate, Company A. Accordingly, we preliminarily determine to base the margins for these sales on facts otherwise available in accordance with section 776(a) of the Act.

Because the Department requested information concerning unaffiliated sales in both its original and

supplemental questionnaires, it is clear from the record that Yihua Timber was aware of its obligation to submit a complete section C response and sales reconciliation for Company A. Further, because Yihua Timber did not indicate that it could not provide this information, we find that Yihua Timber failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information.

Accordingly, the Department preliminarily determines that, when selecting from among the facts otherwise available with respect to Yihua Timber's U.S. sales through Company A, an adverse inference is warranted pursuant to section 776(b) of the Act. For a discussion of the rate we applied as adverse facts available to these sales see the section below entitled *Selection of the Adverse Facts Available Rate*. We intend to issue a post-preliminary results supplemental questionnaire to Yihua Timber to address this issue. As appropriate, we will consider any additional data and the results of verification for purposes of completing the final results of review.

C. Application of Total Adverse Facts Available

1. Hamilton

On April 7, 2008, Hamilton submitted a letter to the Department stating that it had no shipments of the subject merchandise to the United States. See Letter from Hamilton, dated April 7, 2008. Subsequently, the Department conducted independent research to confirm Hamilton's response of no shipments by reviewing import information obtained from CBP. On January 15, 2009, the Department issued a supplemental questionnaire to Hamilton to inquire about a discrepancy found between Hamilton's statement of no shipments and the CBP data. See the Department's January 15, 2009, supplemental questionnaire to Hamilton. On January 22, 2009, Hamilton responded to the Department's supplemental questionnaire stating that when it performed its original internal data search for shipments of subject merchandise during the POR, it inadvertently limited the search to shipments over a certain dollar amount and thereby missed any transactions under that dollar value. As a result, Hamilton reported that it did not have sales of subject merchandise during the POR. In its January 22, 2009 supplemental response, Hamilton argues that the POR shipments consisted of replacement parts that are out of scope merchandise and an

²⁶ Due to the proprietary nature of this information, we are calling this affiliate "Company A."

insignificant quantity of subject merchandise with a “*de minimis*” value that constituted a sample sale. Hamilton requests that the Department apply facts available without an adverse inference and allow it to maintain its status as eligible for a separate rate. *See* Hamilton’s Supplemental Response, dated January 22, 2009.

Hamilton, however, did not submit a separate rate certification on the record of this review. Thus, the Department is unable to determine if Hamilton operates free from PRC government control for purposes of this review. It is the Department’s practice to require a party to submit evidence that it operates independently of the state-controlled entity in each segment of a proceeding in which it requests separate rate status. *See TRBs 2007 and Peer Bearing*. Thus, we find that Hamilton has not demonstrated its eligibility for separate-rate status in this administrative review and is, consequently, part of the PRC-wide entity. *See* section 776(a)(2)(D) of the Act.

Further, based on record evidence, Hamilton, as part of the PRC-wide entity, did not supply the requested information on its shipments of subject merchandise to the United States and, by not doing so, withheld necessary information. Because Hamilton, as part of the PRC-wide entity, limited its examination of its complete database to a certain subset, it misreported that it did not have shipments during the POR. Additionally, when the Department presented information from CBP to Hamilton and allowed it an opportunity to reconcile the discrepancy between the CBP information and what it reported, Hamilton submitted invoices that did not reflect the quantity or value information reflected in the CBP data. Thereby, Hamilton, was unable to substantiate its claims with respect to the U.S. import data. Therefore, we preliminarily find that the PRC-wide entity, which includes Hamilton, withheld requested information and impeded the Department’s proceeding because it did not accurately report that it had shipments of subject merchandise to the United States during the POR. Accordingly, we have preliminary determined to base the PRC-wide entity’s margin on facts otherwise available. *See* section 776(a) of the Act. Further, because the PRC-wide entity failed to cooperate by not acting to the best of its ability to comply with the Department’s request for information, we preliminarily determine that, when selecting from among the facts otherwise available, an adverse inference is warranted for the PRC-wide entity pursuant to section 776(b) of the

Act. For a discussion of the rate we applied as adverse facts available to the PRC-wide entity *see* the section below entitled *Selection of the Adverse Facts Available Rate*.

2. Orient International

On April 4, 2008, Orient International submitted its separate-rate certification. On July 31, 2008, the Department selected Orient International as a mandatory respondent in this administrative review. *See* Selection of Respondents Memorandum. On August 21, 2008, the Department issued its questionnaire to Orient International. On September 12, 2008, Orient International submitted its response to Section A of the Department’s questionnaire. Although Orient International responded to Section A of the questionnaire and submitted a separate rate certification, Orient International did not respond to Sections C and D of the Department’s questionnaire. On September 18, 2008, Orient International submitted a document stating: (1) It would no longer participate in this review; and (2) it is not withdrawing its notice of appearance or its separate rate certification, and intends to participate in briefing and any hearings held in this review. Further, Orient International requested that the Department: (1) Allow it to remove certain business proprietary data submitted under administrative protective order (“APO”); (2) return or destroy its business proprietary versions of its Section A response filed on September 11 and 12, 2008; and (3) instruct all parties on the APO service list to return or destroy all such data as well. *See* Letter from Orient International, dated September 18, 2008.

Although Orient International’s separate rate certification remains on the record of this review, because the respondent ceased to participate, the Department is unable to verify the accuracy of this information, as provided by section 782(i) of the Act. Thus, we find that Orient International has not demonstrated its eligibility for separate-rate status in this administrative review and is, consequently, part of the PRC-wide entity. *See* Section 776(a)(2)(D) of the Act.

Further, from the record evidence, it is clear that Orient International was aware of its obligation to submit its Section C and D questionnaire responses and it failed to do so. In addition, Orient International has requested that the Department allow it to remove certain business proprietary data submitted under APO and return or

destroy its business proprietary versions of its Section A responses filed on September 11 and 12, 2008. *See* Letter from Orient International, dated September 18, 2008. Thus, we preliminarily find that Orient International, as part of the PRC-wide entity, withheld requested information and significantly impeded the Department’s proceeding. Accordingly, we preliminarily determine to base the PRC-wide entity’s margin, which includes Orient International, on facts otherwise available, pursuant to section 776(a) of the Act. Further, because the PRC-wide entity, which includes Orient International, determined not to participate in the administrative review, as discussed above, we find that the PRC-wide entity failed to cooperate by not acting to the best of its ability to comply with the Department’s request for information. Accordingly, the Department preliminarily determines that, when selecting from among the facts otherwise available, an adverse inference is warranted for the PRC-wide entity, pursuant to section 776(b) of the Act. For a discussion of the rate we applied as adverse facts available to the PRC-wide entity *see* the section below entitled *Selection of the Adverse Facts Available Rate*.

Application of Total Adverse Facts Available to the PRC-Wide Entity

As noted above, the Department has determined that several companies are part of the PRC-wide entity; as a result, the PRC-wide entity is now under review. Pursuant to section 776(a) of the Act, the Department further finds that, as discussed above, the PRC-wide entity failed to respond to the Department’s questionnaires, withheld required information, and/or submitted information that cannot be verified, thus significantly impeding the proceeding. Thus, the Department concludes, it is appropriate to apply a preliminary dumping margin to the PRC-wide entity using the facts otherwise available on the record. Also as discussed above, because the PRC-entity failed to cooperate by not acting to the best of its ability to comply with the Department’s requests for information, we find an adverse inference is appropriate, pursuant to section 776(b) of the Act, for the PRC-wide entity.

Selection of the Adverse Facts Available Rate

In deciding which facts to use as AFA, section 776(b) of the Act and 19 CFR 351.308(c)(1) provide that the Department may rely on information derived from (1) The petition, (2) a final determination in the investigation, (3)

any previous review or determination, or (4) any information placed on the record. In selecting a rate for AFA, the Department selects a rate that is sufficiently adverse “as to effectuate the purpose of the facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner.” See *Notice of Final Determination of Sales at Less than Fair Value: Static Random Access Memory Semiconductors From Taiwan*, 63 FR 8909, 8932 (February 23, 1998). Further, it is the Department’s practice to select a rate that ensures “that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.” See *SAA*. See also *Brake Rotors From the People’s Republic of China: Final Results and Partial Rescission of the Seventh Administrative Review; Final Results of the Eleventh New Shipper Review*, 70 FR 69937, 69939 (November 18, 2005).

Generally, the Department finds that selecting the highest rate from any segment of the proceeding as AFA is appropriate. See, e.g., *Certain Cased Pencils from the People’s Republic of China; Notice of Preliminary Results of Antidumping Duty Administrative Review and Intent to Rescind in Part*, 70 FR 76755, 76761 (December 28, 2005). The Court of International Trade (“CIT”) and the Court of Appeals for the Federal Circuit (“Federal Circuit”) have affirmed decisions to select the highest margin from any prior segment of the proceeding as the AFA rate on numerous occasions. See, e.g., *Rhone Poulenc, Inc. v. United States*, 899 F. 2d 1185, 1190 (Fed. Cir. 1990) (affirming the Department’s presumption that the highest margin was the best information of current margins) (“*Rhone Poulenc*”); *NSK Ltd. v. United States*, 346 F. Supp. 2d 1312, 1335 (Ct. Int’l Trade 2004) (affirming a 73.55 percent total AFA rate, the highest available dumping margin from a different respondent in the investigation); *Kompass Food Trading International v. United States*, 24 CIT 678, 683 (2000) (affirming a 51.16 percent total AFA rate, the highest available dumping margin from a different, fully cooperative respondent); and *Shanghai Taoen International Trading Co., Ltd. v. United States*, 360 F. Supp. 2d 1339, 1348 (Ct. Int’l Trade 2005) (affirming a 223.01 percent total AFA rate, the highest available dumping margin from a different respondent in a previous administrative review).

In choosing the appropriate balance between providing respondents with an incentive to respond accurately and imposing a rate that is reasonably related to the respondents’ prior

commercial activity, selecting the highest prior margin “reflects a common sense inference that the highest prior margin is the most probative evidence of current margins, because, if it were not so, the importer, knowing of the rule, would have produced current information showing the margin to be less.” See *Rhone Poulenc*, 899 F. 2d at 1190.

As AFA, we have preliminarily assigned to the PRC-wide entity in total and to Yihua in part, a rate of 216.01 percent, from the 2004–2005 new shipper reviews of WBF from the PRC, which is the highest rate on the record of all segments of this proceeding. The Department preliminarily determines that this information is the most appropriate from the available sources to effectuate the purposes of AFA. The Department’s reliance on the highest calculated rate from the 2004–2005 new shipper review to determine an AFA rate is subject to the requirement to corroborate secondary information. See the *Corroboration of Secondary Information* section below.

Corroboration of Secondary Information

Section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. Secondary information is defined as information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise. See *SAA* at 870. Corroborate means that the Department will satisfy itself that the secondary information to be used has probative value. *Id.* To corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information to be used. See *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from Japan, and Tapered Roller Bearings Four Inches or Less in Outside Diameter, and Components Thereof, from Japan: Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 61 FR 57391, 57392 (November 6, 1996) (unchanged in the final determination) *Final Results of Antidumping Duty Administrative Reviews and Termination in Part: Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from*

Japan, and Tapered Roller Bearings Four Inches or Less in Outside Diameter, and Components Thereof, from Japan, 62 FR 11825 (March 13, 1997). Independent sources used to corroborate such evidence may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation. See *Notice of Preliminary Determination of Sales at Less Than Fair Value: High and Ultra-High Voltage Ceramic Station Post Insulators from Japan*, 68 FR 35627 (June 16, 2003) (unchanged in final determination) *Notice of Final Determination of Sales at Less Than Fair Value: High and Ultra-High Voltage Ceramic Station Post Insulators from Japan*, 68 FR 62560 (November 5, 2003); and *Notice of Final Determination of Sales at Less Than Fair Value: Live Swine From Canada*, 70 FR 12181, 12183–84 (March 11, 2005).

The AFA rate that the Department is now using was determined in the published final results of the previous new shipper review. See *Wooden Bedroom Furniture from the People’s Republic of China: Final Results of the 2004–2005 Semi-Annual New Shipper Reviews*, 71 FR 70739, 70741 (December 6, 2006). In the new shipper review, the Department calculated a company-specific rate, which was above the PRC-wide rate established in the investigation. Because this new rate is a company-specific calculated rate concerning subject merchandise, we have determined this rate to be reliable.

With respect to the relevance aspect of corroboration, the Department will consider information reasonably at its disposal to determine whether a margin continues to have relevance. Where circumstances indicate that the selected margin is not appropriate as AFA, the Department will disregard the margin and determine an appropriate margin. See *Fresh Cut Flowers from Mexico: Final Results of Antidumping Administrative Review*, 61 FR 6812, 6814 (February 22, 1996) (where the Department disregarded the highest margin in that case as adverse best information available (the predecessor to facts available) because the margin was based on another company’s uncharacteristic business expense resulting in an unusually high margin). Similarly, the Department does not apply a margin that has been discredited. See *D&L Supply Co. v. United States*, 113 F. 3d 1220, 1221 (Fed. Cir. 1997) (ruling that the Department will not use a margin that has been judicially invalidated). To assess the relevancy of the rate used, the Department compared the margin

calculations of the mandatory respondent in the instant administrative review with the 216.01 percent calculated rate from the 2004–2005 new shipper review. The Department found that the margin of 216.01 percent was within the range of the margins calculated on the record of the instant administrative review. Because the record of this administrative review contains margins within the range of 216.01 percent, we determine that the rate from the 2004–2005 review continues to be relevant for use in this administrative review.

As the adverse margin is both reliable and relevant, we determine that it has probative value. Accordingly, we determine that this rate meets the corroboration criterion established in section 776(c) of the Act that secondary information have probative value. As a result, the Department determines that the margin is corroborated for the purposes of this administrative review and may reasonably be applied to the PRC-wide entity as AFA.

Because these are preliminary results of review, the Department will consider all margins on the record at the time of the final results of review for the purpose of determining the most appropriate final adverse margin. *See Preliminary Determination of Sales at Less Than Fair Value: Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation*, 65 FR 1139, 1141 (January 7, 2000).

Export Price

For Golden Well and Sunshine, the Department based the U.S. price on export price (“EP”), in accordance with section 772(a) of the Act, because EP is 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 section 772(c) of the Act. Additionally, the Department calculated EP based on the packed price from the exporter to the first unaffiliated customer in the United States.

For Golden Well, we calculated EP based on delivered prices to unaffiliated purchaser(s) in the United States. We made deductions from the U.S. sales price for a movement expense in accordance with section 772(c)(2)(A) of the Act. These included foreign inland freight—plant/warehouse to port of exit, foreign brokerage and handling, U.S. brokerage and handling, and U.S. Customs duties. *See Memorandum* titled “Antidumping Duty New Shipper

Review: Wooden Bedroom Furniture from the People’s Republic of China: Analysis of the Preliminary Results Margin Calculation for Golden Well (HK) International Ltd. (“Analysis Memo Golden Well”), dated January 30, 2009.

For Sunshine, we calculated EP based on delivered prices to unaffiliated purchaser(s) in the United States. We made deductions from the U.S. sales price for a movement expense in accordance with section 772(c)(2)(A) of the Act. These included foreign inland freight—plant/warehouse to port of exit, and foreign brokerage and handling. We deducted these expenses from the gross unit price, in accordance with section 772(c) of the Act. For a detailed description of all adjustments, *see Memorandum* titled, “Antidumping Duty New Shipper Review: Wooden Bedroom Furniture from the People’s Republic of China: Analysis of the Preliminary Results Margin Calculation for Dongguan Sunshine Furniture Co., Ltd.” (“Analysis Memo Sunshine”), dated January 30, 2009.

At the time of initiation of the new shipper review covering Sunshine’s sales of subject merchandise, the Department was unable to locate Sunshine’s entries of subject merchandise in CBP import data. In Sunshine’s supplemental questionnaire response dated December 22, 2008, Sunshine explained that the importer’s customs broker entered Sunshine’s merchandise under an incorrect manufacturer number. The importer’s customs broker submitted a corrected Entry Summary form showing the correct manufacturer number for Sunshine to CBP under a cover letter dated December 11, 2007. *See Sunshine’s December 22, 2008 Supplemental Questionnaire Response*, at pgs. 5–6 and Exhibit SQ2–4.

Constructed Export Price

In accordance with section 772(b) of the Act, constructed export price (“CEP”) is the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under sections 772(c) and (d) of the Act. In accordance with section 772(b) of the Act, we used CEP for Yihua Timber’s sales (with the exception of the sales to which we applied adverse facts available, as discussed above) because the sales were made by U.S. affiliates in the United States.

We calculated CEP based on delivered prices to unaffiliated purchasers in the United States. In accordance with section 772(d)(1) of the Act, we made deductions from the starting price for billing adjustments, movement expenses, discounts and rebates. We made deductions from the U.S. sales price for movement expenses in accordance with section 772(c)(2)(A) of the Act. These included, where applicable, foreign inland freight from plant to the port of exportation, foreign brokerage and handling, ocean freight, marine insurance, U.S. inland freight from port to the warehouse, U.S. freight from warehouse to customer, U.S. warehousing, U.S. customs duty, and U.S. brokerage and handling. In accordance with section 772(d)(1) of the Act, the Department deducted, where applicable, commissions, credit expenses, inventory carrying costs, factoring expense, warranty expense, and indirect selling expenses from the U.S. price, all of which relate to commercial activity in the United States. In addition, we deducted CEP profit in accordance with sections 772(d)(3) and 772(f) of the Act. In accordance with section 773(a) of the Act, we calculated Yihua Timber’s credit expenses and inventory carrying costs based on the company’s short-term interest rate. We deducted these expenses from the gross unit price, in accordance with section 772(c) of the Act. For a detailed description of all adjustments, *see Memorandum* titled “Antidumping Duty Administrative Review: Wooden Bedroom Furniture from the People’s Republic of China: Analysis of the Preliminary Results Margin Calculation for Guangdong Yihua Timber Industry Co., Ltd.,” (“Yihua Timber Analysis Memo”) dated January 30, 2009.

We have denied one of Yihua Timber’s billing adjustments because Yihua Timber has not provided evidence showing that this adjustment should be an adjustment to gross unit price. For a complete discussion of this issue, *see Yihua Timber Analysis Memo*. Both Petitioners and Yihua Timber commented on the FOP input weights and gross weights reported by Yihua Timber which we will examine further after issuance of these preliminary results. For these preliminary results, we have utilized Yihua Timber’s reported gross weight selling expenses, and unadjusted FOPs in calculating Yihua Timber’s preliminary margin. *See Yihua Timber Analysis Memo*.

Normal Value

Section 773(c)(1) of the Act provides that the Department shall determine the NV using an FOP methodology if: (1) the merchandise is exported from an NME country; and (2) the information does not permit the calculation of NV using home-market prices, third-country prices, or constructed value under section 773(a) of the Act. When determining NV in an NME context, the Department will base NV on FOPs, because the presence of government controls on various aspects of these economies renders price comparisons and the calculation of production costs invalid under our normal methodologies. Under section 772(c)(3) of the Act, FOPs include, but are not limited to: (1) Hours of labor required; (2) quantities of raw materials employed; (3) amounts of energy and other utilities consumed; and (4) representative capital costs. The Department used FOPs reported by respondents for materials, energy, labor and packing.

In accordance with 19 CFR 351.408(c)(1), the Department will normally use publicly available information to find an appropriate SV to value FOPs, but when a producer sources an input from a market economy and pays for it in market economy currency, the Department will normally value the factor using the actual price paid for the input. *See* 19 CFR 351.408(c)(1); *see also Lasko Metal Products, Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994). However, when the Department has reason to believe or suspect that such prices may be distorted by subsidies, the Department will disregard the market economy purchase prices and use SVs to determine the NV. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Final Results of the 1998–1999 Administrative Review, Partial Rescission of Review, and Determination Not to Revoke Order in Part*, 66 FR 1953 (January 10, 2001) (“*TRBs 1998–1999*”), and accompanying Issues and Decision Memorandum at Comment 1.

It is the Department's consistent practice that, where the facts developed in either U.S. or third-country countervailing duty findings include the existence of subsidies that appear to be used generally (in particular, broadly available, non-industry specific export subsidies), it is reasonable for the Department to find that it has a reason to believe or suspect that prices of the inputs from the country granting the subsidies may be subsidized. *See TRBs*

1998–1999 at Comment 1; *see also Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Final Results of 1999–2000 Administrative Review, Partial Rescission of Review, and Determination Not to Revoke Order in Part*, 66 FR 57420 (November 15, 2001), and accompanying Issues and Decision Memorandum at Comment 1; *see also China National Machinery Imp. & Exp. Corp. v. United States*, 293 F. Supp. 2d 1334, 1338–39 (Ct. Int'l Trade 2003).

In avoiding the use of prices that may be subsidized, the Department does not conduct a formal investigation to ensure that such prices are not subsidized, but rather relies on information that is generally available at the time of its determination. *See also SAA* at 590.

Factor Valuations

In accordance with section 773(c) of the Act, we calculated NV based on FOPs reported by respondents for the POR. To calculate NV, the Department multiplied the reported per-unit factor quantities by publicly available Philippine SVs (except as noted below). In selecting the SV, the Department considered the quality, specificity, and contemporaneity of the data. As appropriate, the Department adjusted input prices by including freight costs to make them delivered prices. Specifically, the Department added to Philippine import SVs a surrogate freight cost using the shorter of the reported distance from the domestic supplier to the factory or the distance from the nearest seaport to the factory where appropriate (*i.e.*, where the sales terms for the market-economy inputs were not delivered to the factory). This adjustment is in accordance with the decision of the Federal Circuit in *Sigma Corp. v. United States*, 117 F.3d 1401 (Fed. Cir. 1997). Due to the extensive number of SVs it was necessary to assign in this administrative review, we present a discussion of the main factors. For a detailed description of all SVs used to value the respondents reported FOPs, *see* Factor Valuation Memorandum.

Golden Well reported that certain of its reported raw material inputs were sourced from a market-economy country and paid for in market-economy currencies. Both Sunshine and Yihua Timber did not report any raw material inputs sourced from a market-economy country.

Pursuant to 19 CFR 351.408(c)(1), when a mandatory respondent sources inputs from a market-economy supplier in meaningful quantities (*i.e.*, not insignificant quantities), we use the

actual price paid by respondents for those inputs, except when prices may have been distorted by findings of dumping by the PRC and/or subsidies. *See* 19 CFR 351.408(c)(1); *see also Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27366 (May 19, 1997). Golden Well reported information demonstrating that the quantities of certain raw materials purchased from market-economy suppliers are significant. Where we found market-economy purchases to be in significant quantities, in accordance with our statement of policy as outlined in *Antidumping Methodologies: Market Economy Inputs*, we have used the actual purchases of these inputs to value the inputs. *See Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments*, 71 FR 61716 (October 19, 2006) (“*Antidumping Methodologies: Market Economy Inputs*”); *See also*, Analysis Memo Golden Well.

We used import values from the World Trade Atlas® online (“Philippine Import Statistics”), which were published by the Philippines National Statistics Office (“Philippines NSO”), which were reported in U.S. dollars and are contemporaneous with the POR, where market-economy purchases were not made in significant quantities, to value the following inputs: processed woods (*e.g.*, particleboard, etc.), adhesives and finishing materials (*e.g.*, glue, paints, sealer, lacquer, etc.), hardware (*e.g.*, nails, staples, screws, bolts, knobs, pulls, drawer slides, hinges, clasps, etc.), other materials (*e.g.*, mirrors, glass, leather, cloth, sponge, etc.), and packing materials (*e.g.*, cardboard, cartons, plastic film, labels, tape, etc.). *See* Factor Valuation Memorandum. We used import values published by the Philippines NSO, which are available upon request from the Philippines NSO, which were reported in U.S. dollars, contain import quantities in cubic decimeters, and are contemporaneous with the POR to value the following inputs: wood inputs (*e.g.*, lumber of various species), wood veneer of various species, and processed woods (*e.g.*, plywood, etc.). For a complete listing of all the inputs and the valuation for each mandatory respondent *see* Factor Valuation Memorandum.

Where we could not obtain publicly available information contemporaneous with the POR with which to value FOPs, we adjusted the SVs using, where appropriate, the Philippines Wholesale Price Index (“WPI”), available at the Philippines NSO Web site: <http://>

www.census.gov/ph/data/sectordata/datawpi.html.

For the purposes of the preliminary results, the Department has used <http://www.allmeasures.com> and other publicly available information where interested parties did not submit conversion rates or information to calculate conversion rates for specific FOPs.

For labor, consistent with 19 CFR 351.408(c)(3), we used the PRC regression-based wage rate as reported on Import Administration's home page, Import Library, Expected Wages of Selected NME Countries, revised in May 2008, available at <http://ia.ita.doc.gov/wages/index.html>. Because this regression-based wage rate does not separate the labor rates into different skill levels or types of labor, we have applied the same wage rate to all skill levels and types of labor reported by the respondents. If the NME wage rates are updated by the Department prior to issuance of the final determination, we will use the updated wage rate in the final determination. See Factor Valuation Memorandum.

To value electricity, we used data from *The Cost of Doing Business in Camarines Sur* available at the Philippine government's Web site for the province: <http://www.camarinessur.gov.ph>. Because the value for electricity was not contemporaneous with the POR, we adjusted the values for inflation. See Factor Valuation Memorandum.

To calculate the value for domestic brokerage and handling, the Department used brokerage fees available at the Web site of the Republic of the Philippines Tariff Commission, <http://www.tariffcommission.gov.ph/cao01-2001.html>. We calculated the SV for truck freight using Philippine data from two sources: (1) *The Cost of Doing Business in Camarines Sur*, available at the Philippine government's Web site for the province: <http://www.camarinessur.gov.ph>; and (2) a news article from the *Manila Times* titled "Government Mulls Cut in Export Target." We also used this truck rate to value inland boat freight because no other information was available on the record, consistent with *Certain Cut-to-Length Carbon Steel Plate from Romania: Notice of Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 70 FR 12651 (March 15, 2005), and accompanying Issues and Decision Memorandum at Comment 14.

We valued marine insurance using a publicly available price quote from RJG Consultants, a marine insurance provider at <http://www.rjgconsultants.com/insurance.html>.

To calculate the value for domestic brokerage and handling, the Department used brokerage fees available at the Web site of the Republic of the Philippines Tariff Commission, <http://www.tariffcommission.gov.ph/cao01-2001.html>. See Factor Valuation Memorandum.

To value factory overhead, selling, general, and administrative expenses ("SG&A"), and profit, we used the audited financial statements for the fiscal year ending December 31, 2007, from the following producers: Maitland-Smith Cebu, Inc.; Casa Cebuana Incorporated; Global Classic Designs, Inc.; Diretso Design Furniture Inc.; and Las Palmas Furniture, Inc., all of which are Philippine producers of comparable merchandise. From this information, we were able to determine factory overhead as a percentage of the total raw materials, labor and energy ("ML&E") costs; SG&A as a percentage of ML&E plus overhead (*i.e.*, cost of manufacture); and the profit rate as a percentage of the cost of manufacture plus SG&A. For further discussion, see Factor Valuation Memorandum.

Preliminary Results of Review

We preliminarily determine that the following weighted-average dumping margins exist for the period January 1, 2007, through December 31, 2007:

ADMINISTRATIVE REVIEW

Exporter	Antidumping duty percent margin
Guangdong Yihua Timber Industry Co., Ltd. (a.k.a. Yihua Timber Timber Industry Co., Ltd.) *	124.31
Brother Furniture Manufacturing Co., Ltd. *	124.31
COE, Ltd. ^	124.31
Decca Furniture Limited ^	124.31
Dongguan Landmark Furniture Products Ltd. ^	124.31
Dongguan Mingsheng Furniture Co., Ltd. *	124.31
Dongguan Yihaiwei Furniture Limited ^	124.31
Fujian Lianfu Forestry Co., Ltd. aka Fujian Wonder Pacific, Inc. (Dare Group) *	124.31
Fuzhou Huan Mei Furniture Co., Ltd. (Dare Group) *	124.31
Jiangsu Dare Furniture Co., Ltd. (Dare Group) *	124.31
Hwang Ho International Holdings Limited ^	124.31

²⁷ Bon Ten, Dream Rooms, Hamilton, Joyce Art, Orient International, Sande, and Yida are all part of the PRC-wide entity.

ADMINISTRATIVE REVIEW—Continued

Exporter	Antidumping duty percent margin
Meikangchi (Nantong) Furniture Company Ltd. ^	124.31
Qingdao Shengchang Wooden Co., Ltd. ^	124.31
Shenzhen Shen Long Hang Industry Co., Ltd. *	124.31
Transworld (Zhangzhou) Furniture Co., Ltd. ^	124.31
Winy Universal, Ltd., Zhongshan Winy Furniture Ltd., Winy Overseas, Ltd. ^	124.31
Xingli Arts & Crafts Factory of Yangchun *	124.31
Zhongshan Gainwell Furniture Co., Ltd. *	124.31
PRC-Wide Entity ²⁷	216.01

NEW SHIPPER REVIEW

Exporter/producer combination	Antidumping duty percent margin
Golden Well International (HK), Ltd. ^/Producer: Zhangzhou XYM Furniture Product Co., Ltd.	0.0
Dongguan Sunshine Furniture Co., Ltd. */Dongguan Sunshine Furniture Co., Ltd.	0.0

Disclosure

The Department will disclose calculations performed for these preliminary results to the parties within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Comments

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.²⁸ See 19 CFR 351.309(c)(ii). Rebuttal briefs and rebuttals to written comments, limited to issues raised in such briefs or comments, may be filed no later than 35 days after the date of publication. See 19 CFR 351.309(d). Further, parties submitting written comments are requested to provide the Department with an additional copy of those comments on diskette. Any interested party may request a hearing within 30 days of publication of these preliminary results. See 19 CFR

²⁸ Because the Department is conducting verification after issuance of the preliminary results of review in this case, the Department will provide interested parties with an updated briefing and hearing schedule once the verification schedule is established.

351.310(c). Any hearing, if requested, will be held two days after the scheduled date for submission of rebuttal briefs. See 19 CFR 351.310(d).

The Department will issue the final results of the administrative and new shipper reviews, which will include the results of its analysis of issues raised in the briefs, within 120 days of publication of these preliminary results, in accordance with 19 CFR 351.213(h)(1) unless the time limit is extended.

Assessment Rates

The Department will determine, and CBP shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review. For assessment purposes, the Department calculated exporter/importer- (or customer-) specific assessment rates for merchandise subject to this review. Where appropriate, the Department calculated an *ad valorem* rate for each importer (or customer) by dividing the total dumping margins for reviewed sales to that party by the total entered values associated with those transactions. For duty-assessment rates calculated on this basis, the Department will direct CBP to assess the resulting *ad valorem* rate against the entered customs values for the subject merchandise. Where appropriate, the Department calculated a per-unit rate for each importer (or customer) by dividing the total dumping margins for reviewed sales to that party by the total sales quantity associated with those transactions. For duty-assessment rates calculated on this basis, the Department will direct CBP to assess the resulting per-unit rate against the entered quantity of the subject merchandise. Where an importer- (or customer-) specific assessment rate is *de minimis* (i.e., less than 0.50 percent), the Department will instruct CBP to assess that importer (or customer's) entries of subject merchandise without regard to antidumping duties. The Department intends to instruct CBP to liquidate entries containing subject merchandise exported by the PRC-wide entity at the PRC-wide rate we determine in the final results of this review. The Department intends to issue appropriate assessment instructions directly to CBP 15 days after publication of the final results of this review.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of these reviews for shipments of subject merchandise from the PRC entered, or

withdrawn from warehouse, for consumption on or after the publication date, as provided by sections 751(a)(1)(C) and (a)(2)(C) of the Act: (1) For all respondents receiving a separate rate, the cash deposit rate will be that established in the final results of these reviews; (2) for previously investigated or reviewed PRC and non-PRC exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (3) for all PRC exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be the PRC-wide rate of 216.01 percent; and (4) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporters that supplied that non-PRC exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

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 Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

The Department is issuing and publishing these preliminary results of administrative review and new shipper reviews in accordance with sections 751(a) and 777(i)(1) of the Act, and 19 CFR 351.221(b) and 351.214(h).

Dated: January 30, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

[FR Doc. E9-2675 Filed 2-6-09; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XN06

Endangered and Threatened Species; Take of Anadromous Fish

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

ACTION: Application to renew scientific research permit.

SUMMARY: Notice is hereby given that NMFS has received one scientific research permit application request relating to Pacific salmon. The proposed research is intended to increase knowledge of species listed under the Endangered Species Act (ESA) and to help guide management and conservation efforts.

DATES: Comments or requests for a public hearing on the application must be received at the appropriate address or fax number (see **ADDRESSES**) no later than 5 p.m. Pacific standard time on March 11, 2009.

ADDRESSES: Written comments on the application should be sent to the Protected Resources Division, NMFS, 1201 NE Lloyd Blvd., Suite 1100, Portland, OR 97232-1274. Comments may also be sent via fax to 503-230-5441 or by e-mail to resapps.nwr@NOAA.gov.

FOR FURTHER INFORMATION CONTACT: Garth Griffin, Portland, OR (ph.: 503-231-2005, Fax: 503-230-5441, e-mail: Garth.Griffin@noaa.gov). Permit application instructions are available from the address above.

SUPPLEMENTARY INFORMATION:

Species Covered in This Notice

The following listed species are covered in this notice:

Chinook salmon (*Oncorhynchus tshawytscha*): threatened lower Columbia River (LCR), threatened upper Willamette River (UWR), endangered upper Columbia River (UCR), threatened Snake River (SR) spring/summer (spr/sum), threatened SR fall.

Chum salmon (*O. keta*): threatened Columbia River (CR).

Steelhead (*O. mykiss*): threatened LCR, threatened UWR, threatened middle Columbia River (MCR), threatened SR, endangered UCR, threatened PS.

Coho salmon (*O. kisutch*): threatened LCR, threatened Oregon Coast (OC), threatened Southern Oregon/Northern California coasts (SONCC).

Sockeye salmon (*O. nerka*): endangered SR.

Authority

Scientific research permits are issued in accordance with section 10(a)(1)(A) of the ESA (16 U.S.C. 1531 *et seq.*) and regulations governing listed fish and wildlife permits (50 CFR 222-226). NMFS issues permits based on findings that such permits: (1) are applied for in good faith; (2) if granted and exercised, would not operate to the disadvantage

of the listed species that are the subject of the permit; and (3) are consistent with the purposes and policy of section 2 of the ESA. The authority to take listed species is subject to conditions set forth in the permits.

Anyone requesting a hearing on an application listed in this notice should set out the specific reasons why a hearing on that application would be appropriate (see **ADDRESSES**). Such hearings are held at the discretion of the Assistant Administrator for Fisheries, NMFS.

Application Received

Permit 1410 – Renewal

The Northwest Fisheries Science Center (NWFSC) is seeking to renew permit 1410 for a period of five years. The original permit was in place for five years with three modifications; it expired on December 31, 2008. Under the new permit, the NWFSC would conduct research that would annually take adult and juvenile UCR Chinook, SR spr/sum Chinook, SR fall Chinook, LCR Chinook, UWR Chinook, SR sockeye, CR chum, LCR coho, OC coho, SONCC coho, UCR steelhead, SR steelhead, MCR steelhead, LCR steelhead, and UWR steelhead in the Columbia River plume and surrounding ocean environment. The purpose of the research is to: (a) determine the abundance, distribution, growth and condition of juvenile Columbia River salmonids in the plume and nearby ocean environment and characterize the area's physical and biological features as they relate to salmonid survival; (b) determine the impact that predators and food supply have on survival among juvenile Columbia River Chinook and coho salmon as they migrate through the Columbia River estuary and plume; and (c) synthesize the early ocean ecology of juvenile Columbia River salmonids, test mechanisms that control salmonid growth and survival, and produce ecological indices that forecast salmonid survival.

Ultimately the NWFSC would use simulation models and statistical analyses of climatic, oceanic, and other biological data and indices to help inform management decisions regarding the Columbia river and its salmonid populations. The research would benefit listed species by providing data that would help managers understand the linkages between salmonid abundance, distribution, growth, genetics, and health, and the effects of disease, parasites, diet, and predation in the estuarine and ocean environment. Ultimately, the data would help researchers and managers quantify the

effects of habitat restoration efforts and improve harvest and hatchery guidelines. In any case, the research would provide important information on salmonid life histories in the study area. The NWFSC proposes to capture the fish (using surface trawling), identify, sample, and release adult fish. The juvenile fish would be sacrificed to map disease presence and determine the effects that diet, parasites, genetics, etc. have on fish condition.

This notice is provided pursuant to section 10(c) of the ESA. NMFS will evaluate the application, associated documents, and comments submitted to determine whether the application meets the requirements of section 10(a) of the ESA and Federal regulations. The final permit decision will not be made until after the end of the 30-day comment period. NMFS will publish notice of its final action in the **Federal Register**.

Dated: February 3, 2009.

Angela Somma,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E9-2659 Filed 2-6-09; 8:45 am]

BILLING CODE 3510-22-S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XN13

Marine Mammals; File No. 1039-1699

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

ACTION: Notice; receipt of application for amendment.

SUMMARY: Notice is hereby given that Ann Zoidis, Cetos Research Organization, 11 Des Isle Avenue, Bar Harbor, Maine 04609, has applied for an amendment to Scientific Research Permit No. 1039-1699-01.

DATES: Written, telefaxed, or e-mail comments must be received on or before March 11, 2009.

ADDRESSES: The application and related documents are 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 Pacific Islands Region, NMFS, 1601 Kapiolani Blvd., Rm 1110, Honolulu, HI

96814-4700; phone (808)944-2200; fax (808)973-2941.

Written comments or requests for a public hearing on this request should be submitted 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 amendment 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. 1039-1699.

FOR FURTHER INFORMATION CONTACT:

Carrie Hubard or Kristy Beard, (301)713-2289.

SUPPLEMENTARY INFORMATION: The subject amendment to Permit No. 1039-1699, issued on June 30, 2004, is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*) and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

Permit No. 1039-1699-01 authorizes the permit holder to conduct humpback whale (*Megaptera novaeangliae*) research, including photo-identification, behavioral observations, and passive acoustics in the waters off Hawaii. Several species of non-listed, small whales and dolphins may also be studied. The permit holder is requesting an amendment to take up to 100 minke whales (*Balaenoptera acutorostrata*) in the waters off Hawaii annually. Minke whales would be approached for photo-identification. The purpose of the new research is to investigate the abundance, distribution, and behavior of this species, which has not been thoroughly studied in Hawaii. The amended permit would expire on June 30, 2009.

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: February 4, 2009.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E9-2662 Filed 2-6-09; 8:45 am]

BILLING CODE 3510-22-S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XM65

Incidental Takes of Marine Mammals Incidental to Specified Activities; Marine Geophysical Survey in the Southwest Pacific Ocean, January — February, 2009

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

ACTION: Notice; issuance of incidental take authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA) regulations, notification is hereby given that NMFS has issued an Incidental Harassment Authorization (IHA) to Lamont-Doherty Earth Observatory (L-DEO), a part of Columbia University, to take small numbers of marine mammals, by Level B harassment only, incidental to conducting a marine seismic survey in the southwest Pacific Ocean.

DATES: Effective January 14, 2009, through February 21, 2009.

ADDRESSES: A copy of the IHA and the application are available by writing 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 or by telephoning the contact listed here. 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 by visiting the internet at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications>. Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Jeannine Cody, Office of Protected Resources, 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 United States citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for incidental taking shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined “negligible impact” in 50 CFR 216.103 as “...an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.”

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Except with respect to certain activities not pertinent here, the MMPA defines “harassment” as:

any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Section 101(a)(5)(D) establishes a 45-day time limit for NMFS’ review of an application followed by a 30-day public notice and comment period on any proposed authorization for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either approve or deny the authorization.

Summary of Request

On August 18, 2008, NMFS received an application from L-DEO for the taking by Level B harassment only, of

small numbers of 29 species of marine mammals incidental to conducting, with research funding from the National Science Foundation (NSF), a marine seismic survey within the Exclusive Economic Zone (EEZ) of Tonga in the southwest Pacific Ocean during January through February 2009. NMFS outlined the purpose of the research program in a previous notice for the proposed IHA (73 FR 71606, November 25, 2008).

Description of the Activity

The planned survey will involve one source vessel, the R/V *Marcus G. Langseth* (*Langseth*), a seismic vessel owned by the NSF. NSF expects the *Langseth* to depart Nuku’alofa, Tonga on January 14, 2009 for a one-day transit to the study area in the Lau Basin in the southwest Pacific Ocean (between 19–21° S. and 175–176° W.).

To obtain high-resolution three-dimensional (3D) structures of the Lau Basin’s magmatic systems and thermal structures, the *Langseth* will deploy a towed array of 36 airguns with a total discharge volume of approximately 6,600 cubic inches (in³). The array configuration consists of four identical linear arrays or strings, with 10 airguns on each string. L-DEO will distribute the four airgun strings across an approximate area of 24 x 16 meters (m) (79 x 52 feet (ft)) behind the *Langseth* which will tow the array approximately 50–100 m (164–328 ft) behind the vessel at a tow-depth of 9–12 m (29.5–39.4 ft). The airgun array will fire for a brief (0.1 second (s)) pulse every 180 s. The array will remain silent at all other times.

The *Langseth* will also deploy 55 to 64 Ocean Bottom Seismometers (OBS) for the survey. As the airgun array is towed along the survey lines, the OBS will receive the returning acoustic signals and record them internally for later analysis. In addition to the operations of the airgun array, the *Langseth* will operate a multibeam echosounder (MBES) and a sub-bottom profiler (SBP) continuously throughout the Eastern Lau Spreading Center cruise.

The survey area is approximately 42 kilometers (km) (26 miles (mi)) offshore from Tonga in water depths ranging from 1000 – 2600 m (3280 — 9186 ft). The seismic survey effort (e.g., equipment testing, startup, line changes, repeat coverage of any areas, and equipment recovery) will require approximately 19 days to complete 42 transects of variable lengths, totaling 3650 km (2268 mi) and will include approximately 456 hours of airgun operation. Please see L-DEO’s application for more detailed information. The exact dates of the activities will depend on logistics,

weather conditions, and the need to repeat some lines if data quality is substandard.

L-DEO will conduct all geophysical data acquisition activities with on-board assistance by the scientists who have proposed the NSF-funded study. The scientific team consists of Dr. Doug Wiens (Washington University), Dr. Robert Dunn (University of Hawaii), Dr. Donna Blackman (Scripps Institution of Oceanography), and Dr. Spahr Webb (L-DEO). The vessel will be self-contained, and the crew will live aboard the vessel for the entire cruise.

NMFS has provided a more detailed description of the authorized action, including vessel and acoustic source specifications, in a previous notice for the proposed IHA (73 FR 71606, November 25, 2008).

Safety Radii

The distance from the sound source at which an animal would be exposed to these different received sound levels may be estimated and is typically referred to as safety radii. These safety radii are specifically used to help NMFS estimate the number of marine mammals likely to be harassed by the proposed activity and in deciding how close a marine mammal may approach an operating sound source before the applicant will be required to power-down or shut down the sound source.

L-DEO's acoustic models predict received sound levels in relation to distance and direction from the 36-airgun array in order to estimate the safety radii around their operations. L-DEO's model is based on empirical data gathered during the acoustic calibration study of the R/V *Maurice Ewing's*

(*Ewing*) array of 20 airguns (total volume 8600 in³) conducted in the northern Gulf of Mexico in 2003. L-DEO provides a more detailed description of the modeling effort and calculations of the safety radii in the previous notice for the proposed IHA (73 FR 71606, November 25, 2008), Section I of L-DEO's IHA application, and in Appendix A of the Environmental Assessment report prepared by LGL Limited environmental research associates (LGL) on behalf of NSF.

Using the modeled distances and various correction factors, Table 1 outlines the predicted distances at which three root mean square (rms) sound levels (190 decibels (dB), 180 dB, and 160 dB) are expected to be received from the 36-airgun array and a single airgun operating in water greater than 1000 m (3,820 ft) in depth.

Source and Volume	Tow Depth (m)	Predicted RMS Distances (m)		
		190 dB	180 dB	160 dB
Single Bolt airgun 40 in ³	9–12	12	40	385
4 strings 36 airguns 6600 in ³	9	300	950	6000
	12	340	1120	6850

Table 1. Predicted distances to which sound levels ≥ 190 , 180, and 160 dB re 1 μ Pa might be received in deep (>1000 m; 3280 ft) water from the 36-airgun array during the seismic survey, January — February, 2009.

Comments and Responses

NMFS published a notice of receipt of the L-DEO application and proposed IHA in the **Federal Register** on November 25, 2008 (73 FR 71606). During the comment period, NMFS received comments from the Marine Mammal Commission (Commission), the Center for Regulatory Effectiveness (CRE); and the South Pacific Whale Research Consortium (SPWRC).

Following are the comments from the Commission, CRE, and SPWRC and NMFS' responses.

Comment 1: The Commission recommends that NMFS provide additional justification for its preliminary determination that the planned monitoring program will be sufficient to detect, with a high level of confidence, all marine mammals within or entering the identified safety zones; as such monitoring is essential for determining whether animals are being taken in unanticipated ways and unexpected numbers.

Response: NMFS believes that the planned monitoring program will be sufficient to detect (using visual detection and passive acoustic monitoring (PAM)), with reasonable certainty, most marine mammals within or entering identified safety radii. This

monitoring, along with the required mitigation measures (see below), will result in the least practicable adverse impact on the affected species or stocks and will result in a negligible impact on the affected species or stocks. The *Langseth* is utilizing a team of trained marine mammal observers (MMOs) to visually monitor marine mammals and conduct passive acoustic monitoring (PAM).

The *Langseth's* high observation tower is a suitable platform for conducting marine mammal and turtle observations. When stationed on the observation platform, the MMO's eye level will be approximately 18 m (59 ft) above sea level, providing a panoramic view around the entire vessel. During the daytime, the MMO(s) will scan the area around the vessel systematically using reticle binoculars (e.g., 7 x 50 Fujinon), big-eye binoculars (25 x 150), and the naked eye. The platform of the *Langseth* is high enough that, in good weather, MMOs can see out to 8.9 nm (16.5 km, 10.2 mi). All of the 180-dB safety radii that MMOs will monitor during ramp-ups and power-downs are less than 2 km (1.1 nm, 1.2 mi).

MMOs will use night vision devices (NVDs) (ITT F500 Series Generation 3 binocular-image intensifier or

equivalent), during dusk or nighttime, when required. Finally, L-DEO will provide laser rangefinding binoculars (Leica LRF 1200 laser rangefinder or equivalent) to MMOs to assist with distance estimation. MMOs estimate that visual detection from the ship is between 150 and 250 m (492 and 820 ft) using NVDs and about 30 m (98.4 ft) with the naked eye, which are affected by ambient lighting conditions, sea state, and thermal factors.

The *Langseth* will complement visual observations of marine mammals with an acoustical monitoring program. L-DEO will use a PAM system to improve detection, identification, localization, and tracking of marine mammals. The acoustic monitoring will alert visual observers (if on duty) when vocalizing cetaceans are detected. When an MMO detects a vocalization while visual observations are in progress, the acoustic MMO will contact the visual MMO immediately, to alert him/her to the presence of cetaceans (if they have not already been seen), and to initiate a power down or shut down, if required.

The theoretical detection distance of this PAM system is tens of kilometers and it has reliable detection rates out to 3 km (1.6 nm) and more limited ability out to tens of kilometers. During the

Ewing's cruise in the Gulf of Mexico in 2003, MMOs detected marine mammals at a distance of approximately 10 km (5.4 nm) from the vessel and identified them to species level at approximately 5 km (2.7 nm) from the vessel, though the bridge of that vessel was only 11 m (36 ft) above the water (vs. the *Langseth*, which is 18 m (59 ft) above sea level).

The likelihood of MMOs visual detecting a marine mammal at night is significantly lower than the ability to detect any species during the day. However, the PAM operates equally as effective at night as during the day, and does not depend on good visibility.

The *Langseth* will not start up the airguns unless the MMO can visibly detect the safety range for the 30 minutes prior (i.e., not an night) to start up. In all cases at night, the *Langseth* will already be operating the airguns. NMFS believes that operating the airguns at night will cause many cetaceans to avoid the vessel; thus reducing the number of cetaceans likely to come within the safety radii. Additionally, all of the safety radii in deep water depths are smaller than 2 km (1.1 nm, 1.2 mi) and fall easily within the reliable detection capabilities of the PAM.

Comment 2: The Commission recommends that observations be made during all ramp-up procedures to gather data needed to analyze and report on its effectiveness as a mitigation measure.

Response: The IHA requires that MMOs on the *Langseth* make observations for 30 minutes prior to ramp-up, during all ramp-ups, and during all daytime seismic operations and record the following information when a marine mammal is sighted:

(i) Species, group size, age/size/sex categories (if determinable), behavior when first sighted and after initial sighting, heading (if consistent), bearing and distance from seismic vessel, sighting cue, apparent reaction to the airguns or vessel (e.g., none, avoidance, approach, paralleling, etc.), and including responses to ramp-up), and behavioral pace; and

(ii) Time, location, heading, speed, activity of the vessel (including number of airguns operations and whether in state of ramp-up or power-down), sea state, visibility, cloud cover, and sun glare.

These requirements should provide information regarding the effectiveness of ramp-up as a mitigation measure, provided animals are detected during ramp-up.

Comment 3: The Commission recommends that the monitoring period prior to the initiation of seismic activities and to the resumption of

airgun activities after a power-down be extended to one hour.

Response: As the MMC points out, several species of deep-diving cetaceans are capable of remaining underwater for more than 30 minutes, however, for the following reasons NMFS believes that 30 minutes is an adequate length for the monitoring period prior to the start-up of airguns: (1) because the *Langseth* is required to ramp-up, the time of monitoring prior to start-up of any but the smallest array is effectively longer than 30 minutes (Ramp up will begin with the smallest gun in the array and airguns will be added in a sequence such that the source level of the array will increase in steps not exceeding approximately 6 dB per 5-min period over a total duration of 20–30 min), (2) in many cases MMOs are making observations during times when sonar is not being operated and will actually be observing prior to the 30-minute observation period anyway, (3), the majority of the species that may be exposed do not stay underwater more than 30 minutes, and (4) all else being equal and if a deep diving individual happened to be in the area in the short time immediately prior to the pre-start-up monitoring, if an animal's maximum underwater time is 45 minutes, there is only a 1 in 3 chance that his last random surfacing would be prior to the beginning of the required 30-minute monitoring period.

Also, seismic vessels are moving continuously (because of long-towed array) and NMFS believes that unless the animal submerges and follows at the speed of the vessel (highly unlikely), the vessel will be far beyond the length of the safety radii within 30 minutes, and therefore it will be safe to start the airguns again.

Comment 4: In the proposed IHA on page 71612, column 2, paragraph 2: The statement "However, controlled exposure experiments in the Gulf of Mexico indicate that foraging behavior was altered upon exposure to airgun sound (Jochens *et al.*, 2006)," is not based on the most recent assessment of the data. NMFS' statement cites a 2006 Sperm Whale Seismic Study (SWSS) in the Gulf of Mexico Report which discusses data on foraging behavior and avoidance movements of seven tagged sperm whales in the Gulf of Mexico during exposure to airguns. The CRE requests that NMFS cite the final 2008 Synthesis Report on the sperm whale seismic study which cautions that the "...sample size of 7 animals that conducted foraging dives during exposure was too small to provide definitive results...the power of the test to detect *small* changes in foraging

success was low, and no conclusions on the biological significance of these effects for an individual animal or for the population can be made from the data sets available."

Response: As CRE points out in their letter, L-DEO acknowledges in their application (see Section 7, page 34) that seismic energy alters sperm whale foraging behavior. NMFS acknowledges the commentator's interpretation of the 2006 SSWS. However, after reviewing the 2008 Synthesis Report, NMFS believes that the following statement: "...sample size of 7 animals that conducted foraging dives during exposure was too small to provide definitive results...the power of the test to detect small changes in foraging success was low, and no conclusions on the biological significance of these effects for an individual animal or for the population can be made from the data sets available," refers to having the statistical power to detect small changes in foraging success. Conversely, page 264 of the 2008 Synthesis Report states the following: "...Our data seem to indicate that airgun exposure — even at the low exposure levels observed in this experiment — can result in large reductions in foraging rate for some individual sperm whales." Therefore, the proposed IHA notice statement that data indicated alterations in foraging behavior, is supported by one of the conclusions discussed in the 2008 Synthesis Report. NSF/L-DEO presented this study as one of several pieces of information that relate to this topic. Though the commenter has presented an alternate interpretation of the data related to foraging behavior, NMFS finds that the Environmental Assessment (EA) provides sufficient analysis of the available data and the information is not such that it will affect NMFS' findings.

Comment 5: The safety zone (power down/shut down zones) proposed are currently based on 180 dB (re $1\mu\text{Pa}^2$ rms) received level for cetaceans. While this is based on exposure levels that may cause a temporary threshold shift (TTS) in exposed cetaceans, biologically significant behavioral changes may occur at lower levels. Current best-practice is to power down at received levels of 160 dB (re $1\mu\text{Pa}^2$ rms). The SPWRC recommends that NMFS base the exclusion zones on the received levels of 160 dB.

Response: NMFS' marine mammal incidental take authorizations typically require a shutdown zone that corresponds to the isopleths associated with the Level A harassment threshold (i.e., 180 dB). NMFS does not require shutdown at the threshold associated

with the onset of Level B behavioral harassment (i.e., 160 dB), as that would effectively be an avoidance of take, which would render a take authorization under the MMPA unnecessary. The MMOs will still be looking beyond the safety zone and will use the information to help implement the current safety zone measures. Further, though NMFS does not ask for protective measures meant to entirely avoid disturbance of marine mammals, which would preclude the need for an authorization, we have included measures intended to affect the least practicable adverse impact on the species.

Comment 6: If the designated exclusion zone for power down/shut down zones is based on the received levels of 160 dB, SPWRC does not consider that L-DEO can effectively monitor such a large safety zone (> 6 km radius) in normal operating sea conditions and detect cetaceans at that distance. We recommend that a suitable support vessel with a high observation platform, with at least two experienced MMOs operates at least 3 to 4 km ahead of the seismic vessel as a forward lookout.

Response: See Comment 5. The designated exclusion zone for power down/shut down zones is based on the received levels of 180 dB, not 160 dB. The visual and acoustic monitoring program (see below) will be sufficient to detect, most marine mammals within or entering identified safety radii. This monitoring, along with the required mitigation measures, will result in the least practicable adverse impact on the affected species or stocks and will result in a negligible impact on the affected species or stocks.

Comment 7: As no systematic cetacean surveys have been undertaken to determine the diversity, abundance and distribution cetaceans within the Lau Basin during summer months and PAM systems cannot be relied upon to detect all cetaceans present during periods of night, SWPC recommends that should high densities of cetaceans be observed resulting in interruptions to seismic operations during daylight hours, a trigger for ceasing night time operations be included for the survey.

Response: It is NMFS' opinion that once a safety zone is determined visually to be free of marine mammals, seismic may continue into periods of poor visibility. It should be understood that the safety zone is not stationary but is moving along with the ship at whatever speed the ship is progressing.

The IHA authorizes L-DEO to continue marine geophysical surveys into night and low-light hours if such

segment of the survey is initiated when the entire relevant safety zones are visible and can be monitored for the entire 30 minutes prior (i.e., not at night) to starting the airguns. The IHA prohibits the initiation of the airgun array operation from a shut-down position at night or during low-light hours (such as in dense fog) when the full safety zone cannot be monitored by the MMOs. Finally, if L-DEO wishes to conduct seismic surveys at night or during low-light hours, a small airgun with the source level of at least 180 dB re μ Pa (rms) shall be initiated during the day-time with good visibility when no marine mammal is in the safety zone, and be kept on and monitored before ramping up for the survey.

Therefore, in cases where the airguns are already operating at night, NMFS believes that the continuing airgun operation will cause many cetaceans to avoid the vessel, which therefore will reduce the number likely to come within the safety radii. Additionally, because of normal operating procedures, which entail beginning seismic operations as soon after dawn as possible, at the most, less than one third of actual airgun operation (and much less, most likely) will occur at nighttime.

Comment 8: It is recommended that if three or more cetacean related interruptions (shutdowns or power downs) occur during the daylight hours then no nighttime seismic operations are conducted the following night. This is best practice and a requirement for all seismic surveys in Australian waters.

Response: See Comment 7. It is NMFS opinion that once a safety zone is determined visually to be free of marine mammals, seismic should continue into periods of poor visibility. As a general rule, termination of seismic during nighttime and poor visibility is simply not practicable due to cost considerations and ship time schedules. A review of previous monitoring programs indicates that these species were not within a distance to incur Level A harassment.

L-DEO's monitoring plan, along with the required mitigation measures in the IHA, will result in the least practicable adverse impact on the affected species or stocks and will result in a negligible impact on the affected species or stocks.

Comment 9: As the proposed seismic survey is an activity governed by the Tongan Fisheries Act of 1989, we recommend a Tonga Fisheries Observer be invited to participate in the survey (with all costs covered).

Response: NMFS acknowledges the commentator's interpretation of the Tongan Fisheries Act 1989 and will

forward SPWRC's request to NSF and L-DEO. NSF/L-DEO has received approval from the Tonganese government to conduct the survey and the terms and conditions of the IHA encourage NSF to coordinate with the Tongan government regarding the proposed seismic activity.

Comment 10: It is recommended that at least one SPWRC representative who is familiar with the cetacean species within the region be included, in the MMO team for the survey (with all costs associated with participating in the survey covered) and that the Consortium have full access to all cetacean sighting data collected.

Response: L-DEO appoints NMFS-qualified marine mammal observers with NMFS' concurrence. If an SPWRC representative requests to participate in the seismic survey, they should discuss this directly with a representative from L-DEO.

The IHA requires L-DEO to submit a report on all activities and monitoring results to the Office of Protected Resources, NMFS, within 90 days after the expiration of the IHA. L-DEO is then required to submit a final report within 30 days after receiving comments from NMFS on the draft report. NMFS will make a copy of the final report available on the internet at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications>.

Description of Marine Mammals in the Activity Area

Twenty-nine marine mammal species may occur off the coast of Tonga, including 21 odontocetes (toothed cetaceans, such as dolphins), and 8 mysticetes (baleen whales). Pinnipeds are unlikely to be encountered in or near the Lau Basin survey area where seismic operations will occur, and are, therefore, not addressed further in this document. Five of these species are listed as endangered under the U.S. Endangered Species Act (ESA), including the humpback (*Megaptera novaeangliae*), sei (*Balaenoptera borealis*), fin (*Balenoptera physalus*), blue (*Balenoptera musculus*), and sperm (*Physeter macrocephalus*) whales. This IHA will only address requested take authorizations for cetaceans as L-DEO does not expect to encounter pinnipeds that far offshore in the study area. Thus L-DEO is not requesting any takes for pinnipeds in this IHA.

Table 2 below outlines the species, their habitat and abundance in the proposed survey area, and the estimated exposure levels. Additional information regarding the status and distribution of the marine mammals in the area as well as how L-DEO calculated the densities were included in a previous notice for

the proposed IHA (73 FR 71606, November 25, 2008) and in Sections III and IV of L-DEO's application.

Species	Habitat	Abundance in the SW Pacific	Occurrence in the Survey Area	Maximum Estimate of Individuals Exposed to \geq 160 dB	Percent of Estimated Population Exposed to \geq 160 dB
Humpback whale*	Nearshore waters	6,200	Rare	3	0.01
Sei whale*	Offshore, pelagic	12,000	Common	3	0.01
Fin whale*	Pelagic, continental slope	3,031	Uncommon	3	0.03
Blue whale*	Pelagic, coastal	756	Uncommon	3	0.12
Pygmy right whale	Coastal, oceanic	N.A.	Common	3	N.A.
Minke whale	Pelagic, coastal	155,000	Rare in Jan.	3	0.001
Dwarf minke whale	Coastal	N.A.	N.A.	3	N.A.
Bryde's whale	Pelagic, coastal	16,500	Common	14	0.02
Sperm whale*	Pelagic, deep seas	22,700	Common	22	0.03
Pygmy sperm whale	Deep waters off the shelf	N.A.	Common	353	N.A.
Dwarf Sperm whale	Deep waters off the shelf	11,200	Uncommon	353	0.85
Cuvier's beaked whale	Pelagic	20,000	Common	40	0.09
Southern bottlenose whale	Pelagic	N.A.	Rare	0	N.A.
Longman's beaked whale	Pelagic	N.A.	Uncommon	16	N.A.
Blainville's beaked whale	Pelagic	25,300	Common	40	0.07
Ginkgo-toothed beaked whale	Pelagic	25,300	Rare	16	0.03
Rough-toothed dolphin	Deep water	145,900	Uncommon	1,649	0.59
Bottlenose dolphin	Coastal, oceanic	243,500	Common	330	0.07
Pantropical spotted dolphin	Coastal, pelagic	1,298,400	Uncommon	1,649	0.07
Spinner dolphin	Coastal, pelagic	1,019,300	Rare	3,298	0.17
Striped dolphin	Continental shelf	1,918,000	Rare	330	0.01
Fraser's dolphin	Waters > 1000 m	289,300	Rare	989	0.18
Short-beaked common dolphin	Shelf, pelagic	2,210,900	Common	330	0.01
Risso's dolphin	Waters > 1000 m	175,800	Common	330	0.10
Melon-headed whale	Oceanic	45,400	Uncommon	152	0.10
Pygmy killer whale	Deep, pantropical	38,900	Uncommon	30	0.02
False killer whale	Pelagic	39,800	Uncommon	91	0.07
Killer whale	Widely distributed	8,500	Common	61	0.20
Short-finned pilot whale	Pelagic	160,200	Common	61	0.01
Total				10,173	

Table 2. Abundance, preferred habitat, and commonness of the marine mammal species that may be encountered during the proposed survey within the Lau Basin survey area. The far right columns indicate the estimated number of each species that will be exposed to \geq 160 dB based on maximum density estimates. NMFS believes that, when mitigation measures are taken into consideration, the activity is likely to result in take of numbers of animals less than those indicated by the column titled "Maximum Estimate of Individuals Exposed to \geq 160 dB."

* Federally listed endangered species.

Potential Effects on Marine Mammals

The effects of sounds from airguns might include one or more of the following: tolerance, masking of natural sounds, behavioral disturbances, and at least in theory, temporary or permanent hearing impairment, or non-auditory physical or physiological effects (Richardson *et al.*, 1995; Gordon *et al.*, 2004; Nowacek *et al.*, 2007; Southall *et al.*, 2007). Permanent hearing impairment, in the unlikely event that it occurred, would constitute injury, but temporary threshold shift (TTS) is not an injury (Southall *et al.*, 2007). It is unlikely that the project would result in any cases of temporary impairment, or any significant non-auditory physical or physiological effects. Some behavioral disturbance is expected, but this would be localized and short-term. Also, behavioral disturbance is expected to be limited to relatively short distances.

The notice of the proposed IHA (73 FR 71606, November 25, 2008) included a discussion of the effects of sounds from airguns on mysticetes (baleen whales) and odontocetes (toothed whales), including tolerance, masking, behavioral disturbance, hearing impairment, and other non-auditory physical effects. Additional information on the behavioral reactions (or lack thereof) by all types of marine mammals to seismic vessels can be found in Appendix B of L-DEO's application.

The notice of the proposed IHA also included a discussion of the potential effects of the multibeam echosounder (MBES) and the sub-bottom profiler (SBP). Because of the shape of the beams of these sources and their power, NMFS believes it unlikely that marine mammals will be exposed to either the MBES or the SBP at levels at or above those likely to cause harassment. Further, NMFS believes that the brief exposure of cetaceans or pinnipeds to few signals from the multi-beam bathymetric sonar system is not likely to result in the harassment of marine mammals.

Estimated Take by Incidental Harassment

The notice of the proposed IHA (73 FR 71606, November 25, 2008) included an in-depth discussion of the methods used to calculate the densities of the marine mammals in the area of the seismic survey and the take estimates. Based on numbers of animals encountered during previous L-DEO seismic surveys, the likelihood of the successful implementation of the required mitigation measures, and the likelihood that some animals will avoid the area around the operating airguns,

NMFS believes that L-DEO's airgun seismic testing program may result in the Level B harassment of some lower number of individual marine mammals (a few times each) than is indicated by the column titled, Maximum Estimate of Individuals Exposed to ≥ 160 dB, in Table 2. L-DEO has asked for authorization for take of their "maximum estimate" of numbers for each species. Though NMFS believes that take of the requested numbers is unlikely, we still find these numbers small relative to the population sizes.

Few have conducted systematic aircraft- or ship-based surveys for marine mammals in the offshore waters of the southern Pacific Ocean. Hence, the species of marine mammals that occur in the area are not well known. L-DEO's estimates are based on species accounts in part derived from Reeves *et al.* (1999), who summarized distribution information from the area served by the South Pacific Regional Environment Programme (SPREP). The SPREP region covers a vast area of the Pacific Ocean between the Tropic of Capricorn and the Equator from Papua New Guinea (140°E.) to Pitcairn Island (130°W.).

Estimates of the numbers of marine mammals that might be affected are based on consideration of the number of marine mammals that could be disturbed appreciably by approximately 3,650 km of seismic surveys during the proposed seismic program in the Lau Basin, Tonga. The estimates of exposures to various sound levels assume that the surveys will be completed; in fact, the planned number of line-kilometers has been increased by 25 percent to accommodate lines that may need to be repeated, equipment testing, etc.

All anticipated "takes by harassment" authorized by this IHA are Level B harassment only, involving temporary changes in behavior. Because of the required implementation of mitigation measures and the likelihood that some cetaceans will avoid the area around the operating airguns of their own accord, NMFS does not expect any marine mammal to approach the sound source close enough to be injured (Level A harassment). Given these considerations, the predicted number of marine mammals that might be exposed to sounds at or greater than 160 dB may be somewhat overestimated. Thus, the following estimates of the numbers of marine mammals potentially exposed to sounds equal to or greater than 160 dB are precautionary, and probably overestimate the actual numbers of marine mammals that might be exposed.

Potential Effects on Habitat

A detailed discussion of the potential effects of this action on marine mammal habitat, including was included in the notice of the proposed IHA (73 FR 71606, November 25, 2008). Based on the discussion in the proposed IHA notice, the authorized operations are not expected to have any habitat-related effects that could cause significant or long-term consequences for individual marine mammals or their populations or stocks and will not result in any permanent impact on habitats used by marine mammals, or to the food sources they use. The main impact issue associated with the proposed activity will be temporarily elevated noise levels and the associated direct effects on marine mammals.

The *Langseth* will deploy and retrieve approximately 55–64 OBS. The OBS anchors will remain upon equipment recovery. Although OBS placement will disrupt a very small area of seafloor habitat and may disturb benthic invertebrates, the impacts are expected to be localized and transitory. The vessel will deploy the OBS in such a way that creates the least disturbance to the area. Thus, it is not expected that the placement of OBS would have adverse effects beyond naturally occurring changes in this environment, and any effects of the planned activity on marine mammal habitats and food resources are expected to be negligible.

Monitoring and Mitigation

Mitigation and monitoring measures required to be implemented for the proposed seismic survey have been developed and refined during previous L-DEO seismic survey studies and associated environmental assessments, IHA applications, and IHAs. The mitigation and monitoring measures described herein represent a combination of the procedures required by past IHAs for other similar projects and on recommended best practices in Richardson *et al.* (1995), Pierson *et al.* (1998), and Weir and Dolman (2007). The measures are described in detail below.

Required mitigation measures include: (1) safety radii; (2) speed or course alteration, provided that doing so will not compromise operational safety requirements; (2) power-down procedures; (3) shutdown procedures; (4) ramp-up procedures; and (5) special procedures for nighttime and low-light hour operations.

Vessel-based Visual Monitoring

Vessel-based marine mammal visual observers (MMVOs) will be based

aboard the seismic source vessel and will watch for marine mammals near the vessel during daytime airgun operations and during start-ups of airguns at night. MMVOs will also watch for marine mammals near the seismic vessel for at least 30 minutes prior to the start of airgun operations and after an extended shutdown of the airguns (i.e., 7 minutes). When feasible, MMVOs will also make observations during daytime periods when the seismic system is not operating for comparison of animal abundance and behavior. Based on MMVO observations, airguns will be powered down, or if necessary, shut down completely (see below), when marine mammals are detected within or about to enter a designated safety radius corresponding to 180-dB isopleths. The MMVOs will continue to maintain watch to determine when the animal(s) are outside the safety radius, and airgun operations will not resume until the animal has left that zone. The predicted distances for the safety radii are listed according to the sound source, water depth, and received isopleth in Table 1.

During seismic operations in the southwest Pacific Ocean, at least three visual observers and one bioacoustician will be based aboard the *Langseth*. MMVOs will be appointed by L-DEO with NMFS' concurrence. At least one MMVO, and when practical two, will monitor the safety radii for marine mammals during daytime operations and nighttime startups of the airguns. Use of two simultaneous MMVOs will increase the proportion of the animals present near the source vessel that are detected. MMVO(s) will be on duty in shifts of duration no longer than 4 hours. The vessel crew will also be instructed to assist in detecting marine mammals and implementing mitigation requirements (if practical). Before the start of the seismic survey the crew will be given additional instruction regarding how to do so.

The *Langseth's* high observation tower is a suitable platform for conducting marine mammal and turtle observations. When stationed on the observation platform, the MMO's eye level will be approximately 18 m (59 ft) above sea level, providing a panoramic view around the entire vessel. During the daytime, the MMO(s) will scan the area around the vessel systematically using reticle binoculars (e.g., 7 x 50 Fujinon), big-eye binoculars (25 x 150), and the naked eye. The platform of the *Langseth* is high enough that, in good weather, MMOs can see out to 8.9 nm (16.5 km, 10.2 mi). All of the 180-dB safety radii that MMOs will monitor during ramp-ups and power-downs are less than 2 km (1.1 nm, 1.2 mi).

MMOs will use night vision devices (NVDs) (ITT F500 Series Generation 3 binocular-image intensifier or equivalent), during dusk or nighttime, when required. Finally, L-DEO will provide laser rangefinding binoculars (Leica LRF 1200 laser rangefinder or equivalent) to MMOs to assist with distance estimation. MMOs estimate that visual detection from the ship is between 150 and 250 m (492 and 820 ft) using NVDs and about 30 m (98.4 ft) with the naked eye, which are affected by ambient lighting conditions, sea state, and thermal factors.

Passive Acoustic Monitoring

PAM will take place to complement the visual monitoring program. Acoustic monitoring can be used in addition to visual observations to improve detection, identification, localization, and tracking of cetaceans. It is only useful when marine mammals call, but it can be effective either by day or by night and does not depend on good visibility. The acoustic monitoring will serve to alert visual observers when vocalizing cetaceans are detected. It will be monitored in real time so visual observers can be advised when cetaceans are detected. When bearings (primary and mirror-image) to calling cetacean(s) are determined, the bearings will be relayed to the visual observer to help him/her sight the calling animal(s).

The PAM system consists of hardware (i.e., hydrophones) and software. The "wet end" of the system consists of a low-noise, towed hydrophone array that is connected to the vessel by a "hairy" faired cable. The array will be deployed from a winch located on the back deck. A deck cable will connect from the winch to the main computer lab where the acoustic station and signal condition and processing system will be located. The lead-in from the hydrophone array is approximately 400 m (1,312 ft) long, and the active part of the hydrophone is approximately 56 m (184 ft) long. The hydrophone array is typically towed at depths of 20 m (65.6 ft).

The towed hydrophone array will be monitored 24 hours per day while at the survey area during airgun operations and also during most periods when the *Langseth* is underway with the airguns not operating. One MMO and/or bioacoustician will monitor the acoustic detection system at any one time, by listening to the signals from two channels via headphones and/or speakers and watching the real time spectrographic display for frequency ranges produced by cetaceans. MMOs monitoring the acoustical data will be on shift for 1–6 hours. Of the three observers required on board, one will

have primary responsibility for PAM during the seismic survey. However, all MMOs are expected to rotate through the PAM position, although the most experienced with acoustics will be on PAM duty more frequently.

When a vocalization is detected, the acoustic MMO will, if visual observations are in progress, contact the MMVO immediately to alert him/her to the presence of the vocalizing marine mammal(s) (if they have not already been seen), and to allow a power down or shutdown to be initiated, if required. The information regarding the call will be entered into a database. The data to be entered includes an acoustic encounter identification number, whether it was linked with a visual sighting, date, time when first and last heard and whenever any additional information was recorded, position and water depth when first detected, bearing if determinable, species or species group (e.g., unidentified dolphin, sperm whale), types and nature of sounds heard (e.g., clicks, continuous, sporadic, whistles, creaks, burst pulses, strength of signal, etc.), and any other notable information. The acoustic detection can also be recorded for further analysis.

Speed or Course Alteration – If a marine mammal is detected outside the safety radius and, based on its position and the relative motion, is likely to enter the safety radius or exclusion zone (EZ), the vessel's speed and/or direct course may be changed. This would be done if practicable while minimizing the effect on the planned science objectives. The activities and movements of the marine mammal(s) (relative to the seismic vessel) will then be closely monitored to determine whether the animal is approaching the applicable EZ. If the animal appears likely to enter the EZ, further mitigation actions will be taken, i.e., either further course alterations or a power down or shut down of the airguns. Typically, during seismic operations, major course and speed adjustments are often impractical when towing long seismic streamers and large source arrays, thus alternative mitigation measures (see below) will need to be implemented.

Power-down Procedures – A power-down involves reducing the number of operating airguns in use to minimize the exclusion zone, so that marine mammals are no longer in or about to enter this zone. A power-down of the airgun array to a reduced number of operating airguns may also occur when the vessel is moving from one seismic line to another. During a power down for mitigation, one airgun will be operated. The continued operation of at least one airgun is intended to alert

marine mammals to the presence of the seismic vessel in the area. In contrast, a shut down occurs when all airgun activity is suspended.

If a marine mammal is detected outside the safety radii but is likely to enter it, and if the vessel's speed and/or course cannot be changed to avoid the animal(s) entering the EZ, the airguns will be powered down to a single airgun before the animal is within the EZ. Likewise, if a mammal is already within the EZ when first detected, the airguns will be powered down immediately. During a power down of the airgun array, the 40-in³ airgun will be operated. If a marine mammal is detected within or near the smaller safety radii around that single airgun (see Table 1 above), all airguns will be shutdown (see next subsection).

Following a power down, airgun activity will not resume until the marine mammal is outside the safety radius for the full array. The animal will be considered to have cleared the safety radius if it:

- (1) Is visually observed to have left the safety radius; or
- (2) Has not been seen within the safety radius for 15 minutes in the case of small odontocetes; or
- (3) Has not been seen within the safety radius for 30 minutes in the case of mysticetes and large odontocetes, including sperm, pygmy sperm, dwarf sperm, and beaked whales; or
- (4) During airgun operations following a power-down (or shut-down) and subsequent animal departure as above, the airgun array will resume operations following ramp-up procedures described below.

Shutdown Procedures – The operating airgun(s) will be shut down if a marine mammal is detected within or approaching the safety radius for the then-operating single 40 in³ airgun while the airgun array is at full volume or during a power down. Airgun activity will not resume until the marine mammal has cleared the safety radius or until the MMO is confident that the animal has left the vicinity of the vessel. Criteria for judging that the animal has cleared the safety radius will be as described in the preceding subsection.

Ramp-up Procedures – A ramp-up procedure will be followed when the airgun array begins operating after more than seven minutes without airgun operations or when a power-down has exceeded seven minutes. This period is based on the modeled 180-dB radius for the 36-airgun array (see Table 1) in relation to the planned speed of the *Langseth* while shooting. Similar periods (approximately eight to 10

minutes) were used during previous L-DEO surveys.

Ramp-up will begin with the smallest airgun in the array (40 in³). Airguns will be added in a sequence such that the source level of the array will increase in steps not exceeding 6 dB per 5-minute period over a total duration of approximately 20 to 25 minutes. During ramp-up, the MMVOs will monitor the safety radius, and if marine mammals are sighted, a course/speed change, power down, or shutdown will be implemented as though the full array were operational.

If the complete safety radius has not been visible for at least 30 minutes prior to the start of operations in either daylight or nighttime, ramp-up will not commence unless at least one airgun (40 in³ or similar) has been operating during the interruption of seismic survey operations. Given these provisions, it is likely that the airgun array will not be ramped up from a complete shut down at night or in thick fog, because the other part of the safety radius for that array will not be visible during those conditions. If one airgun has operated during a power down period, ramp up to full power will be permissible at night or in poor visibility, on the assumption that marine mammals will be alerted to the approaching seismic vessel by the sounds from the single airgun and have the opportunity to move away. Ramp up of the airguns will not be initiated if a marine mammal is sighted within or near the applicable safety radius during the day or close to the vessel at night.

MMVO Data and Documentation

MMVOs will record data to estimate the numbers of marine mammals exposed to various received sound levels and to document any apparent disturbance reactions or lack thereof. Data will be used to estimate the numbers of mammals potentially "taken" by harassment. They will also provide information needed to order a power-down or shutdown of airguns when marine mammals are within or near the relevant safety radius. When a sighting is made, the following information about the sighting will be recorded:

- (1) Species, group size, age/size/sex categories (if determinable), behavior when first sighted and after initial sighting, heading (if consistent), bearing and distance from seismic vessel, sighting cue, apparent reaction to the airguns or vessel (e.g., none, avoidance, approach, paralleling, etc. and including responses to ramp-up), and behavioral pace.

- (2) Time, location, heading, speed, activity of the vessel (including number of airguns operating and whether in state or ramp-up, power-down, or full power), sea state, visibility, cloud cover, and sun glare.

The data listed under (2) will also be recorded at the start and end of each observation watch and during a watch, whenever there is a change in one or more of the variables.

All observations, as well as information regarding airgun power down and shutdown, will be recorded in a standardized format. Data will be entered into a custom electronic database. The accuracy of data will be verified by computerized data validity checks as the data are entered and by subsequent manual checking of the database. Preliminary reports will be prepared during the field program and summaries forwarded to the operating institution's shore facility and to NSF weekly or more frequently. MMO observations will provide the following information:

- (1) The basis for decisions about powering down or shutting down airgun arrays.
- (2) Information needed to estimate the number of marine mammals potentially 'taken by harassment.' These data will be reported to NMFS per terms of MMPA authorizations or regulations.
- (3) Data on the occurrence, distribution, and activities of marine mammals in the area where the seismic study is conducted.
- (4) Data on the behavior and movement patterns of marine mammals seen at times with and without seismic activity.

Reporting

A draft report will be submitted to NMFS within 90 days after expiration of the IHA. The report will describe the operations that were conducted and sightings of marine mammals near the operations. The report will be submitted to NMFS, providing full documentation of methods, results, and interpretation pertaining to all monitoring and mitigation. The 90-day draft report will summarize the dates and locations of seismic operations (dates, times, locations, heading, speed, weather, sea state, activities), and all marine mammal sightings (dates, times, locations, species, behavior, number of animals, associated seismic survey activities).

The report will also include the estimates of the amount and nature of potential "take" of marine mammals by harassment or in other ways, as well as a description of the implementation and effectiveness of the monitoring and mitigation measures of the IHA and

Biological Opinion's (BiOp) Incidental Take Statement. L-DEO is then required to submit a final report within 30 days after receiving comments from NMFS on the draft report.

Endangered Species Act (ESA)

Pursuant to section 7 of the ESA, NSF has consulted with the NMFS, Office of Protected Resources, Endangered Species Division on this seismic survey. NMFS Headquarters' Office of Protected Resources, Permits, Conservation, and Education Division has also consulted internally pursuant to section 7 of the ESA on the issuance of an IHA under section 101(a)(5)(D) of the MMPA for this activity. On January 13, 2009, NMFS issued a BiOp and concluded that the issuance of an IHA is not likely to jeopardize the continued existence of blue, fin, humpback, sei, and sperm whales; green sea turtles (*Chelonia mydas*); hawksbill sea turtles (*Eretmochelys imbricata*); leatherback sea turtles (*Dermochelys coriacea*); loggerhead sea turtles (*Caretta caretta*); and olive ridley sea turtles (*Lepidochelys olivacea*). The BiOp also concluded that the proposed activities would have no effect on critical habitat, as the Tongan government has no such designation within the action area. Finally, NMFS has incorporated the Relevant Terms and Conditions of the Incidental Take Statement in the BiOp into the IHA.

National Environmental Policy Act (NEPA)

On September 22, 2005 (70 FR 55630), NSF published a notice of intent to prepare a Programmatic Environmental Impact Statement/Overseas Environmental Impact Statement (EIS/OES) to evaluate the potential environmental impacts associated with the use of seismic sources in support of NSF-funded research by U.S. academic scientists. NMFS agreed to be a cooperating agency in the preparation of the EIS/OEIS. This EIS/OEIS has not been completed. Therefore, in order to meet NSF's and NMFS' NEPA requirements for the proposed activity and issuance of an IHA to L-DEO, the NSF has prepared an EA that is specific to the marine geophysical survey conducted by the R/V *Marcus G. Langseth* in the Southwest Pacific Ocean off the coast of Tonga. The NSF has made a Finding of No Significant Impact (FONSI) determination based on information contained within its EA that implementation of the proposed action is not a major Federal action having significant effects on the environment within the meaning of NEPA. NSF determined, therefore, that

an environmental impact statement would not be prepared. On November 25, 2008 (73 FR 71606), NMFS noted that the NSF had prepared an EA for the southwest Pacific Ocean surveys and made this EA available upon request. NMFS has reviewed the information contained in NSF's EA and determined that the NSF EA describes the proposed action alternative, and the potential impacts on marine mammals, endangered species, and other marine life that could be impacted by the preferred alternative and the other alternatives. Accordingly, NMFS adopted the NSF EA under 40 CFR 1506.3 and made its own FONSI. The NMFS FONSI also takes into consideration additional mitigation measures required by the IHA that are not in NSF's EA. Therefore, NMFS has determined that it is not necessary to issue a new EA, supplemental EA or an EIS for the issuance of an IHA to L-DEO for this activity. A copy of the EA and the NMFS FONSI for this activity is available upon request (see **ADDRESSES**).

Determinations

NMFS has determined that the impact of conducting the seismic survey in the southwest Pacific Ocean may result, at worst, in a temporary modification in behavior (Level B harassment) of small numbers of 29 species of cetaceans. Though NMFS believes that take of the requested numbers is unlikely, we still find these numbers small relative to the population sizes. Further, this activity is expected to result in a negligible impact on the affected species or stocks.

The provision requiring that the activity not have an unmitigable adverse impact on the availability of the affected species or stock for subsistence uses is not implicated for this proposed action. There is no subsistence harvest of marine mammals in the proposed research area; therefore, there will be no impact of the activity on the availability of the species or stocks of marine mammals for subsistence uses.

This negligible impact determination is supported by: (1) the likelihood that, given sufficient warning through relatively slow ship speed, marine mammals are expected to move away from a noise source that is annoying prior to it becoming potentially injurious; (2) the fact that marine mammals would have to be closer than 40 m (131 ft) in deep water, when a single airgun is in use from the vessel to be exposed to levels of sound (180 dB) believed to have even a minimal chance of causing TTS; (3) the fact that marine mammals would have to be closer than 950 m (0.5 nm) in deep water, when the full array is in use at

a 9 m (29.5 ft) tow depth from the vessel to be exposed to levels of sound (180 dB) believed to have even a minimal chance of causing TTS; (4) the likelihood that marine mammal detection ability by trained observers is good at those distances from the vessel; (5) the use of PAM, which is effective out to tens of km, will assist in the detection of vocalizing marine mammals at greater distances from the vessel; (6) the incorporation of other required mitigation measures (i.e., ramp-up, power-down, and shutdown); and (7) the limited duration of the seismic survey in the study area (approximately 39 days). As a result, no take by injury or death is anticipated, and the potential for temporary or permanent hearing impairment is very low and will be avoided through the incorporation of the required monitoring and mitigation measures.

While the number of potential incidental harassment takes will depend on the distribution and abundance of marine mammals in the vicinity of the survey activity, the number of potential harassment takings is estimated to be small, relative to the affected species and stock sizes, and has been mitigated to the lowest level practicable through incorporation of the measures mentioned previously in this document.

Authorization

As a result of these determinations, NMFS has issued an IHA to L-DEO for conducting a marine geophysical survey in the southwest Pacific Ocean in January — February, 2009, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: January 13, 2009.

James H. Lecky,

*Director, Office of Protected Resources,
National Marine Fisheries Service.*

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XN15

Taking and Importing Marine Mammals; U.S. Navy Training in the Hawaii Range Complex

AGENCY: National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Notice; issuance of a letter of authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA) and implementing regulations, notification is hereby given that a 1-year letter of authorization (LOA) has been issued to the U.S. Navy (Navy) for the incidental take of marine mammals during training, maintenance, and research, development, testing, and evaluation (RDT&E) activities conducted within the Navy's Hawaii Range Complex (HRC). These activities are considered military readiness activities pursuant to the Marine Mammal Protection Act (MMPA), as amended by the National Defense Authorization Act of 2004 (NDAA).

DATES: Effective January 8, 2009, through January 7, 2010.

ADDRESSES: The LOA and supporting documentation are available by writing 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, by telephoning one of the contacts listed here (**FOR FURTHER INFORMATION CONTACT**), or online at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm>.

FOR FURTHER INFORMATION CONTACT: Jolie Harrison, Office of Protected Resources, NMFS.

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 (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 and of no more than 1 year, the Secretary shall issue a notice of proposed authorization for public review.

Authorization shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses, and if 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 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 June 25, 2007, NMFS received an application from the Navy requesting authorization for the take of 24 species of marine mammals incidental to upcoming Navy training activities to be conducted within the HRC, which covers 235,000 nm² around the Main Hawaiian Islands (see map on page 17 of the application), over the course of 5 years. These training activities are classified as military readiness activities. These training activities may incidentally take marine mammals present within the HRC by exposing them to sound from mid-frequency or high frequency active sonar (MFAS/HFAS) or to underwater detonations at levels that NMFS associates with the take of marine mammals. The Navy requested authorization to take individuals of 24 species of marine mammals by Level B Harassment. Further, though they do not anticipate it to occur, the Navy requested authorization to take, by injury or mortality, up to 10 individuals each of 11 species over the course of the 5-year period (bottlenose dolphin, *Kogia* spp., melon-headed whale, pantropical spotted dolphin, pygmy killer whale, short-finned pilot whale, striped dolphin, and Cuvier's, Longman's, and Blainville's beaked whale).

Authorization

On January 5, 2009, NMFS' final rule governing the take of marine mammals incidental to U.S. Navy Training in the Hawaii Range Complex became effective. In accordance with the final rule, NMFS issued an LOA to the Navy on January 8, 2009, authorizing Level B harassment of 24 species of marine mammals and mortality of 11 species of marine mammals incidental to U.S. Navy training, maintenance, and RDT&E activities in the HRC. Issuance of this LOA is based on findings, described in the preamble to the final rule (74 FR

1456, January 12, 2009), that the taking resulting from the activities described in this LOA will have a negligible impact on marine mammal stocks and will not have an unmitigable adverse impact on the availability of the affected marine mammal stock for subsistence uses. The LOA describes the permissible methods of taking and includes requirements pertaining to the mitigation, monitoring and reporting of such taking.

Dated: February 4, 2009.

P. Michael Payne,

Chief, Permits, Conservation, and Recreation, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E9-2661 Filed 2-6-09; 8:45 am]

BILLING CODE 3510-22-S

CONSUMER PRODUCT SAFETY COMMISSION

Notice of Stay of Enforcement of Testing and Certification Requirements

AGENCY: Consumer Product Safety Commission.

ACTION: Stay of enforcement.

SUMMARY: This notice announces the decision of the Consumer Product Safety Commission ("CPSC" or "Commission") to stay enforcement of certain provisions of subsection 14(a) of the Consumer Product Safety Act ("CPSA") as amended by section 102(a) of the Consumer Product Safety Improvement Act of 2008 ("CPSIA"), Public Law 110-314. Specifically, the Commission is staying certain of the requirements of paragraphs 14(a)(1), (2), and (3) that otherwise require testing and issuance of certificates of compliance by manufacturers, including importers, of products subject to an applicable consumer product safety rule as defined in the CPSA or similar rule, ban, standard, or regulation under any other Act enforced by the Commission. This stay covers all such requirements with the exception of:

(1) Those where testing and certification was required by subsection 14(a) of the CPSA prior to enactment of the CPSIA; and

(2) Those requirements, when they become effective, applicable to children's product certifications required to be supported by third party testing for which the Commission has issued requirements for acceptance of accreditation of third party testing laboratories to test for:

- Lead paint (effective for products manufactured after December 21, 2008),
- Full-size and non-full size cribs and pacifiers (effective for products manufactured after January 20, 2009),

- Small parts (effective for products manufactured after February 15, 2009), and

- Metal components of children's metal jewelry (effective for products manufactured after March 23, 2009); and

(3) Any and all certifications expressly required by CPSC regulations; and

(4) The certifications required due to certain requirements of the Virginia Graeme Baker Pool & Spa Safety Act being defined as consumer product safety "rules;" and

(5) The certifications of compliance required for ATVs in section 42(a)(2) of the CPSA which were added by CPSIA; and

(6) Any voluntary guarantees provided for in the Flammable Fabrics Act ("FFA") or otherwise (to the extent a guarantor wishes to issue one).

This stay will remain in effect until February 10, 2010, at which time the Commission will vote to terminate the stay. This stay does not alter or postpone the requirement that all products meet applicable consumer product safety rules as defined in the CPSA or similar rules, bans, standards, or regulations under any other Act enforced by the Commission.

DATES: *Effective Date:* This stay is effective February 10, 2009.¹

FOR FURTHER INFORMATION CONTACT: John "Gib" Mullan, Assistant Executive Director for Compliance and Field Operations, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, Maryland 20814; e-mail jmullan@cpsc.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The Commission is aware that there is substantial confusion as to which testing and certification requirements of subsection 14(a) of the CPSA apply to which products under the Commission's jurisdiction, what sort of testing is required where the provisions do apply, whether testing is necessary for children's products that may not by their nature contain lead, whether testing to demonstrate compliance must be conducted on the final product rather than on its parts prior to assembly or manufacture, whether manufacturers and importers must issue certificates of compliance to address the labeling requirements under the Federal Hazardous Substance Act ("FHSA"), and what sort of certificate must be

issued and by whom. The Commission has received literally thousands of e-mail, telephone, and written inquiries as to how to comply, when to comply, what is required in support of the various certifications, what form the required certificates must take, and who must issue them. Likewise, the Commission has received innumerable inquiries seeking relief from the expense of testing children's products that either may not contain lead or may be subject to exemptions that the Commission may announce in the near future as a result of ongoing rulemakings either required or permitted by the CPSIA.² Commission staff has been unable to respond to many of these inquiries due to the press of its usual regulatory and compliance activities and the additional burden of the very early, multiple statutory deadlines imposed on the agency by the CPSIA, including those necessitating issuance of fourteen proposed and final rules in the six months since CPSIA was signed into law on August 14, 2008. Furthermore, the Commission is operating in fiscal year 2009 with the same level of funding appropriated to it for fiscal year 2008, before the CPSIA as well as two other acts also requiring significant additional Commission efforts—the Virginia Graeme Baker Pool and Spa Safety Act and the Children's Gasoline Burn Prevention Act—were enacted. This funding constraint is a severe handicap on the Commission's ability to staff up to address the numerous new requirements imposed by the CPSIA.

The Commission has embarked on four rulemakings to address many of these issues³ as they relate to the lead content of children's products:

- Determinations that certain materials inherently will not exceed the statutory CPSIA limits on the lead content of children's products. 74 FR 2433 (January 15, 2009).
- Exemption of certain electronic devices from otherwise applicable limits on lead in children's products. 74 FR 2435 (January 15, 2009).
- Guidance on determining inaccessibility of components of children's products containing lead. 74 FR 2439 (January 15, 2009).

² "Children's products" are defined in section 3(a)(2) of Consumer Product Safety Act, as amended, as consumer products "designed or intended primarily for children 12 years of age or younger."

³ The Commission has also requested comments on section 102 of the CPSIA, entitled "Mandatory Third-Party Testing for Certain Children's Products," specifically seeking input on the possibility of testing of component parts rather than the final children's products. <http://www.cpsc.gov/about/cpsia/ComponentPartsComments.pdf>.

- Procedures for seeking determinations as to lead content of materials or products and exclusions from otherwise applicable limits on lead content of children's products. 74 FR 2428 (January 15, 2009).

These proposed rules present complex scientific, technical, and procedural issues that will not be resolved by February 10, 2009, the effective date of CPSIA's initial 600 parts per million ("ppm") limit on the lead content of children's products. Moreover, on that same date—February 10, 2009—additional sweeping requirements of the CPSIA come into effect, including those related to the phthalates content of children's toys and child care articles, the myriad requirements of the ASTM F963 voluntary toy standard becoming mandatory CPSC consumer product safety standards,⁴ and the recently issued CPSIA regulations related to print and catalog advertising of certain children's products.

These extensive changes to the regulatory landscape cut a broad swath through the business community from books to children's apparel to toys and sporting goods to children's electronic products. Many firms making consumer products, especially children's products, are small businesses. Bureau of Census data indicates that approximately ninety-eight percent of the domestic manufacturers of toys, dolls and games fall into the Small Business Administration's traditional definition of small business (less than 500 employees), approximately eighty one percent of manufacturers of such products have fewer than twenty employees, and over fifty percent have fewer than five employees. According to the same source, over 99 percent of firms making apparel (including clothing for children and infants) are small businesses. Moreover, the testing and certification requirements affect companies that have not previously been regulated (or did not realize that they could be regulated) by the Commission, such as book publishers and craft makers. These entities too are dominated by small businesses. According to a 2000 survey conducted by the Craft Organization Directors Association, 64 percent of craftspeople

⁴ To add even further complexity with respect to the F963 toy standard, while the CPSIA explicitly states that the version of F963 as it existed on the date of enactment of CPSIA (August 14, 2008) presumably F963-07, is what becomes mandatory on February 10, 2009, the Commission understands that ASTM either has issued or intends to issue a new version of F963-F963-08—in the very near future.

¹ The Commission voted 2-0 to implement the stay. The Commissioners' statements concerning the stay are available on the Commission Web site at <http://www.cpsc.gov>.

worked alone, and nearly all of them employed fewer than 5 people.

The new requirements pose many significant technical challenges. Since the passage of the CPSIA, the Commission's technical staff has had to verify testing methods for total lead in metallic substrates. The staff has also been working diligently to validate testing methodologies for lead in plastics and other organic substrates to meet the lead content requirements of section 101 of the CPSIA. As soon as those methodologies are confirmed, they will be announced publicly. A method for testing for phthalates was identified by staff, but the extremely tight timeframe precluded meaningful public comment and input from the laboratories that will ultimately have to perform the testing. While the x-ray fluorescence screening method for lead has proven a useful tool, there is presently no similar screening method for preliminary testing for phthalates, although several promising ideas are under development. Finding appropriate screening tests for phthalates is essential given the costly and burdensome destructive testing currently required for the chemical analysis measuring phthalate concentrations. Commission staff needs time to work with laboratories to assure uniform understanding of the testing requirements adequate to support certification of compliance. We also need time to educate the numerous businesses, both big and small, for which this expansion of mandatory regulatory requirements is all new.

Smaller businesses that make up a significant portion of companies manufacturing products under the Commission's jurisdiction do not have laboratory test facilities and must turn to outside labs. The testing required to confirm compliance with requirements of the F963 toy standard ranges from chemical tests for antimony, arsenic, barium, cadmium, and chromium in surface coatings to various acoustic measurements for sound producing toys, tests for surface temperatures in battery operated toys, and tests for breakaway features on cords, straps, and elastic, among other things. To enforce certification on February 10, 2009, without the Commission having identified the labs accredited to do such testing disadvantages these small businesses and could result in these businesses paying for testing twice if the accreditation of the laboratory they choose for testing is not later accepted by the Commission. Also, the Commission has not had enough time or resources to educate the craft and handmade toy businesses on these new

standards and testing requirements. While many of the larger manufacturers may already be conducting testing and certification, many smaller companies are only just learning which CPSIA requirements apply to them. Companies cannot test and certify products when it is still unclear to them what standards apply.

Furthermore, the CPSIA tasks the Commission with issuing a number of additional rules within the first 15 months of enactment addressing testing and certification of compliance of children's products that will help to clarify the responsibilities of importers, manufacturers, distributors, retailers, and testing labs. These include requirements addressing mandatory third party testing to all applicable children's product safety rules⁵ due by statute in June 2009, rules addressing auditing of accredited children's product testing laboratories also due in June 2009, and comprehensive rules addressing compliance labeling of consumer products and production testing of children's products subject to third party testing and certification for continued compliance with applicable requirements, including random sampling protocols, required by CPSIA to be issued in November of 2009. These rules will define, among other things, which tests on what products will be required and how frequently those tests will need to be conducted. These answers are needed to ensure that the right tests are run on the right products without unnecessary and expensive testing on products likely to be exempted in some manner by the Commission in the coming months.⁶

The Commission anticipates that when these rules are finalized and our ongoing stakeholder information and education efforts have been in place for sufficient time for the new requirements to become known and understood within the regulated community, implementation of the stayed testing and certification requirements could

⁵ Children's product safety rule means "a consumer product safety rule under this Act [the CPSIA] or similar rule, regulation, standard, or ban under any other Act enforced by the Commission, including a rule declaring a consumer product to be a banned hazardous product or substance." CPSIA at § 14(f)(1), as amended by CPSIA § 102(b).

⁶ Because of the tremendous burden all of this has placed on the agency, the Commission staff has been unable to respond to questions from businesses small and large on the general certification requirements for all consumer product safety rules and similar rules which went into effect on November 12, 2008. Indeed, several requests for relief from those provisions have not yet been acted upon by the Commission. This stay provides relief from those certification requirements as well but does not provide any defense or excuse for non-compliance with the underlying standards or bans.

move forward by Commission action in orderly fashion supported by sound scientific and technical analysis and determinations. Accordingly, the stay will remain in effect until February 10, 2010, at which time the Commission will vote to terminate the stay. We believe at this time that the stay will give us the time needed to develop sound rules and requirements as well as implement outreach efforts to explain these requirements of the CPSIA and their applicability.

The stay will provide the Commission with the ability to focus in the immediate future on high priority enforcement matters such as those related to cribs, where the Commission has recognized the need for a thorough investigation of what appear to be potentially widespread safety issues (see 73 FR 71570), small parts, and lead in children's metal jewelry. Also, the Commission's technical and scientific staff will be able to focus on areas such as children's wearing apparel and children's books where certain of the pending rulemakings noted above may be able to provide appropriate relief, well in advance of the lifting of this stay, assuming that those industries provide the additional information requested by our staff in a timely manner. Among the children's products issues staff will need to address are bicycles intended or designed primarily for children 12 and under, where spokes and tire inflation valves raise complex issues related to the lead provisions of CPSIA.

Leaving in place the manufacturer, including importer, certification and testing requirements for lead paint, full-size and non-full-size cribs, pacifiers, small parts, and lead in metal components of children's metal jewelry, where laboratory accreditation requirements have been issued by the Commission will provide a high degree of assurance of safety in children's products manufactured during the pendency of the stay and reflects the priorities attached to those products by Congress in the CPSIA. Also, the Commission emphasizes that the stay only applies to testing and certification, not to the sale of products that do not comply with applicable mandatory safety requirements. All children's products must comply with all applicable children's product safety rules, including, but not limited to, the upcoming limits on lead and phthalates in the CPSIA.⁷ Failure to comply with

⁷ Children's product safety rule means "a consumer product safety rule under this Act [the CPSIA] or similar rule, regulation, standard, or ban under any other Act enforced by the Commission,

all applicable product safety rules as defined in the CPSA or similar rules, bans, standards, or regulations under any other Act enforced by the Commission will remain prohibited in accordance with section 19 of the CPSA as amended by CPSIA.

II. The Stay

The United States Consumer Product Safety Commission hereby stays applicability to manufacturers, including importers, of the requirements for testing and certification⁸ of products set forth in paragraphs 14(a)(1), (2) and (3) of the CPSA, as amended by subsection 102(a) of CPSIA, with the exception of:

(1) The requirements of any CPSC regulation, or of subsection 14(a) of the CPSA as it existed prior to amendment by the CPSIA, for product testing and certification, including existing requirements for certification of automatic residential garage door openers, bike helmets, candles with metal core wicks, lawnmowers, lighters, mattresses, and swimming pool slides;⁹ and

(2) The certifications required due to certain requirements of the Virginia Graeme Baker Pool & Spa Safety Act being defined as consumer product safety "rules;" and

(3) The certifications of compliance required for ATVs in section 42(a)(2) of the CPSA which were added by CPSIA; and

(4) Any voluntary guarantees provided for in the Flammable Fabrics Act ("FFA") or otherwise (to the extent a guarantor wishes to issue one); and

(5) The requirements on manufacturers, including importers, of children's products to use third party laboratories to test and to certify, on the basis of that testing, compliance of children's products with:

- Requirements on the lead content of paint and other surface coatings effective for products manufactured after December 21, 2008;

including a rule declaring a consumer product to be a banned hazardous product or substance." CPSA at § 14(f)(1), as amended by CPSIA § 102(b).

⁸ By immediate final rule published November 18, 2008 (73 FR 68,328–32), the Commission limited the testing and certification requirement to importers and U.S. domestic manufacturers.

⁹ Prior to amendment by the CPSIA, § 14(a) of the CPSA required testing and issuance of a certification for each product subject to a CPSA consumer product safety standard, namely a product subject any requirement of 16 CFR parts 1201 through 1213, e.g., part 1205 for walk-behind power mowers or part 1211 for automatic residential garage door operators. Certain CPSC regulations themselves require certification of compliance or a statement of conformity. See, e.g. 16 CFR part 1633 for flammability (open flame) of mattresses or 16 CFR 1500.17(a)(13)(i)(B) for candles made with metal-cored wicks.

- Requirements applicable to full-size and non-full-size cribs and pacifiers effective for products manufactured after January 20, 2009;

- Requirements concerning small parts effective for products manufactured after February 15, 2009; and

- Requirements on the lead content of metal components of children's metal jewelry effective for products manufactured after March 23, 2009.

This action by the Commission does not stay the requirement that products meet all applicable product safety rules as defined in the CPSA or similar rules, bans, standards, or regulations under any other Act enforced by the Commission.

Dated: February 2, 2009.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. E9–2590 Filed 2–6–09; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Intent To Grant a Partially Exclusive Patent License; Intellikine, Inc.

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: The Department of the Navy hereby gives notice of its intent to grant to Intellikine, Inc., a revocable, nonassignable, partially exclusive license to practice worldwide the Government owned inventions described in U.S. Patent 6,632,789 entitled "Methods for Modulating T Cell Responses by Manipulating Intracellular Signal Transduction" issued 14 October 2003 and related foreign filings in the fields of diagnosis, prevention and/or treatment of disease in humans and/or animals utilizing methods for modulating T cell responses by manipulating intracellular signals associated with T cell costimulation.

DATE: Anyone wishing to object to the grant of this license has fifteen (15) days from the date of this notice to file written objections along with supporting evidence, if any. Written objections are to be filed with the Office of Technology Transfer, Naval Medical Research Center, 503 Robert Grant Ave., Silver Spring, MD 20910–7500, telephone: 301–319–7428.

ADDRESSES: Written objections are to be filed with the Office of Technology Transfer, Naval Medical Research

Center, 503 Robert Grant Ave., Silver Spring, MD 20910–7500.

FOR FURTHER INFORMATION CONTACT: Dr. Charles Schlagel, Director, Office of Technology Transfer, Naval Medical Research Center, 503 Robert Grant Ave., Silver Spring, MD 20910–7500, telephone: 301–319–7428.

Dated: February 3, 2009.

A.M. Vallandingham,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. E9–2614 Filed 2–6–09; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Director, 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 April 10, 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 Director, 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: February 3, 2009.

Angela C. Arrington,

Director, Information Collections Clearance Division, Regulatory Information Management Services, Office of Management.

Federal Student Aid

Type of Review: New.

Title: Documents Associated with the Notice of Terms and Conditions of Additional Purchase of Loans under the "Ensuring Continued Access to Student Loans Act of 2008."

Frequency: On occasion.

Affected Public: Businesses or other for-profit.

Reporting and Recordkeeping Hour Burden:

Responses: 14,880.

Burden Hours: 14,880.

Abstract: The Ensuring Continued Access to Student Loans Act of 2008 (Pub. L. No. 110-227) (the ECASLA) which was signed into law on May 7, 2008, amended the Higher Education Act of 1965, as amended (the HEA) by adding a new Section 459A that provides the U.S. Department of Education (the Department) with temporary authority to purchase student loans from Federal Family Education Loan (FFEL) Program lenders. The documents included with this submission establish the terms and conditions that will govern certain loan purchases through the replication for the 2009-2010 academic year of the Loan Participation Purchase Program and the Loan Purchase Commitment Program that have been established for the 2007-2008 and 2008-2009 academic years.

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 3904. 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. E9-2623 Filed 2-6-09; 8:45 am]

BILLING CODE 4000-01-P

ELECTION ASSISTANCE COMMISSION

Sunshine Act Notice

AGENCY: United States Election Assistance Commission.

* * * * *

ACTION: Notice of Public Meeting for EAC Standards Board.

DATE AND TIME: Thursday, February 26, 2009, 8:30 a.m.-5:30 p.m. and Friday, February 27, 2009, 9 a.m.-5 p.m.

PLACE: DoubleTree Orlando Hotel at the Entrance to Universal Orlando, 5780 Major Boulevard, Orlando, Florida 32819, Phone number (407) 351-1000.

PURPOSE: The U.S. Election Assistance Commission (EAC) Standards Board, as required by the Help America Vote Act of 2002, will meet to elect the Executive Board of the Standards Board. The Standards Board will also be presented on updates of the Voluntary Voting System Guidelines, the NIST UOCAVA study, and the Threat/Risk Assessment Project. They will also have the opportunity to formulate recommendations to EAC regarding those presentations and consider other administrative matters.

This meeting will be open to the public.

PERSON TO CONTACT FOR INFORMATION: Sharmili Edwards, Telephone: (202) 566-3100.

Gineen Bresso Beach,

Chair, U.S. Election Assistance Commission.

[FR Doc. E9-2751 Filed 2-5-09; 4:15 pm]

BILLING CODE 6820-KF-P

DEPARTMENT OF ENERGY

A123 Systems, Inc.

AGENCY: Office of the General Counsel, Department of Energy.

ACTION: Notice of intent to grant exclusive patent license.

SUMMARY: Notice is hereby given with an intent to grant to A123 Systems, Inc. of Watertown, Massachusetts an exclusive license to practice the inventions described in U.S. Patent Application No. 11/768,977, entitled "High Power and High Energy Density Battery." The inventions are owned by the United States of America, as represented by the U.S. Department of Energy (DOE).

DATE: Written comments or nonexclusive license applications are to be received at the address listed below no later than March 11, 2009.

ADDRESSES: Office of the Assistant General Counsel for Technology Transfer and Intellectual Property, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT:

Annette R. Reimers, Office of the Assistant General Counsel for Technology Transfer and Intellectual Property, U.S. Department of Energy, Forrestal Building, Room 6F-067, 1000 Independence Ave., SW., Washington, DC 20585; Telephone (202) 586-3815.

SUPPLEMENTARY INFORMATION: 35 U.S.C. 209 provides federal agencies with authority to grant exclusive licenses in federally-owned inventions, if, among other things, the agency finds that the public will be served by the granting of the license. The statute requires that no exclusive license may be granted unless public notice of the intent to grant the license has been provided, and the agency has considered all comments received in response to that public notice before the end of the comment period.

A123 Systems, Inc. of Watertown, Massachusetts has applied for an exclusive license to practice the inventions embodied in U.S. Patent Application No. 11/768,977 and has plans for commercialization of the inventions. The exclusive license will be subject to a license and other rights retained by the U.S. Government and other terms and conditions to be negotiated. DOE intends to negotiate to grant the license, unless, within 30 days of this notice, the Assistant General Counsel for Technology Transfer and Intellectual Property, Department of Energy, Washington, DC 20585, receives in writing any of the following, together with supporting documents:

(i) A statement from any person setting forth reason why it would not be in the best interests of the United States to grant the proposed license; or

(ii) An application for a nonexclusive license to the invention in which applicant states that it already has

brought the invention to practical application or is likely to bring the invention to practical application expeditiously.

The Department will review all timely written responses to this notice and will proceed with negotiating the license if, after consideration of written responses to this notice, a finding is made that the license is in the public interest.

Issued in Washington, DC on February 3, 2009.

John T. Lucas,

Acting Assistant General Counsel for Technology Transfer and Intellectual Property.

[FR Doc. E9-2633 Filed 2-6-09; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC09-546-000]

Commission Information Collection Activities (FERC-546); Comment Request; Extension

February 2, 2009.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of proposed information collection and request for comments.

SUMMARY: In compliance with the requirements of section 3506(c)(2)(a) of the Paperwork Reduction Act of 1995 (Pub. L. No. 104-13), the Federal Energy Regulatory Commission (Commission) is soliciting public comment on the specific aspects of the information collection described below.

DATES: Comments in consideration of the collection of information are due April 13, 2009.

ADDRESSES: Comments may be filed either electronically or in paper format, and should refer to Docket No. IC09-546-000. Documents must be prepared in an acceptable filing format and in compliance with Commission submission guidelines at <http://www.ferc.gov/help/submission-guide.asp>.

Comments may be eFiled. The eFiling option under the Documents & Filings tab on the Commission's home Web page: <http://www.ferc.gov> directs users to the eFiling Web site. First-time users follow the eRegister instructions on the eFiling Web page to establish a user name and password before eFiling. Filers will receive an emailed confirmation of their eFiled comments. Commenters filing electronically should not make a paper filing. If you are unable to make a filing electronically, submit an original and 14 paper copies of the filing to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426.

Parties interested in receiving automatic notification of activity in this docket may do so through eSubscription. The eSubscription option under the Documents & Filings tab on the Commission's home Web page directs users to the eSubscription Web page. Users submit the docket numbers of the filings they wish to track and will subsequently receive an e-mail notification each time a filing is made under the submitted docket numbers. First-time users will need to establish a user name and password before eSubscribing.

Filed comments and FERC issuances may be viewed, printed and downloaded remotely from the Commission's Web site. The red eLibrary link found at the top of most of the Commission's Web pages directs users to the eLibrary. From the eLibrary Web page, choose General Search, and in the Docket Number space provided, enter IC09-546; then click the Submit button at the bottom of the page.

For help with any of the Commission's electronic submission or retrieval systems, e-mail FERC Online Support: ferconlinesupport@ferc.gov, or telephone toll-free: (866) 208-3676 (TTY (202) 502-8659).

FOR FURTHER INFORMATION: Michael Miller may be reached by telephone at (202) 502-8415, by fax at (202) 273-0873, and by e-mail at michael.miller@ferc.gov.

SUPPLEMENTARY INFORMATION: FERC-546 (Certificated Rate Filings: Gas Pipeline Rates; OMB Control Number 1902-0155) is required to implement Sections 4, 5, 16 and 7(e) of the Natural Gas Act (NGA) (15 U.S.C. 717-717w). NGA Sections 4, 5 and 16 authorize the Commission to inquire into rate structures and methodologies and to set rates at a just and reasonable level. Section 7(e) authorizes the Commission to set initial rates that are in keeping with the public convenience and necessity.

The Commission uses the FERC-546 information to examine service and tariff provisions for the transportation and storage, and/or sale of natural gas in interstate commerce filed with the Commission.

When a pipeline decides to construct and operate a jurisdictional pipeline, it files an application with the Commission and receives a Certificate of Public Convenience and Necessity. As part of its review, the Commission considers and authorizes "initial rates" for transportation and/or storage service for the pipeline. Initial rates are established for new services authorized in certificate proceedings and must meet a public convenience and necessity standard. Initial rates established in the certificate proceeding remain in effect until such rates are reviewed by the Commission in a rate proceeding. The information submitted by the pipeline company to the Commission in these applications for initial rates is the subject of FERC-546.¹

The Commission's reporting requirements for this information collection are provided in 18 CFR 154.4, 154.7, 154.202, 154.204-.209, and 154.602-.603. Failure to collect this information would prevent the Commission from monitoring and properly evaluating pipeline proposals to add or modify services.

Action: The Commission is requesting a three-year extension of the current reporting requirements.

Burden Statement: Public reporting burden for this collection is estimated at:

FERC Data Collection—FERC-546	Number of respondents annually	Number of responses per respondent	Average burden hours per response	Total annual burden hours
	(1)	(2)	(3)	(1) × (2) × (3)
Natural Gas Companies	77	4	40	12,320
Storage Operators	3	1	350	1,050

¹ The Commission collects information necessary to examine and approve any change in rates

separately under FERC-542 and FERC-545. The FERC-542 is for tracking filings, and FERC-545 is

for general rate change filings, including NGA Section 4 major rate cases.

FERC Data Collection—FERC-546	Number of respondents annually	Number of responses per respondent	Average burden hours per response	Total annual burden hours
	(1)	(2)	(3)	(1) × (2) × (3)
Total	13,370

The estimated cost burden to respondents is \$812,381.76 (13,370 hours divided by 2,080 hours² per year times \$126,384³ equals \$812,381.77). The cost per respondent is \$10,154.77.

The reporting burden includes the total time, effort, or financial resources expended to generate, maintain, retain, disclose, or provide the information including: (1) Reviewing instructions; (2) developing, acquiring, installing, and utilizing technology and systems for the purposes of collecting, validating, verifying, processing, maintaining, disclosing and providing information; (3) adjusting the existing ways to comply with any previously applicable instructions and requirements; (4) training personnel to respond to the collection of information; (5) searching data sources; (6) completing and reviewing the collection of information; and (7) transmitting, or otherwise disclosing the information.

The respondent's cost estimate is based upon salaries for professional and clerical support, as well as direct and indirect overhead costs. Direct costs include all costs directly attributable to providing this information, such as administrative costs and the cost for information technology. Indirect or overhead costs are costs incurred by an organization in support of its mission. These costs apply to activities which benefit the whole organization rather than any one particular function or activity.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the respondent information collection burden, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information

technology, e.g. permitting electronic submission of responses.

Kimberly D. Bose,

Secretary.

[FR Doc. E9-2603 Filed 2-6-09; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2536-084]

NewPage Wisconsin System, Inc., Northbrook Wisconsin, LLC; Notice of Application for Transfer of License, and Soliciting Comments, Motions To Intervene, and Protests

February 2, 2009.

On January 21, 2009, NewPage Wisconsin System, Inc. and Northbrook Wisconsin, LLC filed an application, for transfer of license of the Little Quinnesec Project, located on the Menominee River in Marinette County, Wisconsin.¹

Applicants seek Commission approval to transfer the license for the Little Quinnesec Project from NewPage Wisconsin System, Inc. to Northbrook Wisconsin, LLC.

Applicants Contact: Mr. John C. Ahlrichs, Northbrook Wisconsin, LLC, 20 North Walker, Suite 3121, Chicago Illinois, phone (312) 419-1771 and Mr. Douglas K. Cooper, Newpage Wisconsin System, Inc., 8540 Gander Creek Road, Miamisburg, OH 45342, phone (937) 242-9339

FERC Contact: Robert Bell, (202) 502-6062.

Deadline for filing comments, motions to intervene: 30 days from the issuance of this notice. Comments and motions to intervene may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D.

¹ On October 1, 2008, licensee Stora Enso North America Corp., filed a notice (along with a related state-issued amendment of its articles of incorporation) that its corporate name had been formerly changed to NewPage Wisconsin System, Inc., without changing it as a legal entity.

Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at <http://www.ferc.gov/filing-comments.asp>. More information about this project can be viewed or printed on the "eLibrary" link of Commission's Web site at <http://www.ferc.gov/docs-filing/elibrary.asp>. Enter the docket number (P-2536-084) in the docket number field to access the document. For assistance, call toll-free 1-866-208-3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E9-2602 Filed 2-6-09; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12775-001]

City of Spearfish, SD; Notice of Application Accepted for Filing and Soliciting Motions To Intervene and Protests

February 2, 2009.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

- Type of Application:* Major Project.
- Project No.:* P-12775-001.
- Date filed:* September 10, 2008.
- Applicant:* City of Spearfish, South Dakota.
- Name of Project:* Spearfish Hydroelectric Project.
- Location:* On Spearfish Creek in Lawrence County, South Dakota. The project occupies about 57.3 acres of United States lands within the Black Hills National Forest administered by the U.S. Forest Service.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)-825(r).

h. *Applicant Contact:* Ms. Cheryl Johnson, Public Works Administrator, City of Spearfish, 625 Fifth Street, Spearfish, SD 57783; (605) 642-1333; or e-mail at cherylj@city.spearfish.sd.us.

i. *FERC Contact:* Steve Hocking at (202) 502-8753; or e-mail at steve.hocking@ferc.gov.

² Number of hours an employee works each year.

³ Average annual salary per employee.

j. *Deadline for filing motions to intervene and protests:* April 3, 2009.

All documents (original and eight copies) should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's Rules of Practice and Procedures require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

Motions to intervene and protests 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. For a simpler method of submitting text only comments, click on "Quick Comment".

k. This application has been accepted for filing, but is not ready for environmental analysis at this time.

l. *The existing Spearfish Project consists of:* (1) A 130-foot-long, 4-foot-high concrete gravity dam; (2) a 0.32-acre reservoir; (3) a gatehouse next to the dam that contains four 2-foot-high, 4-foot-wide steel intake gates; (4) a 4.5-mile-long, 6.5-foot-wide, 9-foot-high concrete-lined rock tunnel; (5) a forebay pond; (6) two 1,200-foot-long, 48-inch diameter, wood stave pipelines; (7) four 36-inch-diameter, 54-foot-high standpipe surge towers; (8) two 4,700-foot-long, 30- to 34-inch diameter steel penstocks; (9) a reinforced concrete powerhouse containing two Pelton

turbines and two, 2,000-kilowatt generators; and (10) appurtenant facilities.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at FERCOnlineSupport@ferc.gov or toll-free at (866) 208-3676, or for TTY, (202) 502-8659. A copy is also available for inspection and reproduction at the address in item h above.

You may also register online at <http://www.ferc.gov/docs-filing/esubscription.asp> to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Any qualified applicant desiring to file a competing application must submit to the Commission, on or before the specified intervention deadline date, a competing development application, or a notice of intent to file such an application. Submission of a timely notice of intent allows an interested person to file the competing development application no later than 120 days after the specified intervention deadline date. Applications for preliminary permits will not be accepted in response to this notice.

A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit a development application. A notice of intent must be served on the applicant named in this public notice.

Anyone may submit a protest or a motion to intervene in accordance with the requirements of Rules of Practice and Procedures, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any protests or motions to intervene must be received on or before the specified deadline date for the particular application.

When the application is ready for environmental analysis, the Commission will issue a public notice requesting comments, recommendations, terms and conditions, or prescriptions.

All filings must: (1) Bear in all capital letters the title "PROTEST" or "MOTION TO INTERVENE", "NOTICE OF INTENT TO FILE COMPETING APPLICATION", or "COMPETING APPLICATION"; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application.

o. *Procedural schedule:* The application will be processed according to the following Hydro Licensing Schedule. Revisions to the schedule will be made as appropriate.

Milestone	Target date
All stakeholders: Comments on Scoping Document 1 (SD1) due	February 13, 2009.
All stakeholders: Interventions and protests due	April 3, 2009.
FERC issues ready for environmental analysis notice and SD2	April 3, 2009.
All Stakeholders: Terms and conditions due	June 2, 2009.
All Stakeholders: Reply comments due	July 17, 2009.
FERC issues single environmental assessment (EA) (no draft EA)	August 3, 2009.
All stakeholders: EA comments due	September 2, 2009.
All stakeholders: Modified terms and conditions due	November 2, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9-2604 Filed 2-6-09; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings # 1

February 2, 2009.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER99-3151-011; ER97-837-010; ER03-327-005; ER08-447-003; ER08-448-003.

Applicants: PSEG Energy Resources & Trade LLC, Public Service Electric and Gas Company, PSEG Fossil LLC, PSEG Nuclear LLC, PSEG Power Connecticut LLC.

Description: Notice of Change in Status of the PSEG Sellers.

Filed Date: 01/29/2009.

Accession Number: 20090129-5107.

Comment Date: 5 p.m. Eastern Time on Thursday, February 19, 2009.

Docket Numbers: ER03-409-006; ER03-666-005; ER04-109-001; ER05-1284-003; ER06-1325-001.

Applicants: Pacific Gas & Electric Company.

Description: Compliance Filing and Refund Report of Pacific Gas and Electric Company.

Filed Date: 01/30/2009.

Accession Number: 20090130-5018.

Comment Date: 5 p.m. Eastern Time on Friday, February 20, 2009.

Docket Numbers: ER03-534-009.

Applicants: Ingenco Wholesale Power, LLC.

Description: Ingenco Wholesale Power, LLC Application for a Finding of Category 1 Seller Status.

Filed Date: 01/30/2009.

Accession Number: 20090130-5164.

Comment Date: 5 p.m. Eastern Time on Friday, February 20, 2009.

Docket Numbers: ER05-1178-014; ER05-1191-015.

Applicants: Union Power Partners, L.P., Gila River Power, L.P.

Description: Notice of Non-Material Change in Status of Gila River Power, L.P. and Union Power Partners, L.P.

Filed Date: 01/29/2009.

Accession Number: 20090129-5091.

Comment Date: 5 p.m. Eastern Time on Thursday, February 19, 2009.

Docket Numbers: ER06-510-003.

Applicants: Energy Endeavors LLC.

Description: Energy Endeavors, LLC, Notice of Non-Material Change in Status.

Filed Date: 01/30/2009.

Accession Number: 20090130-5253.

Comment Date: 5 p.m. Eastern Time on Friday, February 20, 2009.

Docket Numbers: ER06-1014-007.

Applicants: New York Independent System Operator, Inc.

Description: New York Independent System Operator, Inc. submits Price Validation Informational Report from the period 8/1/08 through 12/31/08 pursuant to FERC's 7/14/06 Order.

Filed Date: 01/30/2009.

Accession Number: 20090130-5137.

Comment Date: 5 p.m. Eastern Time on Friday, February 20, 2009.

Docket Numbers: ER07-1136-001.

Applicants: Camp Grove Wind Farm LLC.

Description: Errata filing to add Attachment C inadvertently omitted from Camp Grove Wind Farm LLC.

Filed Date: 01/30/2009.

Accession Number: 20090130-5251.

Comment Date: 5 p.m. Eastern Time on Friday, February 20, 2009.

Docket Numbers: ER07-1356-008;

ER07-1112-006; ER07-1113-006;

ER07-1115-007; ER07-1116-005;

ER07-1117-007; ER07-1118-007;

ER07-1120-007; ER07-1122-007;

ER00-2885-022; ER01-2765-021;

ER02-1582-019; ER02-2102-021;

ER03-1283-016; ER05-1232-016;

ER07-1358-007; ER08-148-007; ER09-335-002.

Applicants: BE Alabama LLC; BE Allegheny LLC; BE CA LLC; BE Colquitt LLC; BE Ironwood LLC; BE KJ LLC; BE Rayle LLC; BE Satilla LLC; BE Walton LLC; Cedar Brakes I, L.L.C.; Cedar Brakes II, L.L.C.; Mohawk River Funding IV, L.L.C.; Utility Contract Funding, L.L.C.; Vineland Energy LLC; J.P. Morgan Ventures Energy Corporation; BE Louisiana LLC; Central Power & Lime, Inc.; J.P. Morgan Ventures Energy Corporation.

Description: Notice of Non-Material Change in Status of BE Alabama LLC, et al.

Filed Date: 01/29/2009.

Accession Number: 20090129-5122.

Comment Date: 5 p.m. Eastern Time on Thursday, February 19, 2009.

Docket Numbers: ER08-513-003.

Applicants: Entergy Services, Inc.

Description: Entergy Operating Companies submits its compliance filing in accordance with FERC's 5/5/08 Order.

Filed Date: 01/16/2009.

Accession Number: 20090122-0202.

Comment Date: 5 p.m. Eastern Time on Friday, February 6, 2009.

Docket Numbers: ER09-578-000.

Applicants: Southern California Edison Company.

Description: Southern California Edison Company submits revised rate sheet to the Mansana Wind Project Engineering, Design and Procurement Second Amended Letter Agreement between SCE and PPM Energy, Inc to reflect the cancellation of the agreement.

Filed Date: 01/28/2009.

Accession Number: 20090130-0129.

Comment Date: 5 p.m. Eastern Time on Wednesday, February 18, 2009.

Docket Numbers: ER09-579-000.

Applicants: Florida Power Corporation.

Description: Florida Power Corporation submits executed interconnection agreement with Kissimmee Utility Authority.

Filed Date: 01/28/2009.

Accession Number: 20090130-0130.

Comment Date: 5 p.m. Eastern Time on Wednesday, February 18, 2009.

Docket Numbers: ER09-580-000.

Applicants: Bangor Hydro-Electric Company.

Description: Bangor Hydro Electric Company submits request for a waiver of the Standards of Conduct for Transmission Providers.

Filed Date: 01/28/2009.

Accession Number: 20090130-0131.

Comment Date: 5 p.m. Eastern Time on Wednesday, February 18, 2009.

Docket Numbers: ER09-581-000.

Applicants: Pacific Gas & Electric Company.

Description: Pacific Gas and Electric Co submits agreements for load interconnection facilities executed with City and County of San Francisco.

Filed Date: 01/29/2009.

Accession Number: 20090130-0132.

Comment Date: 5 p.m. Eastern Time on Thursday, February 19, 2009.

Docket Numbers: ER09-582-000.

Applicants: American Electric Power Service Corporation.

Description: AEP Operating Companies submits revisions to the Repair and Maintenance Agreement with Indiana Michigan Power Company and Wabash Valley Power Association.

Filed Date: 01/28/2009.

Accession Number: 20090130-0167.

Comment Date: 5 p.m. Eastern Time on Wednesday, February 18, 2009.

Docket Numbers: ER09-583-000.

Applicants: ITC Midwest LLC

Description: ITC Midwest LLC submits an executed Distribution-Transmission Interconnection Agreement with Interstate Power and Light Company.

Filed Date: 01/28/2009.

Accession Number: 20090130-0170.

Comment Date: 5 p.m. Eastern Time on Wednesday, February 18, 2009.

Docket Numbers: ER09-584-000.

Applicants: Bangor Hydro-Electric Company.

Description: Bangor Hydro Electric Company submits revisions to its local service schedule set fourth as Schedule 21-BHE in the ISO New England Inc Transmission, Markets and Services Tariff.

Filed Date: 01/28/2009.

Accession Number: 20090130-0166.

Comment Date: 5 p.m. Eastern Time on Wednesday, February 18, 2009.

Docket Numbers: ER09-586-000.

Applicants: Black Hills Power, Inc.
Description: Black Hills Power, Inc submits proposed amendments to the joint open access transmission tariff with Basin Electric Power Cooperative *et al.*

Filed Date: 01/29/2009.

Accession Number: 20090202-0527.

Comment Date: 5 p.m. Eastern Time on Thursday, February 19, 2009.

Docket Numbers: ER09-587-000.

Applicants: Ameren Services Company.

Description: Union Electric Company submits an Executed Service Agreement for Wholesale Distribution Service with City of Owensville, Missouri.

Filed Date: 01/29/2009.

Accession Number: 20090202-0526.

Comment Date: 5 p.m. Eastern Time on Thursday, February 19, 2009.

Docket Numbers: ER09-588-000.

Applicants: Ameren Services Company.

Description: Union Electric Company submits an Executed Service Agreement for Wholesale Distribution Service with the City of Jackson, Missouri.

Filed Date: 01/29/2009.

Accession Number: 20090202-0525.

Comment Date: 5 p.m. Eastern Time on Thursday, February 19, 2009.

Docket Numbers: ER09-599-000.

Applicants: Duke Energy Carolinas, LLC.

Description: Duke Energy Carolinas, LLC submits revised Network Integration Transmission Service Agreement 210 with North Carolina Electric Membership Corporation *et al.*

Filed Date: 01/30/2009.

Accession Number: 20090202-0610.

Comment Date: 5 p.m. Eastern Time on Friday, February 20, 2009.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES09-12-000.

Applicants: AEP Texas Central Company.

Description: Application of AEP Texas Central Company to issue securities.

Filed Date: 01/30/2009.

Accession Number: 20090130-5044.

Comment Date: 5 p.m. Eastern Time on Friday, February 20, 2009.

Docket Numbers: ES09-13-000.

Applicants: PJM Interconnection L.L.C.

Description: Application of PJM Interconnection L.L.C. under Section 204 for an Order Authorizing the Issuance of Securities.

Filed Date: 01/30/2009.

Accession Number: 20090130-5214.

Comment Date: 5 p.m. Eastern Time on Friday, February 20, 2009.

Docket Numbers: ES09-14-000.

Applicants: PJM Interconnection L.L.C.

Description: Application of PJM Interconnection L.L.C. under Section 204 for an Order Authorizing the Issuance of Securities.

Filed Date: 01/30/2009.

Accession Number: 20090130-5217.

Comment Date: 5 p.m. Eastern Time on Friday, February 20, 2009.

Docket Numbers: ES09-15-000.

Applicants: Old Dominion Electric Cooperative, Inc.

Description: Application of Old Dominion Electric Cooperative for Extension of Authorization to Issue Debt with a Maturity of One Year or Less.

Filed Date: 01/30/2009.

Accession Number: 20090130-5250.

Comment Date: 5 p.m. Eastern Time on Friday, February 20, 2009.

Take notice that the Commission received the following open access transmission tariff filings:

Docket Numbers: OA08-39-002.

Applicants: American Electric Power Service Corporation.

Description: American Electric Power Service Corporation submits Substitute Second Third Revised Sheet 30 *et al.* to FERC Electric Tariff, Third Revised Volume 6 to show changes to Section 2.2 of the AEP OATT required by Order 890-A *et al.*

Filed Date: 01/29/2009.

Accession Number: 20090202-0528.

Comment Date: 5 p.m. Eastern Time on Thursday, February 19, 2009.

Docket Numbers: OA08-78-002.

Applicants: MidAmerican Energy Company.

Description: Compliance Filing of MidAmerican Energy Company to conform OATT to Order No. 890-A as clarified by the Dec. 30, 2008 Order.

Filed Date: 01/29/2009.

Accession Number: 20090129-5044.

Comment Date: 5 p.m. Eastern Time on Thursday, February 19, 2009.

Take notice that the Commission received the following public utility holding company filings:

Docket Numbers: PH09-15-000.

Applicants: South Jersey Industries, Inc.

Description: FERC 65A: Exemption Notification of South Jersey Industries, Inc.

Filed Date: 01/30/2009.

Accession Number: 20090130-5140.

Comment Date: 5 p.m. Eastern Time on Friday, February 20, 2009.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail FERCOnlineSupport@ferc.gov, or call

(866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9-2606 Filed 2-6-09; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER09-75-001]

Pioneer Transmission, LLC; Notice of Filing

February 2, 2009.

Take notice that on January 26, 2009, Pioneer Transmission, LLC submitted a Study Report pursuant to their Formula Rate and Incentive Rate Filing submitted on October 15, 2008, in response to the Commission's December 11, 2008 letter.

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 online 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 February 13, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9-2605 Filed 2-6-09; 8:45 am]

BILLING CODE 6717-01-P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted for Review to the Office of Management and Budget

February 2, 2009.

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 April 10, 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.

FOR FURTHER INFORMATION CONTACT: For additional information, contact Judith B. Herman at 202-418-0214 or via the Internet at Judith-B.Herman@fcc.gov.

SUPPLEMENTARY INFORMATION: OMB Control Number: 3060-0859.

Title: Suggested Guidelines for Petitions for Ruling Under Section 253 of the Communications Act.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents: 80 respondents; 80 responses.

Estimated Time per Response: 63-125 hours.

Frequency of Response: On occasion reporting requirement.

Obligation to Respond: Voluntary. Statutory authority for this information collection are contained in 47 U.S.C. 253.

Total Annual Burden: 6,280 hours.

Total Annual Cost: N/A.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality:

The Commission is not requesting respondents to submit confidential information to the Commission. Respondents may request confidential treatment of such information under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: The Commission will submit this information collection to the Office of Management and Budget (OMB) after this 60 day comment period in order to obtain the full three year clearance from them. The Commission is requesting an extension (no change in the on reporting requirement).

The Commission published a Public Notice in November 1998 which established various procedural guidelines related to the Commission's processing of petitions for preemption pursuant to Section 253 of the Communications Act of 1934, as amended. The Commission will use the information to discharge its statutory mandate relating to the preemption of state or local statutes or other state or local legal requirements.

Section 253 of the Communications Act of 1934, as amended; added by the Telecommunications Act of 1996, requires the Commission, with certain important exceptions, to preempt the enforcement of any state or local statute or regulation, or other state or local legal requirement (to the extent necessary) that prohibits or has the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. The Commission's consideration of preemption begins with the filing of a

petition by an aggrieved party. The petition is placed on public notice and commented on by others. The Commission's decision is based on the public record, generally composed of the petition and comments. The Commission has considered a number of preemption items since the passage of the Telecommunications Act of 1996, and believes it in the public interest to inform the public of the information necessary to support its full consideration of the issues likely to be involved in preemption actions. In order to render a timely and informed decision, the Commission expects petitioners and commenters to provide it with relevant information sufficient to describe the legal regime involved in the controversy and to establish the factual basis necessary for decision.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E9-2570 Filed 2-6-09; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collections Approved by Office of Management and Budget

February 2, 2009.

SUMMARY: The Federal Communications Commission (FCC) has received Office of Management and Budget (OMB) approval for the following public information collections pursuant to the Paperwork Reduction Act of 1995, Public Law 104-13. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid control number.

FOR FURTHER INFORMATION CONTACT:

Thomas Butler, Federal Communications Commission, (202) 418-1492 or via the Internet at Thomas.butler@fcc.gov.

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060-0816.

OMB Approval Date: January 30, 2009.

Expiration Date: January 31, 2010.

Title: Local Telephone Competition and Broadband Reporting (Report and Order, WC Docket No. 07-38, FCC 08-89; Order on Reconsideration, WC Docket No. 07-38, FC 08-148).

Form Number(s): FCC Form 477.

Estimated Annual Burden: 1,610 respondents; 3,220 responses; 1,085,140 total annual hours; 337 hours per response (average).

Needs and Uses: This information collection (IC) was approved by OMB as a revision. The Commission reported an increase of 956,340 hours to the total annual burden. This program change increase is due to an increase in the estimated number of respondents and responses since this IC was last submitted to the OMB in June 2008.

The Commission submitted two Orders to the OMB for approval. The first was a Report and Order and Further Notice of Proposed Rulemaking in WC Docket No. 07-38, FCC 08-89 and the second was an Order on Reconsideration in WC Docket No. 07-38, FCC 08-148. With these two Orders, the Commission revised the FCC Form 477 data collection to improve the Commission's understanding of the extent of broadband deployment, facilitating the development of appropriate broadband policies. In particular, these amendments will improve the Commission's ability to carry out its obligation under section 706 of the Telecommunications Act of 1996 to "determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion." The Report and Order revised the FCC Form 477 to require all broadband providers to report the number of broadband connections in service in individual Census Tracts. The Report and Order adopted three additional changes to FCC Form 477. First, it requires providers to report broadband service speed data in conjunction with subscriber counts according to new categories for download and upload speeds. These new speed tiers will better identify services that support advanced applications. Second, it amended reporting requirements for mobile wireless broadband providers to require them to report the number of subscribers whose data plans allow them to browse the Internet and access the lawful Internet content of their choice. Third, it requires providers of interconnected Voice over Internet Protocol (interconnected VoIP) service to report subscribership information on FCC Form 477.

The Order on Reconsideration amended FCC Form 477 to require filers to report the percentage of broadband connections that are residential at the Census Tract level. The Telecommunications Act of 1996 directs the Commission to take actions to open all telecommunications markets to competition and to seek to promote innovation and investment by all participants, including new entrants. A central task in creating this framework is the opening of previously

monopolized local telecommunications markets. By collecting timely and reliable information about the pace and extent of competition for local telephony service in different geographic areas—including rural areas—the Commission significantly improves the ability to evaluate the effectiveness of actions the Commission and the states are taking to facilitate economic competition in those markets. The Report and Order provides for additional methods to supplement the data reported by FCC Form 477 filers, including a voluntary self-reporting system, and a recommendation to the Census Bureau that the American Community Survey questionnaire be modified to gather information about broadband availability and subscription in households. The information is used by the Commission to prepare reports that help inform consumers and policy makers at the federal and state level of the development of competition in the local telephone service market and the deployment of broadband services. The Commission will continue to use the information to better inform its understanding of broadband deployment in conjunction with its congressionally mandated section 706 reports. The Commission also uses the data to support its analyses in a variety of rulemaking proceedings under the Communications Act of 1934, as amended. Absent this information collection, the Commission would lack essential data for assisting it in determining the effectiveness of its policies and fulfilling its statutory responsibilities in accordance with the Communications Act of 1934, as amended.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E9-2575 Filed 2-6-09; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

February 3, 2009

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction

Act (PRA) of 1995, Public Law No. 104-13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. Pursuant to the PRA, no person shall be subject to any penalty for failing to comply with a collection of information that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written PRA comments should be submitted on or before April 10, 2009. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Interested parties may submit all PRA comments by e-mail or U.S. mail. To submit your comments by e-mail, send them to PRA@fcc.gov. To submit your comments by U.S. mail, mark them to the attention of Cathy Williams, Federal Communications Commission, Room 1-C823, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, send an e-mail to PRA@fcc.gov or contact Cathy Williams at 202-418-2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060-0249.
Title: Sections 74.781, 74.1281 and 78.69, Station Records.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business and other for-profit entities; Not-for-profit institutions; State, Federal or Tribal Governments.

Number of Respondents/Responses: 13,811 respondents/20,724 responses.

Estimated Time per Response: 30 minutes to 1 hour.

Frequency of Response:

Recordkeeping requirement.

Total Annual Burden: 11,726 hours.

Total Annual Costs: \$8,295,600.

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in Section 154(i) of the Communications Act of 1934, as amended.

Privacy Impact Assessment(s): No impact(s).

Needs and Uses: 47 CFR 74.781 requires the following:

(a) The licensee of a low power TV, TV translator, or TV booster station shall maintain adequate station records, including the current instrument of authorization, official correspondence with the FCC, contracts, permission for rebroadcasts, and other pertinent documents.

(b) Entries required by § 17.49 of this Chapter concerning any observed or otherwise known extinguishment or improper functioning of a tower light: (1) The nature of such extinguishment or improper functioning. (2) The date and time the extinguishment or improper operation was observed or otherwise noted. (3) The date, time and nature of adjustments, repairs or replacements made.

(c) The station records shall be maintained for inspection at a residence, office, or public building, place of business, or other suitable place, in one of the communities of license of the translator or booster, except that the station records of a booster or translator licensed to the licensee of the primary station may be kept at the same place where the primary station records are kept. The name of the person keeping station records, together with the address of the place where the records are kept, shall be posted in accordance with § 74.765(c) of the rules. The station records shall be made available upon request to any authorized representative of the Commission.

(d) Station logs and records shall be retained for a period of two years.

47 CFR 74.1281 requires the following:

(a) The licensee of a station authorized under this Subpart shall maintain adequate station records, including the current instrument of authorization, official correspondence with the FCC, maintenance records, contracts, permission for rebroadcasts, and other pertinent documents.

(b) Entries required by § 17.49 of this chapter concerning any observed or otherwise known extinguishment or improper functioning of a tower light: (1) The nature of such extinguishment or improper functioning. (2) The date and time the extinguishment or improper operation was observed or otherwise noted. (3) The date, time and

nature of adjustments, repairs or replacements made.

(c) The station records shall be maintained for inspection at a residence, office, or public building, place of business, or other suitable place, in one of the communities of license of the translator or booster, except that the station records of a booster or translator licensed to the licensee of the primary station may be kept at the same place where the primary station records are kept. The name of the person keeping station records, together with the address of the place where the records are kept, shall be posted in accordance with § 74.1265(b) of the rules. The station records shall be made available upon request to any authorized representative of the Commission.

(d) Station logs and records shall be retained for a period of two years.

47 CFR 78.69 requires each licensee of a CARS station shall maintain records showing the following:

(a) For all attended or remotely controlled stations, the date and time of the beginning and end of each period of transmission of each channel;

(b) For all stations, the date and time of any unscheduled interruptions to the transmissions of the station, the duration of such interruptions, and the causes thereof;

(c) For all stations, the results and dates of the frequency measurements made pursuant to § 78.113 and the name of the person or persons making the measurements;

(d) For all stations, when service or maintenance duties are performed, which may affect a station's proper operation, the responsible operator shall sign and date an entry in the station's records, giving:

(1) Pertinent details of all transmitter adjustments performed by the operator or under the operator's supervision.

(e) When a station in this service has an antenna structure which is required to be illuminated, appropriate entries shall be made as follows:

(1) The time the tower lights are turned on and off each day, if manually controlled. (2) The time the daily check of proper operation of the tower lights was made, if an automatic alarm system is not employed. (3) In the event of any observed or otherwise known failure of a tower light: (i) Nature of such failure. (ii) Date and time the failure was observed or otherwise noted. (iii) Date, time, and nature of the adjustments, repairs, or replacements made. (iv) Identification of Flight Service Station (Federal Aviation Administration) notified of the failure of any code or rotating beacon light not corrected

within 30 minutes, and the date and time such notice was given. (v) Date and time notice was given to the Flight Service Station (Federal Aviation Administration) that the required illumination was resumed. (4) Upon completion of the 3-month periodic inspection required by § 78.63(c):

(i) The date of the inspection and the condition of all tower lights and associated tower lighting control devices, indicators, and alarm systems. (ii) Any adjustments, replacements, or repairs made to insure compliance with the lighting requirements and the date such adjustments, replacements, or repairs were made.

(f) For all stations, station record entries shall be made in an orderly and legible manner by the person or persons competent to do so, having actual knowledge of the facts required, who shall sign the station record when starting duty and again when going off duty.

(g) For all stations, no station record or portion thereof shall be erased, obliterated, or willfully destroyed within the period of retention required by rule. Any necessary correction may be made only by the person who made the original entry who shall strike out the erroneous portion, initial the correction made, and show the date the correction was made.

(h) For all stations, station records shall be retained for a period of not less than 2 years. The Commission reserves the right to order retention of station records for a longer period of time. In cases where the licensee or permittee has notice of any claim or complaint, the station record shall be retained until such claim or complaint has been fully satisfied or until the same has been barred by statute limiting the time for filing of suits upon such claims.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E9-2576 Filed 2-6-09; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority, Comments Requested

February 3, 2009.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to take this

opportunity to comment on the following information collection, as required by the Paperwork Reduction Act of 1995 (PRA), Public Law No. 104-13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written PRA comments should be submitted on or before April 10, 2009. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Interested parties may submit all PRA comments by e-mail or U.S. post mail. To submit your comments by e-mail, send them to PRA@fcc.gov and/or Cathy.Williams@fcc.gov. To submit your comments by U.S. mail, mark them to the attention of Cathy Williams, Federal Communications Commission, Room 1-C823, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection(s), contact Cathy Williams at (202) 418-2918 or send an e-mail to PRA@fcc.gov and/or Cathy.Williams@fcc.gov.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060-0310.
Title: Section 73.1801, Registration Statement; FCC Form 322, Community Cable Registration.

Form Number: FCC Form 322.

Type of Review: Extension of a currently approved collection.

Respondents: Business and other for-profit entities; Not-for-profit institutions.

Number of Respondents/Responses: 755 respondents; 755 responses.

Estimated Time per Response: 30 minutes.

Frequency of Response: One time reporting requirement; On occasion reporting requirement.

Total Annual Burden: 378 hours.

Total Annual Costs: \$37,750.

Nature and Extend of Confidentiality: There is no need for confidentiality with this collection of information.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in Sections 154(i), 303, 308, 309 and 621 of the Communications Act of 1934, as amended.

Privacy Impact Assessment(s): No impact(s).

Needs and Uses: On March 13, 2003, the Commission adopted a Report and Order (R&O), Amendment of the Commission's Rules for Implementation of its Cable Operations and Licensing System (COALS) to Allow for Electronic Filing of Licensing Applications, Forms, Registrations and Notifications in the Multichannel Video and Cable Television Service and the Cable Television Relay Service, FCC 03-55. This R&O provided for electronic filing and standardized information collections. Under 47 CFR Section 76.1801, cable operators are required to file FCC Form 322 with the Commission prior to commencing operation of a community unit. FCC Form 322 identifies biographical information about the operator and system as well as a list of broadcast channels carried on the system. This form replaces the requirement that cable operators send a letter containing the same information.

OMB Control Number: 3060-0341.

Title: Section 73.1680, Emergency Antennas.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit institutions.

Number of Respondents/Responses: 142 respondents/142 responses.

Estimated time per response: 1 hour.

Frequency of response: On occasion reporting requirement.

Total annual burden: 142 hours.

Total annual costs: \$28,400.

Nature and Extend of Confidentiality: There is no need for confidentiality with this collection of information.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in Section 154(i) of the Communications Act of 1934, as amended.

Privacy Impact Assessment(s): No impact(s).

Needs and Uses: 47 CFR 73.1680 requires that licensees of AM, FM or TV

stations submit an informal request to the FCC (within 24 hours of commencement of use) to continue operation with an emergency antenna. An emergency antenna is one that is erected for temporary use after the authorized main and auxiliary antennas are damaged and cannot be used. FCC staff uses the data to ensure that interference is not caused to other existing stations.

OMB Control Number: 3060-0331.

Title: Aeronautical Frequency Notification.

Form Number: FCC Form 321.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit institutions.

Number of Respondents/Responses: 3,240 respondents/3,240 responses.

Estimated Time per Response: 40 minutes.

Frequency of Response: One-time reporting requirement; On occasion reporting requirement.

Total Annual Burden: 2,291 hours.

Total Annual Costs: \$205,200.

Nature and Extend of Confidentiality: There is no need for confidentiality with this collection of information.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in Sections 154(i), 301, 303, 308, 309 and 621 of the Communications Act of 1934, as amended.

Privacy Impact Assessment(s): No impact(s).

Needs and Uses: The FCC Form 321 is the means by which multichannel video programming distributors obtain authority to commence operation of a system on frequencies used by aeronautical services. The information is used to protect aeronautical radio communications from interference.

OMB Control Number: 3060-0569.

Title: Section 76.975, Commercial leased access dispute resolution.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; State, Local or Tribal Government.

Number of Respondents/Responses: 60 respondents; 60 responses.

Estimated Time per Response: 4 to 40 hours.

Frequency of Response: Third party disclosure requirement; On occasion reporting requirement.

Nature and Extend of Confidentiality: There is no need for confidentiality with this collection of information.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in Sections 154(i) and 612 of the Communications Act of 1934, as amended.

Total Annual Burden: 1,320 hours.

Total Annual Cost: \$24,000.

Privacy Act Impact Assessment: No impact(s).

Needs and Uses: 47 CFR 76.975 permits any person aggrieved by the failure or refusal of a cable operator to make commercial channel capacity available or to charge rates for such capacity in accordance with the provisions of Title VI of the Communications Act of 1934 may file a petition for relief with the Commission.

OMB Control Number: 3060-0607.

Title: Section 76.922, Rates for Basic Service Tiers and Cable Programming Services Tiers.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; State, local or Tribal Government.

Number of Respondents/Responses: 25 respondents/25 responses.

Estimated Time per Response: 12 hours.

Frequency of Response: On occasion reporting requirement.

Total Annual Burden: 300 hours.

Total Annual Costs: None.

Nature and Extend of Confidentiality: There is no need for confidentiality with this collection of information.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in Sections 4(i) and 623 of the Communications Act of 1934, as amended.

Privacy Impact Assessment(s): No impact(s).

Needs and Uses: 47 CFR 76.922(b)(5)(c) provides that an eligible small system that elects to use the streamlined rate reduction process must implement the required rate reductions and provide written notice of such reductions to local subscribers, the local franchising authority ("LFA"), and the Commission. The information is used by Commission staff to ensure that qualified small systems have additional incentives to add channels and to insure that small systems are able to recover costs for headend upgrades when doing so.

OMB Control Number: 3060-0938.

Title: Application for a Low Power FM Broadcast Station License.

Form Number: FCC Form 319.

Type of Review: Extension of a currently approved collection.

Respondents: Not-for-profit institutions; State, local or Tribal Government.

Number of Respondents/Responses: 200 respondents/200 responses.

Estimated Time per Response: 1 hour.

Frequency of Response: On occasion reporting requirement.

Total Annual Burden: 200 hours.

Total Annual Costs: \$17,500.

Nature and Extend of Confidentiality: There is no need for confidentiality with this collection of information.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in Sections 154(i), 303 and 308 of the Communications Act of 1934, as amended.

Privacy Impact Assessment(s): No impact(s).

Needs and Uses: On January 20, 2000, the Commission adopted a Report and Order (R&O) in MM Docket No. 99-25, In the Matter of Creation of Low Power Radio Service. With the adoption of this R&O, the Commission authorized the licensing of two new classes of FM radio stations, generally referred to as low power FM stations (LPFM): A LP100 class for stations operating at 50-100 watts effective radiated power (ERP) at an antenna height above average terrain (HAAT) of 30 meters; and a LP10 class for stations operating at 1-10 watts ERP and an antenna height of 30 meters HAAT. These stations will be operated on a noncommercial educational basis by entities that do not hold attributable interests in any other broadcast station or other media subject to the Commission's ownership rules. The LPFM service authorized in this Report and Order provides significant opportunities for new radio services. The LPFM service creates a class of radio stations designed to serve very localized communities or underrepresented groups within communities.

In connection with this new service, the Commission developed a new FCC Form 319, Application for a Low Power FM Broadcast Station License. FCC Form 319 is required to apply for a license for a new or modified Low Power FM (LPFM) station.

OMB Control Number: 3060-1045.

Title: Section 76.1610, Change of Operational Information; FCC Form 324, Operator, Mail Address and Operational Information Changes.

Form Number: FCC Form 324.

Type of Review: Extension of a currently approved collection.

Respondents: Business and other for-profit entities; Not-for-profit institutions.

Number of Respondents/Responses: 5,000 respondents/5,000 responses.
Estimated Time per Response: 30 minutes.

Frequency of Response: On occasion reporting requirement.

Total Annual Burden: 2,500 hours.

Total Annual Costs: None.

Nature and Extend of Confidentiality: There is no need for confidentiality with this collection of information.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in Sections 154(i), 303, 308, 309 and 621 of the Communications Act of 1934, as amended.

Privacy Impact Assessment(s): No impact(s)

Needs and Uses: Under 47 CFR 76.1610, cable operators must notify the Commission of changes in ownership information or operating status within 30 days of such change. FCC Form 324 is used to update information filed with the Commission concerning the Cable Community Registration. The information is the basic operational information on operator name, mailing address, community served, and system identification. FCC Form 324 will cover a variety of changes related to cable operators, replacing the requirement of a letter containing approximately the same information. Every Form 324 filing will require information about the system—the additional information required depending largely upon the nature of the change.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E9-2577 Filed 2-6-09; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL COMMUNICATIONS COMMISSION

Revised Sunshine Notice FCC To Hold Open Commission Meeting Thursday, February 5, 2009

February 4, 2009.

The Federal Communications Commission will hold an Open Meeting on Thursday, February 5, 2009, which is scheduled to commence at 2 p.m. in Room TW-C305, at 445 12th Street, SW., Washington, DC (See announcement dated January 29, 2009, 74 FR 6036, February 4, 2009).

- The meeting will include presentations and discussion by senior agency officials as well as industry, consumer groups and others involved in the Digital Television Transition.

- The purpose of the meeting is to educate and inform the Commission and

the public about the status and issues involved with the upcoming Digital Television Transition.

Agenda and list of witnesses follows:

2 p.m. Opening Statements by Chairman and Commissioners

2:15 p.m. Panel 1: DTV Consumer Outreach

Cathy Seidel, Chief of the Consumer and Governmental Affairs Bureau, FCC

Tony Wilhelm, Consumer Education Director, National

Telecommunications and Information Administration

Mark Lloyd, Vice President for Strategic Initiatives, Leadership

Conference on Civil Rights and Leadership Conference on Civil

Rights Education Fund

Sandy Markwood, Chief Executive Officer, National Association of

Area Agencies on Aging

3 p.m. Panel 2: DTV Call Centers

Andrew Martin, Chief Information Officer, Federal Communications Commission

Sam Howe, Executive Vice President, Time Warner Cable

David Rehr, President and CEO, National Association of

Broadcasters

Dennis Lyle, President, National Alliance of State Broadcasters

Associations

3:45 p.m. Panel 3: Reception Issues and Analog Nightlight

Julius Knapp, Chief of Office of

Engineering and Technology, FCC

David Donovan, President, MSTV

Joel Kelsey, Policy Analyst, Consumers Union

Michael Petricone, Senior Vice President, Government Affairs,

Consumer Electronics Association

4:30 p.m. Closing Statements/Adjournment

The meeting site is fully accessible to people using wheelchairs or other mobility aids. Sign language interpreters, open captioning, and assistive listening devices will be provided on site. Other reasonable accommodations for people with disabilities are available upon request. Include a description of the accommodation you will need. Also include a way we can contact you if we need more information. Last minute requests will be accepted, but may be impossible to fill. Send an e-mail to: fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

Additional information concerning this meeting may be obtained from Audrey Spivack or David Fiske, Office of Media Relations, (202) 418-0500;

TTY 1-888-835-5322. Audio/Video coverage of the meeting will be broadcast live with open captioning over the Internet from the FCC's Audio/Video Events Web page at <http://www.fcc.gov/realaudio>.

For a fee this meeting can be viewed live over George Mason University's Capitol Connection. The Capitol Connection also will carry the meeting live via the Internet. To purchase these services call (703) 993-3100 or go to <http://www.capitolconnection.gmu.edu>.

Copies of materials adopted at this meeting can be purchased from the FCC's duplicating contractor, Best Copy and Printing, Inc. (202) 488-5300; Fax (202) 488-5563; TTY (202) 488-5562. These copies are available in paper format and alternative media, including large print/type; digital disk; and audio and video tape. Best Copy and Printing, Inc. may be reached by e-mail at FCC@BCPIWEB.com.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E9-2752 Filed 2-5-09; 4:15 pm]

BILLING CODE 6712-01-P

GENERAL SERVICES ADMINISTRATION

Multiple Award Schedule Advisory Panel; Notification of Public Advisory Panel Meetings

AGENCY: U.S. General Services Administration (GSA).

ACTION: Notice.

SUMMARY: The U.S. General Services Administration (GSA) Multiple Award Schedule Advisory Panel (MAS Panel), a Federal Advisory Committee, will hold public meetings on the following dates: Friday, February 27, 2009 and Monday March 2, 2009. GSA utilizes the MAS program to establish long-term Governmentwide contracts with responsible firms to provide Federal, State, and local government customers with access to a wide variety of commercial supplies (products) and services.

The MAS Panel was established to develop advice and recommendations on MAS program pricing policies, provisions, and procedures in the context of current commercial pricing practices. The Panel will be developing recommendations for MAS program pricing provisions for the acquisition of (1) professional services; (2) products; (3) total solutions which consist of professional services and products; and (4) non professional services. In

developing the recommendations, the Panel will, at a minimum, address these 5 questions for each of the 4 types of acquisitions envisioned above: (1) Where does competition take place?; (2) If competition takes place primarily at the task/delivery order level, does a fair and reasonable price determination at the MAS contract level really matter?; (3) If the Panel consensus is that competition is at the task order level, are the methods that GSA uses to determine fair and reasonable prices and maintain the price/discount relationship with the basis of award customer(s) adequate?; (4) If the current policy is not adequate, what are the recommendations to improve the policy/guidance; and (5) If fair and reasonable price determination at the MAS contract level is not beneficial and the fair and reasonable price determination is to be determined only at the task/delivery order level, then what is the GSA role?

The meetings will be held at U.S. General Services Administration, Federal Acquisition Service, 2200 Crystal Drive, Room L1301, Arlington, VA 22202. The location is within walking distance of the Crystal City metro stop. The start time for each meeting is 9 a.m., and each meeting will adjourn no later than 5 p.m.

FOR FURTHER INFORMATION CONTACT: Information on the Panel meetings, agendas, and other information can be obtained at www.gsa.gov/masadvisorypanel or you may contact Ms. Pat Brooks, Designated Federal Officer, Multiple Award Schedule Advisory Panel, U.S. General Services Administration, 2011 Crystal Drive, Suite 911, Arlington, VA 22205; telephone 703-605-3406, Fax 703-605-3454; or via email at mas.advisorypanel@gsa.gov.

AVAILABILITY OF MATERIALS: All meeting materials, including meeting agendas, handouts, public comments, and meeting minutes will be posted on the MAS Panel website at www.gsa.gov/masadvisorypanel or www.gsa.gov/masap.

MEETING ACCESS: Individuals requiring special accommodations at any of these meetings should contact Ms. Brooks at least ten (10) business days prior to the meeting date so that appropriate arrangements can be made.

Dated: February 3, 2009

Rodney P. Lantier,

Acting Deputy Chief Acquisition Officer and Senior Procurement Executive, Office of the Chief Acquisition Officer, General Services Administration.

[FR Doc. E9-2624 Filed 2-6-09; 8:45 am]

BILLING CODE 6820-EP-S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day-09-08BD]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639-5960 or send an e-mail to omb@cdc.gov. Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395-6974. Written comments should be received within 30 days of this notice.

Proposed Project

National Survey of HIV Testing in Hospitals—New—National Center for HIV, Viral Hepatitis, STD and TB Prevention (NCHHSTP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Early identification of HIV infection has significant benefits to the infected individual and society. In light of recent advancements in HIV testing and treatment, the Centers for Disease Control and Prevention (CDC) released its prevention initiative, Advancing HIV Prevention: New Strategies for a Changing Epidemic. A key component of this strategy focuses upon increased HIV testing in healthcare settings to increase the number of persons with HIV who are aware of their infection and are successfully referred to treatment and prevention services. In September 2006, CDC released revised recommendations for routine HIV testing of adults, adolescents, and pregnant women in healthcare settings as a measure to address the high number

of individuals who are unaware of their HIV infection.

Routine HIV testing programs in hospital settings, including emergency departments (EDs) and urgent care centers (UCCs), have great potential to identify a large number of previously undiagnosed individuals. Prior to the release of the revised recommendations, few such hospital-based testing programs had existed in the United States. CDC is committed to increasing the number of such programs in the U.S., and is currently working with partners to achieve these goals. This project proposes a survey to assess HIV testing policies and practices in hospitals nationwide and to describe the uptake of the revised HIV testing recommendations for hospital settings.

The objectives of this project are: (1) To determine the extent to which HIV testing is being conducted in U.S. hospitals; (2) to describe the characteristics of hospitals with and without HIV testing programs; and (3) to identify barriers to and facilitators of implementing HIV testing programs in these settings. This data will assist CDC in monitoring the uptake of recommendations for HIV testing in healthcare settings.

CDC is requesting approval for collecting information for 2 years. This project will collect data from hospitals on a one-time voluntary basis using a brief survey. Surveys will be completed by the hospital administrators at each site who are most knowledgeable on HIV testing practices, infection control, and laboratory procedures for their site, in consultation with other hospital staff, as necessary. Collection of data will provide information on current HIV testing practices and policies for the hospital; use of point-of-care and conventional HIV tests; and barriers and facilitators of hospital-based HIV testing.

Data will be requested from a representative sample of the nearly 5000 U.S. community hospitals. CDC estimates that a total of 1000 respondents would spend one hour in the collection, management, and reporting of information under this project. Data collection will occur over two years with 500 surveys conducted per year. There is no cost to the participating hospitals other than their time. The total estimated annual burden hours are 500.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Avg. burden per response (in hours)
Hospital	National Survey of HIV Testing in Hospitals	500	1	1

Dated: February 3, 2009.
Maryam I. Daneshvar,
Acting Reports Clearance Officer, Centers for Disease Control and Prevention.
 [FR Doc. E9-2610 Filed 2-6-09; 8:45 am]
BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day-09-09AQ]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404-639-5960 or send comments to Maryam Daneshvar, CDC Reports Clearance Officer, 1600 Clifton Road, MS-D74, Atlanta, GA 30333 or send an e-mail to omb@cdc.gov.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have

practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Behavioral Assessment and Rapid Testing Project (BART)—New—National Center for HIV/AIDS, Viral Hepatitis, Sexually Transmitted Diseases, and Tuberculosis Elimination Programs (NCHHSTP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

This project seeks to establish feasibility of collecting behavioral practices and performing rapid HIV tests. Such opportunities enable CDC to develop risk reduction interventions that are appropriate for the attendees of special events that attract persons who may be at high risk for HIV infection but who do not access the other services in their community. This collection consists of behavioral assessments and rapid HIV testing at a variety of events serving different minority and hard-to-reach populations at high risk for acquiring or transmitting HIV infection.

A single protocol and one research agenda will be used in all settings.

This project will address the increasing rates of HIV infection among African Americans and men who have sex with men as well as the need for early detection and linkage to health care for HIV-infected persons. The proposed project addresses "Healthy People 2010" priority area(s) of identifying new HIV infections and is in alignment with NCHHSTP performance goal(s) to strengthen the national capacity to monitor the epidemic, develop and implement effective HIV prevention interventions, and evaluate prevention programs. A secondary purpose of BART is to decrease stigma associated with testing by increasing awareness, visibility and acceptability of public rapid testing programs.

A randomized convenience sample will be used to select attendees at (1) Gay Pride; (2) Minority Gay Pride; (3) black spring break; and (4) cultural and social events attracting large numbers of African Americans. Trained interviewers will select and approach event attendees. A screener questionnaire will be used to determine participation eligibility and obtain oral consent. Approximately 7,000 individuals will be approached to participate in the BART interview each year and participate in a two minute screener interview. Approximately 5,600 individuals are expected to be eligible and participate in BART interview each year. There is no cost to respondents other than their time.

ESTIMATE OF ANNUALIZED BURDEN TABLE

Types of data collection	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hour)
Screener	7,000	1	2/60	233
Interview	5,600	1	15/60	1,400
Total	12,600	1,633

Maryam I. Daneshvar,
Acting Reports Clearance Officer, Centers for Disease Control and Prevention.
 [FR Doc. E9-2611 Filed 2-6-09; 8:45 am]
BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day-09-0530]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639-5960 or send an e-mail to omb@cdc.gov. Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395-6974. Written comments should be received within 30 days of this notice.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments must be received within 60 days of this notice.

Proposed Project

Energy Employees Occupational Illness Compensation Program Act

(EEOICPA), Dose Reconstruction Interviews and Forms, OMB No. 0920-0530—Reinstatement—The National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (DHHS).

Background and Brief Description

On October 30, 2000, the Energy Employees Occupational Illness Compensation Program Act of 2000 (42 U.S.C. 7384-7385) was enacted. This Act established a federal compensation program for employees of the Department of Energy (DOE) and certain of its contractors, subcontractors and vendors, who have suffered cancers and other designated illnesses as a result of exposures sustained in the production and testing of nuclear weapons.

Executive Order 13179, issued on December 7, 2000, delegated authorities assigned to "the President" under the Act to the Departments of Labor (DOL), Health and Human Services, Energy and Justice. The Department of Health and Human Services (DHHS) was delegated the responsibility of establishing methods for estimating radiation doses received by eligible claimants with cancer applying for compensation. NIOSH is applying the following methods to estimate the radiation doses of individuals applying for compensation.

In performance of its dose reconstruction responsibilities, under the Act, NIOSH is providing voluntary interview opportunities to claimants (or their survivors) individually and providing them with the opportunity to assist NIOSH in documenting the work history of the employee by characterizing the actual work tasks performed. In addition, NIOSH and the claimant may identify incidents that may have resulted in undocumented radiation exposures, characterizing radiological protection and monitoring practices, and identify co-workers and other witnesses as may be necessary to

confirm undocumented information. In this process, NIOSH uses a computer assisted telephone interview (CATI) system, which allows interviews to be conducted more efficiently and quickly as opposed to a paper-based interview instrument. Both interviews are voluntary and failure to participate in either or both interviews will not have a negative effect on the claim, although voluntary participation may assist the claimant by adding important information that may not be otherwise available.

NIOSH uses the data collected in this process to complete an individual dose reconstruction that accounts, as fully as possible, for the radiation dose incurred by the employee in the line of duty for DOE nuclear weapons production programs. After dose reconstruction, NIOSH also performs a brief, voluntary final interview with the claimant to explain the results and to allow the claimant to confirm or question the records NIOSH has compiled. This will also be the final opportunity for the claimant to supplement the dose reconstruction record.

At the conclusion of the dose reconstruction process, the claimant submits a form to confirm that the claimant has no further information to provide to NIOSH about the claim at this time. The form notifies the claimant that signing the form allows NIOSH to forward a dose reconstruction report to DOL and to the claimant, and closes the record on data used for the dose reconstruction. Signing this form does not indicate that the claimant agrees with the outcome of the dose reconstruction. The dose reconstruction results will be supplied to the claimant and to the DOL, the agency that will utilize them as one part of its determination of whether the claimant is eligible for compensation under the Act.

There is no cost to respondents other than their time. The total estimated annualized burden hours are 4,900.

ESTIMATED ANNUALIZED BURDEN HOURS

Instrument type	Number of respondents	Number of responses per respondent	Average burden (in hours)
Initial interview	4,200	1	1
Conclusion Form	8,400	1	5/60

Dated: January 30, 2009.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E9-2612 Filed 2-6-09; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Human Genome Research Institute; 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 Human Genome Research Institute Special Emphasis Panel, Data Analysis and Coordinating Center for Research Training.

Date: March 31, 2009.

Time: 3 p.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: NHGRI Twinbrook Library, 5635 Fishers Lane, Suite 4076, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Keith McKenney, Ph.D., Scientific Review Officer, NHGRI, 5635 Fishers Lane, Suite 4076, Bethesda, MD 20814, 301-594-4280, mckenneyk@mail.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.172, Human Genome Research, National Institutes of Health, HHS)

Dated: February 3, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9-2658 Filed 2-6-09; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as

amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Cell Fate Determination RFA.

Date: March 4, 2009.

Time: 12 p.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Room 2C212, Bethesda, MD 20814 (Telephone Conference Call).

Contact Person: Bita Nakhai, PhD, Scientific Review Officer, Scientific Review Branch, National Institute on Aging, Gateway Bldg., 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20814, 301-402-7701, nakhaib@nia.nih.gov.

Name of Committee: National Institute on Aging Special Emphasis Panel, Roybal Centers for Translational Research on Aging.

Date: March 16-17, 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: Alfonso R. Latoni, PhD, Deputy Chief and Scientific Review Officer, Scientific Review Branch, National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Room 2C218, Bethesda, MD 20892, 301-402-7702, latonia@nia.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: February 2, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9-2593 Filed 2-6-09; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice

is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Immune Defense Mechanisms at the Mucosa.

Date: March 5-6, 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: Priti Mehrotra, Ph.D., Scientific Review Administrator, Division of Extramural Activities, NIAID/NIH, 6700B Rockledge Drive, Room 2100, Bethesda, MD 20892-7616, (301) 496-2550, pm158b@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: February 3, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9-2660 Filed 2-6-09; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS-R8-FHC-2009-N0021; 81331-1334-8TWG-W4]

Trinity Adaptive Management Working Group

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of meeting.

SUMMARY: The Trinity Adaptive Management Working Group (TAMWG) affords stakeholders the opportunity to give policy, management, and technical input concerning Trinity River (California) restoration efforts to the Trinity Management Council (TMC). This notice announces a TAMWG meeting, which is open to the public.

DATES: TAMWG will meet from 1 p.m. to 5 p.m. on Monday, March 16, 2009,

and from 8 a.m. to 5 p.m. on Tuesday, March 17, 2009.

ADDRESSES: The meeting will be held at the Weaverville Victorian Inn, 1709 Main St., 299 West, Weaverville, CA 96093.

FOR FURTHER INFORMATION CONTACT:

Randy A. Brown of the U.S. Fish and Wildlife Service, 1655 Heindon Road, Arcata, CA 95521; telephone: (707) 822-7201. Randy A. Brown is the TAMWG Designated Federal Officer. For background information and questions regarding the Trinity River Restoration Program (TRRP), please contact Mike Hamman, Executive Director, Trinity River Restoration Program, P.O. Box 1300, 1313 South Main Street, Weaverville, CA 96093; telephone: (530) 623-1800; e-mail: mhamman@mp.usbr.gov.

SUPPLEMENTARY INFORMATION: Under section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App.), this notice announces a meeting of the (TAMWG).

Primary objectives of the meeting will include discussion of the following topics:

- Welcome and introductions,
- History and status of TRRP,
- Roles and responsibilities of

TAMWG,

- FACA procedures,
- Discussion of bylaws,
- TRRP flow scheduling, and
- Election of officers.

Completion of the agenda is dependent on the amount of time each item takes. The meeting could end early if the agenda has been completed.

Dated: February 3, 2009.

Randy A. Brown,

Designated Federal Officer, Arcata Fish and Wildlife Office, Arcata, CA.

[FR Doc. E9-2613 Filed 2-6-09; 8:45 am]

BILLING CODE 4310-55-P

DEPARTMENT OF THE INTERIOR

U.S. Geological Survey

Notice of U.S. Geological Survey Price Increase for Primary Series Quadrangles, Thematic Maps, National Earthquake Information Center Maps, and Large Format and Poster Maps

SUMMARY: The U.S. Geological Survey will increase prices for their following products:

(1) 7.5 minute 1:20,000-scale, 1:24,000-scale, 1:25,000-scale, 1:63,360-scale, and 7.5 minute × 15 minute 1:25,000-scale, 1:63,360-scale, 1:100,000-scale and 1:250,000-scale primary series quadrangles from \$6.00 to \$8.00 per quadrangle.

(2) Thematic maps and small scale National Park maps from \$7 per sheet to \$9 per sheet.

(3) National Earthquake Information Center maps bearing private sector copyright from \$10 per sheet to \$12 per sheet.

(4) Large format and poster maps from \$7 per sheet to \$10 per sheet.

Prices for these products were last revised 7 years ago and will be adjusted to accurately reflect and ensure recovery of the costs associated with their reproduction and distribution. These changes are consistent with guidance contained in the Office of Management and Budget (OMB) Circular A-130, concerning management of Federal information resources (Revised Nov. 2000), Circular A-25, establishing Federal policy regarding fees assessed for Government services, which permits government agencies to recover reproduction and distribution costs from the sale of their products.

DATES: The price increase will be effective March 2, 2009. All map orders received by or postmarked before March 2, 2009 will be subject to the current price. On February 2, 2009, the U.S. Geological Survey Business Partners will receive a 30-day advance notification of the impending price increase. Prices listed at http://ask.usgs.gov/prices/faqs_prices_usgs_products.html supersedes all pricing notices previously published.

FOR FURTHER INFORMATION CONTACT: Kip McCarty, Geospatial Information Office, (303) 202-4619 or by e-mail at kmccarty@usgs.gov.

Dated: February 3, 2009.

Stephen E. Hammond,

Acting Chief, Science Information and Education Office.

[FR Doc. E9-2609 Filed 2-6-09; 8:45 am]

BILLING CODE 4311-AM-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY-923-1310-FI; WYW156556]

Wyoming: Notice of Proposed Reinstatement of Terminated Oil and Gas Lease

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Proposed Reinstatement of Terminated Oil and Gas Lease

SUMMARY: Under the provisions of 30 U.S.C. 188(d) and (e), and 43 CFR 3108.2-3(a) and (b)(1), the Bureau of

Land Management (BLM) received a petition for reinstatement from Equity Oil Company for competitive oil and gas lease WYW156556 for land in Big Horn County, Wyoming. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

FOR FURTHER INFORMATION CONTACT:

Bureau of Land Management, Julie L. Weaver, Acting Chief, Branch of Fluid Minerals Adjudication, at (307) 775-6176.

SUPPLEMENTARY INFORMATION: The lessee has agreed to the amended lease terms for rentals and royalties at rates of \$10.00 per acre, or fraction thereof, per year, and 16 $\frac{2}{3}$ percent, respectively. The lessee has paid the required \$500 administrative fee and \$163 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Sections 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate lease WYW156556 effective October 1, 2008, under the original terms and conditions of the lease and the increased rental and royalty rates cited above. BLM has not issued a valid lease affecting the lands.

Julie L. Weaver,

Acting Chief, Branch of Fluid Minerals Adjudication.

[FR Doc. E9-2665 Filed 2-6-09; 8:45 am]

BILLING CODE 4310-22-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MTM 42157]

Public Land Order No. 7729; Partial Revocation of Power Site Reserve No. 676; Montana

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order partially revokes a withdrawal created by an Executive Order insofar as it affects 80 acres, more or less, of National Forest System lands withdrawn for Power Site Reserve No. 676. This order also opens the lands to exchange.

DATES: *Effective Date:* March 11, 2009.

FOR FURTHER INFORMATION CONTACT: Sandra Ward, BLM Montana State Office, 5001 Southgate Drive, Billings, Montana 59101-4669, 406-896-5052.

SUPPLEMENTARY INFORMATION: The U.S. Forest Service has determined that the

withdrawal is no longer needed on the lands described in this order and the partial revocation is needed to facilitate a pending land exchange with the State of Montana.

Order

By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (2000), it is ordered as follows:

1. The withdrawal created by the Executive Order dated February 11, 1918, which established Power Site Reserve No. 676, is hereby revoked insofar as it affects the following described lands:

Lolo National Forest

Principal Meridian, Montana

T. 23 N., R. 27 W.,

Sec. 32, SE $\frac{1}{4}$ NE $\frac{1}{4}$ and SE $\frac{1}{4}$ SW $\frac{1}{4}$.

The areas described aggregate 80 acres, more or less, in Sanders County.

2. At 9 a.m. on March 11, 2009, the above-described lands are hereby made available for exchange under the Act of March 20, 1922, as amended, 16 U.S.C. 485, 486 (2000).

Dated: January 9, 2009.

C. Stephen Allred,

Assistant Secretary—Land and Minerals Management.

[FR Doc. E9-2631 Filed 2-6-09; 8:45 am]

BILLING CODE 3419-11-P

204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (2000), it is ordered as follows:

1. Subject to valid existing rights, the following described National Forest System land is hereby withdrawn from location and entry under the United States mining laws, 30 U.S.C. Ch. 2 (2000), to protect the Red Rock Ranger District Administrative Site:

Coconino National Forest

Gila and Salt River Meridian

T. 16 N., R. 5 E.,

Sec. 25, S $\frac{1}{2}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ and E $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$.

T. 16 N., R. 6 E.,

Sec. 30, lot 2.

The area described contains 62.08 acres in Yavapai County.

2. This withdrawal will expire 20 years from the effective date of this order unless, as a result of a review conducted before the expiration date pursuant to Section 204(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714(f) (2000), the Secretary determines that the withdrawal shall be extended.

Dated: January 9, 2009.

C. Stephen Allred,

Assistant Secretary—Land and Minerals Management.

[FR Doc. E9-2632 Filed 2-6-09; 8:45 am]

BILLING CODE 3410-11-P

the NPS's preferred alternative. The anticipated environmental impacts of those alternatives are also analyzed. Public comment on the draft plan was considered when preparing the final.

DATES: The NPS will execute a Record of Decision no sooner than 30 days following publication by the Environmental Protection Agency of this Notice of Availability in the **Federal Register**.

ADDRESSES: Copies of the FEIS/GMPA are available from the Superintendent, Great Smoky Mountains National Park, 107 Park Headquarters Road, Gatlinburg, Tennessee 37738; telephone: 865-436-1201. An electronic copy of the document is available on the Internet at <http://parkplanning.nps.gov/>.

AUTHORITY: The authority for publishing this notice is 40 CFR 1506.6.

FOR FURTHER INFORMATION CONTACT: The Superintendent, Great Smoky Mountains National Park, at the address and telephone number shown above; or Cathleen Cook, Great Smoky Mountains National Park, at 865-436-1255; or Steve Whissen, Denver Service Center, at 303-969-2380.

The responsible official for this FEIS is the Regional Director, Southeast Region, National Park Service, 100 Alabama Street, SW., 1924 Building, Atlanta, Georgia 30303.

Dated: January 2, 2009.

David Vela,

Regional Director, Southeast Region.

[FR Doc. E9-2645 Filed 2-6-09; 8:45 am]

BILLING CODE 4310-70-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AZA 33447]

Public Land Order No. 7730; Withdrawal of National Forest System Land for the Red Rock Ranger District Administrative Site; Arizona

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order withdraws 62.08 acres of National Forest System land from location and entry under the United States mining laws for 20 years to protect the Forest Service Red Rock Ranger District Administrative Site within the Coconino National Forest.

DATES: *Effective Date:* February 9, 2009.

FOR FURTHER INFORMATION CONTACT:

Angela Mogel, BLM Arizona State Office, One North Central Avenue, Suite 800, Phoenix, Arizona 85004-4427, 602-417-9536.

Order

By virtue of the authority vested in the Secretary of the Interior by Section

DEPARTMENT OF THE INTERIOR

National Park Service

Environmental Impact Statements; Availability

AGENCY: National Park Service, Interior.

ACTION: Notice of Availability of a Final Environmental Impact Statement for the General Management Plan Amendment (FEIS/GMPA), Elkmont Historic District, Great Smoky Mountains National Park.

SUMMARY: The National Park Service (NPS) announces the availability of the FEIS/GMPA for Elkmont in the Great Smoky Mountains National Park. This document will be available for public review pursuant to 42 U.S.C. 4332(2)(C) of the National Environmental Policy Act of 1969 and NPS policy in Director's Order Number 2 (Park Planning) and Director's Order Number 12 (Conservation Planning, Environmental Impact Analysis, and Decision-making).

The document provides a framework for management, use, and development of Elkmont by the NPS for the next 15 to 20 years. The document describes seven management alternatives, including a No-Action Alternative and

DEPARTMENT OF THE INTERIOR

National Park Service

Announcement of the National Park Service Subsistence Resource Commission Meetings Within the Alaska Region

AGENCY: National Park Service, Interior.

ACTION: Announcement of the National Park Service Subsistence Resource Commission meetings within the Alaska Region.

SUMMARY: The National Park Service (NPS) announces the Subsistence Resource Commission (SRC) meeting schedule for the following areas: Lake Clark National Park, and Wrangell-St. Elias National Park. The purpose of each meeting is to develop and continue work on subsistence hunting program recommendations and other related subsistence management issues. Each meeting is open to the public and will

have time allocated for public testimony. The public is welcomed to present written or oral comments to the SRC. The NPS SRC program is authorized under Title VIII, Section 808, of the Alaska National Interest Lands Conservation Act, Public Law 96-487, to operate in accordance with the provisions of the Federal Advisory Committee Act. Draft meeting minutes will be available upon request from each Superintendent for public inspection approximately six weeks after each meeting.

DATES: The Lake Clark National Park SRC meeting will be held from 1 p.m. to 5 p.m., on Wednesday, March 11, 2009.

Location: The meeting will be held at the Nondalton Community Center, in Nondalton, AK.

FOR FURTHER INFORMATION CONTACT: Michelle Ravenmoon, Subsistence Coordinator, Lake Clark National Park, One Park Place, Port Alsworth, AK 99653; telephone: (907) 781-2135 or Mary McBurney, Subsistence Manager, 2181 Kachemak Drive, Homer, AK; telephone: (907) 271-3751.

DATES: The Wrangell-St. Elias National Park SRC meeting will be held from 9 a.m. to 5 p.m. on Wednesday, March 18, 2009.

Location: The meeting will be held at the Gakona Village Hall in Gakona, Alaska. The alternate meeting site is Wrangell-St. Elias National Park and Preserve Headquarters, Copper Center, AK, telephone: (907) 822-5234.

FOR FURTHER INFORMATION CONTACT: Barbara Cellarius, Subsistence Manager/Cultural Anthropologist, Wrangell-St. Elias National Park and Preserve, P.O. Box 439, Copper Center, AK 99573; telephone: (907) 822-7236, or Clarence Summers, Subsistence Coordinator, NPS Alaska Regional Office; telephone: (907) 644-3603.

SUPPLEMENTARY INFORMATION: SRC meeting locations and dates may need to be changed based on weather or local circumstances. If meeting dates and locations are changed, notice of each meeting will be published in local newspapers and announced on local radio stations prior to the meeting dates.

The proposed agendas for each meeting include the following:

1. Call to order (SRC Chair).
2. SRC Roll Call and Confirmation of Quorum.
3. SRC Chair and Superintendent's Welcome and Introductions.
4. Review and Approve Agenda.
5. Review and adopt minutes from last meeting.
6. SRC Membership Status.

7. SRC Member Reports.
8. Park Superintendent and NPS Staff Reports.
9. Federal Subsistence Board Update.
 - a. Wildlife Proposals.
 - b. Fisheries Proposals.
10. Board of Game and Board of Fisheries Updates.
11. Subsistence Uses: Horns, Antlers, Bone and Plant Environmental Assessment Update.
12. Old Business.
13. New Business.
14. Agency and Public Comments.
15. SRC Work Session.
16. Adjournment.

Dated: January 13, 2009.

Victor Knox,

Deputy Regional Director.

[FR Doc. E9-2663 Filed 2-6-09; 8:45 am]

BILLING CODE 4310-70-P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Agency Information Collection; Activities Under OMB Review; Comment Request

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of renewal of a currently approved collection (OMB No. 1006-0003).

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Bureau of Reclamation (Reclamation, we) has forwarded the following Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval: Use Authorization Application (Form 7-2540), OMB Control Number: 1006-0003. Title 43 CFR part 429 requires that applicants for certain uses of Reclamation land, facilities, and waterbodies apply using Form 7-2540. We request your comments on specific aspects of the revised Use Authorization Application Form.

DATES: OMB has up to 60 days to approve or disapprove this information collection, but may respond after 30 days; therefore, public comments must be received on or before March 11, 2009 to assure maximum consideration.

ADDRESSES: You may send written comments to the Desk Officer for the Department of the Interior at the Office of Management and Budget, Office of Information and Regulatory Affairs, via facsimile to (202) 395-6566 or e-mail to OIRA_DOCKET@omb.eop.gov. A copy of your comments should also be directed to the Bureau of Reclamation,

Attention: 84-53000, PO Box 25007, Denver, CO 80225.

FOR FURTHER INFORMATION CONTACT: Greek Taylor at: (303) 445-2895.

SUPPLEMENTARY INFORMATION:

Title: Bureau of Reclamation Use Authorization Application, 43 CFR part 429.

Abstract: Reclamation is responsible for approximately 6.5 million acres of land which directly support Reclamation's Federal water projects in the 17 western states. Individuals or entities wanting to use Reclamation's lands, facilities, or waterbodies must submit an application to gain permission for such uses. Examples of such uses are:

- Agricultural uses such as grazing and farming;
- Commercial or organized recreation and sporting activities;
- Other commercial activities such as “guiding and outfitting” and “filming and photography;” and
- Resource exploration and extraction, including sand and gravel removal and timber harvesting.

Reclamation reviews applications to determine whether granting individual use authorizations is compatible with Reclamation's present or future uses of the lands, facilities, or waterbodies. When we find a proposed use compatible, we advise the applicant of the estimated administrative costs and estimated application processing time. In addition to the administrative costs, we require the applicant to pay a use fee for the use authorization based on a valuation or competitive bidding. If the application is for construction of a bridge, building, or other significant construction project, Reclamation may require that all plans and specifications be signed and sealed by a licensed professional engineer.

We changed the form and its instructions to comply with revisions to 43 CFR part 429. The name of the form is now “Bureau of Reclamation Use Authorization Application” and “right-of-use” is replaced with “use authorization” in the form and instructions. We expanded the examples in the instructions of proposed uses for which you must seek permission. The instructions reflect an application fee of \$100. However, some applications may incur a higher cost due to additional required analyses such as the need to perform a valuation or to ensure compliance with the National Environmental Policy Act. The average cost for preparing an application is estimated to be \$200. We made other changes to the form and the instructions to improve the readability and

information-gathering. For instance, the form now requests day and evening phone numbers, instead of work and home numbers.

Frequency: Each time a use authorization is requested.

Respondents: Individuals, corporations, companies, and State and local entities who want to use Reclamation lands, facilities, or waterbodies.

Estimated Annual Total Number of Respondents: 175.

Estimated Number of Responses per Respondent: 1.

Estimated Total Number of Annual Responses: 175.

Estimated Total Annual Burden on Respondents: 350 hours.

Estimated Completion Time per Respondent: 2 hours.

Comments

We invite your comments on:

(a) Whether the proposed collection of information is necessary for the proper performance of our functions, including whether the information will have practical use;

(b) The accuracy of our burden estimate for the proposed collection of information;

(c) Ways to enhance the quality, usefulness, and clarity of the information to be collected; and

(d) Ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology.

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. Reclamation will display a valid OMB control number on the Use Authorization Application Form 7-2540. A **Federal Register** notice with a 60-day comment period soliciting comments on this collection of information was published in the **Federal Register** (73 FR 56865, Sep. 30, 2008). No public comments were received.

OMB has up to 60 days to approve or disapprove this information collection, but may respond after 30 days; therefore, public comment should be submitted to OMB within 30 days in order to assure maximum consideration.

Before including your address, telephone 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.

Roseann Gonzales,

Director, Policy and Program Services, Denver Office.

[FR Doc. E9-2639 Filed 2-6-09; 8:45 am]

BILLING CODE 4310-MN-P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree in United States v. Kentucky Utilities Company Under the Clean Air Act

Under 28 CFR 50.7, notice is hereby given that on February 3, 2009, a proposed consent decree ("Consent Decree") between Kentucky Utilities Company ("Kentucky Utilities") and the United States in connection with Civil Action No. 5:07-CV-75-KSF, was lodged with the United States District Court for the Eastern District of Kentucky.

The Consent Decree would resolve claims asserted by the United States against Kentucky Utilities pursuant to Sections 113(b) and 167 of the Clean Air Act (the "Act"), 42 U.S.C. 7413(b) and 7477, seeking injunctive relief and the assessment of civil penalties for Kentucky Utilities' violations of:

(a) The Prevention of Significant Deterioration ("PSD") provisions in Part C of Subchapter I of the Act, 42 U.S.C. 7470-92;

(b) The New Source Performance Standards ("NSPS") provisions of the Act, 42 U.S.C. 7411;

(c) Title V of the Act, 42 U.S.C. 7661 *et seq.*; and

(d) The federally enforceable State Implementation Plan ("SIP") developed by the Commonwealth of Kentucky.

Kentucky Utilities Company is a Kentucky corporation headquartered in Lexington, Kentucky. Kentucky Utilities owns and operates five coal-fired electrical power generating stations in Kentucky. One of those stations, the E.W. Brown Plant ("Brown Plant") is located on Lake Herrington in Mercer County, Kentucky. The Brown Plant operates three coal-fired boiler units. Only Unit 3 at the Brown Plant ("Brown Unit 3") is the subject of this settlement. The complaint filed by the United States alleges that Kentucky Utilities modified Brown Unit 3 without complying with the PSD requirements of the Act (including the requirements to first obtain a PSD permit authorizing the modification and to install and operate the best available technology to control emissions of sulfur dioxide ("SO₂"), nitrogen oxides ("NO_x"), and/or

particulate matter ("PM")), and without complying with the NSPS requirements of the Act. The complaint also alleges that Kentucky Utilities violated Title V of the Act by failing to include the PSD and NSPS requirements triggered by its modifications in its Title V operating permit for the Brown Plant. Finally, the complaint alleges that Kentucky Utilities illegally operated Brown Unit 3 at heat input capacities that were higher than allowed by its operating permit.

The proposed Consent Decree would require Kentucky Utilities to reduce SO₂, NO_x and PM emissions at Brown Unit 3 through the installation and operation of state-of-the-art pollution control technologies. In addition, the proposed Consent Decree would require Kentucky Utilities to contribute \$3 million toward environmental mitigation projects, including \$1.8 million toward a carbon sequestration research project overseen by the University of Kentucky and the Kentucky Geological Survey, \$1 million to retrofit diesel school buses with devices to reduce particulate matter emissions, and \$200,000 toward the National Park Service's efforts to protect and restore Mammoth Caves National Park. Finally, the proposed Consent Decree would require Kentucky Utilities to pay a civil penalty of \$1.4 million.

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. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to pubcomment-ees.enrd@usdoj.gov or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044-7611, and should refer to *United States v. Kentucky Utilities Company*, D.J. Ref. No. 90-5-2-1-08850.

The Consent Decree may be examined at the Office of the United States Attorney, Eastern District of Kentucky, 260 West Vine Street, Suite 300, Lexington, Kentucky 40507-1612, and at U.S. EPA Region IV, 61 Forsyth Street, SW., Atlanta, Georgia 30303-8960. 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 \$16.75 (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.

W. Benjamin Fisherow,

Deputy Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E9-2588 Filed 2-6-09; 8:45 am]

BILLING CODE 4410-15-P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Alliance for Sustainable Air Transportation

Notice is hereby given that, on January 5, 2009, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Alliance for Sustainable Air Transportation ("ASAT") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, DayJet, Boca Raton, FL has withdrawn as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and ASAT intends to file additional written notifications disclosing all changes in membership.

On July 25, 2008, ASAT filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on August 25, 2008 (73 FR 50055).

The last notification was filed with the Department on October 17, 2008. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on November 21, 2008 (73 FR 70674).

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. E9-2595 Filed 2-6-09; 8:45 am]

BILLING CODE 4410-11-M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—American Society of Mechanical Engineers

Notice is hereby given that, on January 14, 2009, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), the American Society of Mechanical Engineers (ASME) has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing additions or changes to its standards development activities. The notifications were filed for the purpose of extending the Acts provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, since October 1, 2008, ASME has published six new standards, initiated seven new standards activities, and established two new standards-writing committees within the general nature and scope of ASME's standards development activities, as specified in its original notification. More detail regarding these changes can be found at <http://www.asme.org>.

On September 15, 2004, ASME filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on October 13, 2004 (69 FR 60895).

The last notification was filed with the Department on October 3, 2008. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on November 5, 2008 (73 FR 65884).

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. E9-2596 Filed 2-6-09; 8:45 am]

BILLING CODE 4410-11-M

DEPARTMENT OF JUSTICE

Foreign Claims Settlement Commission

[F.C.S.C. Meeting Notice No. 1-09]

Meetings

The Foreign Claims Settlement Commission, pursuant to its regulations (45 CFR part 504) and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of meetings for the

transaction of Commission business and other matters specified, as follows:

Date and Time: Thursday, February 19, 2009, at 10:30 a.m.

Subject Matter: Issuance of Proposed Decisions, Amended Proposed Decisions, and Orders in claims against Albania.

Status: Open.

All meetings are held at the Foreign Claims Settlement Commission, 600 E Street, NW., Washington, DC. Requests for information, or advance notices of intention to observe an open meeting, may be directed to: Administrative Officer, Foreign Claims Settlement Commission, 600 E Street, NW., Room 6002, Washington, DC 20579. Telephone: (202) 616-6988.

Dated at Washington, DC.

Mauricio J. Tamargo,

Chairman.

[FR Doc. E9-2670 Filed 2-6-09; 8:45 am]

BILLING CODE 4410-01-P

THE NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Federal Council on the Arts and the Humanities Arts and Artifacts Indemnity Panel

AGENCY: The National Endowment for the Humanities.

ACTION: Notice of meeting.

Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92-463 as amended) notice is hereby given that a meeting of the Arts and Artifacts Domestic Indemnity Panel of the Federal Council on the Arts and the Humanities will be held at 1100 Pennsylvania Avenue, NW., Washington, DC 20506, in Room 730, from 9 a.m. to 5 p.m., on Monday, February 23, 2009.

The purpose of the meeting is to review applications for Certificates of Indemnity submitted to the Federal Council on the Arts and the Humanities for exhibitions beginning after April 1, 2009.

Because the proposed meeting will consider financial and commercial data and because it is important to keep values of objects, methods of transportation and security measures confidential, pursuant to the authority granted me by the Chairman's Delegation of Authority to Close Advisory Committee Meetings, dated July 19, 1993, I have determined that the meeting would fall within exemption (4) of 5 U.S.C. 552(b) and that it is essential to close the meeting to protect the free exchange of views and to avoid

interference with the operations of the Committee.

It is suggested that those desiring more specific information contact Advisory Committee Management Officer, Michael P. McDonald, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, or call 202/606-8322.

Michael P. McDonald,

Advisory Committee Management Officer.

[FR Doc. E9-2634 Filed 2-6-09; 8:45 am]

BILLING CODE 7536-01-P

NUCLEAR REGULATORY COMMISSION

[Docket No. NRC-2008-0040]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: U.S. Nuclear Regulatory Commission (NRC).

ACTION: Notice of pending NRC action to submit an information collection request to the Office of Management and Budget (OMB) and solicitation of public comment.

SUMMARY: The NRC invites public comment about our intention to request the OMB's approval for renewal of an existing information collection that is summarized below. We are required to publish this notice in the **Federal Register** under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

Information pertaining to the requirement to be submitted:

1. *The title of the information collection:* Billing Instructions for NRC Cost Type Contracts.
2. *Current OMB approval number:* 3150-0109.
3. *How often the collection is required:* Monthly and on occasion.
4. *Who is required or asked to report:* NRC Contractors.
5. *The number of annual respondents:* 64.
6. *The number of hours needed annually to complete the requirement or request:* 1,202 hours.
7. *Abstract:* In administering its contracts, the NRC Division of Contracts provides billing instructions for its contractors to follow in preparing invoices. These instructions stipulate the level of detail in which supporting data must be submitted for NRC review. The review of this information ensures that all payments made by NRC for valid and reasonable costs are in accordance with the contract terms and conditions.

Submit, by April 10, 2009, comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?

2. Is the burden estimate accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection be minimized, including the use of automated collection techniques or other forms of information technology?

A copy of the draft supporting statement may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O-1 F21, Rockville, MD 20852. OMB clearance requests are available at the NRC worldwide Web site: <http://www.nrc.gov/public-involve/doc-comment/omb/index.html>. The document will be available on the NRC home page site for 60 days after the signature date of this notice. Comments submitted in writing or in electronic form will be made available for public inspection. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed. Comments submitted should reference Docket No. NRC-2008-0040. You may submit your comments by any of the following methods. Electronic comments: Go to <http://www.regulations.gov> and search for Docket No. NRC-2008-0040. Mail comments to NRC Clearance Officer, Gregory Trussell (T-5 F53), U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. Questions about the information collection requirements may be directed to the NRC Clearance Officer, Gregory Trussell (T-5 F53), U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, by telephone at 301-415-6874, or by e-mail to INFOCOLLECTS.Resource@NRC.GOV.

Dated at Rockville, Maryland, this 29th day of January, 2009.

For the Nuclear Regulatory Commission,
Gregory Trussell,
NRC Clearance Officer, Office of Information Services.

[FR Doc. E9-2616 Filed 2-6-09; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[Docket No. NRC-2008-0563]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: U.S. Nuclear Regulatory Commission (NRC).

ACTION: Notice of pending NRC action to submit an information collection request to the Office of Management and Budget (OMB) and solicitation of public comment.

SUMMARY: The NRC invites public comment about our intention to request the OMB's approval for renewal of an existing information collection that is summarized below. We are required to publish this notice in the **Federal Register** under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

Information pertaining to the requirement to be submitted:

1. *The title of the information collection:* Application for NRC Export/Import License, Amendment, or Renewal.
2. *Current OMB approval number:* 3150-0027.
3. *How often the collection is required:* On occasion; for each separate export, import, amendment, or renewal license application, and for exports of incidental radioactive material using existing general licenses.
4. *Who is required or asked to report:* Any person in the U.S. who wishes to export or import (a) nuclear material and equipment or byproduct material subject to the requirements of a specific license; (b) amend a license; (c) renew a license, and (d) for notification of incidental radioactive material exports that are contaminants of shipments of more than 100 kilograms of non-waste material using existing NRC general licenses.
5. *The number of annual respondents:* 170.
6. *The number of hours needed annually to complete the requirement or request:* 484.
7. *Abstract:* Persons in the U.S. wishing to export or import nuclear material or equipment, or byproduct material requiring a specific authorization, amend or renew a license, or wishing to use existing NRC general licenses for the export of incidental radioactive material over 100 kilograms must file an NRC Form 7 application. The NRC Form 7 application will be reviewed by the NRC and by the Executive Branch, and if applicable statutory, regulatory, and

policy considerations are satisfied, the NRC will issue an export, import, amendment or renewal license.

Submit, by April 10, 2009, comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?
2. Is the burden estimate accurate?
3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?
4. How can the burden of the information collection be minimized, including the use of automated collection techniques or other forms of information technology?

A copy of the draft supporting statement may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O-1 F21, Rockville, MD 20852. OMB clearance requests are available at the NRC worldwide Web site: <http://www.nrc.gov/public-involve/doc-comment/omb/index.html>. The document will be available on the NRC home page site for 60 days after the signature date of this notice. Comments submitted in writing or in electronic form will be made available for public inspection. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed. Comments submitted should reference Docket No. NRC-2008-0563. You may submit your comments by any of the following methods. Electronic comments: Go to <http://www.regulations.gov> and search for Docket No. NRC-2008-0563. Mail comments to NRC Clearance Officer, Gregory Trussell (T-5 F53), U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. Questions about the information collection requirements may be directed to the NRC Clearance Officer, Gregory Trussell (T-5 F53), U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, by telephone at 301-415-6445, or by e-mail to INFOCOLLECTS.Resource@NRC.GOV.

Dated at Rockville, Maryland, this 27th day of January 2009.

For the Nuclear Regulatory Commission,
Gregory Trussell,
NRC Clearance Officer, Office of Information Services.

[FR Doc. E9-2618 Filed 2-6-09; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[Docket No. NRC-2008-0565]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: U.S. Nuclear Regulatory Commission (NRC).

ACTION: Notice of pending NRC action to submit an information collection request to the Office of Management and Budget (OMB) and solicitation of public comment.

SUMMARY: The NRC invites public comment about our intention to request the OMB's approval for renewal of an existing information collection that is summarized below. We are required to publish this notice in the **Federal Register** under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

Information pertaining to the requirement to be submitted:

1. *The title of the information collection:* 10 CFR Part 62—"Criteria and Procedures for Emergency Access to Non-Federal and Regional Low-Level Waste Disposal Facilities."

2. *Current OMB approval number:* 3150-0143.

3. *How often the collection is required:* The collection would only be required upon application for an exemption when access to a non-federal low-level waste disposal facility is denied, which results in a public health and safety and/or common defense and security concern.

4. *Who is required or asked to report:* Generators of low-level radioactive waste who are denied access to a non-federal low-level radioactive waste and who wish to request emergency access for disposal at a non-federal LLRW disposal facility pursuant to 10 CFR Part 62.

5. *The number of annual respondents:* 1.

6. *The number of hours needed annually to complete the requirement or request:* 233.

7. *Abstract:* 10 CFR part 62 sets out the information which must be provided to the NRC by any low-level waste generator seeking emergency access to an operating low-level waste disposal facility. The information is required to allow NRC to determine if denial of disposal constitutes a serious and immediate threat to public health and safety or common defense and security. 10 CFR part 62 also provides that the Commission may grant an exemption from the requirements in this part upon

application of an interested person or upon its own initiative.

Submit, by April 10, 2009, comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?
2. Is the burden estimate accurate?
3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?
4. How can the burden of the information collection be minimized, including the use of automated collection techniques or other forms of information technology?

A copy of the draft supporting statement may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O-1 F21, Rockville, Maryland 20852. OMB clearance requests are available at the NRC worldwide Web site: <http://www.nrc.gov/public-involve/doc-comment/omb/index.html>. The document will be available on the NRC home page site for 60 days after the signature date of this notice. Comments submitted in writing or in electronic form will be made available for public inspection. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed. Comments submitted should reference Docket No. NRC-2008-0565. You may submit your comments by any of the following methods. Electronic comments: Go to <http://www.regulations.gov> and search for Docket No. NRC-2008-0565. Mail comments to NRC Clearance Officer, Gregory Trussell (T-5 F53), U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. Questions about the information collection requirements may be directed to the NRC Clearance Officer, Gregory Trussell (T-5 F53), U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, by telephone at 301-415-6445, or by e-mail to INFOCOLLECTS.Resource@NRC.GOV.

Dated at Rockville, Maryland, this 26th day of January 2009.

For the Nuclear Regulatory Commission,
Gregory Trussell,
NRC Clearance Officer, Office of Information Services.

[FR Doc. E9-2620 Filed 2-6-09; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50-277 and 50-278; NRC-2009-0033]

Exelon Generation Company, LLC and PSEG Nuclear, LLC Peach Bottom Atomic Power Station Unit Nos. 2 and 3; Exemption

1.0 Background

The Exelon Generation Company (Exelon, the licensee in addition to PSEG Nuclear, LLC) is the holder of Facility Operating License Nos. DPR-44 and DPR-56 which authorize operation of the Peach Bottom Atomic Power Station (PBAPS) Units 2 and 3. The licenses provide, among other things, that the facility is subject to all rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (NRC, the Commission) now or hereafter in effect.

The facility consists of two boiling-water reactors located in York and Lancaster Counties, Pennsylvania.

2.0 Request/Action

Title 10 of the *Code of Federal Regulations* (10 CFR), Part 50, Section 50.48, requires that nuclear power plants that were licensed before January 1, 1979, must satisfy the requirements of 10 CFR part 50, Appendix R, Section III.G, "Fire protection of safe shutdown capability." PBAPS Units 2 and 3 were licensed to operate prior to January 1, 1979. As such, the licensee's Fire Protection Program (FPP) must satisfy the established fire protection features of 10 CFR part 50, Appendix R, Section III.G. NRC Regulatory Information Summary (RIS) 2006-10, "Regulatory Expectations with Appendix R Paragraph III.G.2, Operator Manual Actions," noted that NRC inspections identified that some licensees had relied upon operator manual actions, instead of the options specified in 10 CFR part 50, Appendix R, Section III.G.2 as a permanent solution to resolve issues related to Thermo-Lag 330-1 fire barriers.

In a letter dated October 5, 2007 (Agencywide Documents Access and Management System (ADAMS) Accession Number ML072820129), the licensee identified 25 operator manual actions that were previously included in correspondence with the NRC and found acceptable in a fire protection-related Safety Evaluation (SE) dated September 16, 1993 (ADAMS Accession Number ML081690220). However, RIS 2006-10 identifies that an exemption under 10 CFR 50.12 is necessary for use of the manual actions in lieu of the

requirements of 10 CFR part 50, Appendix R, Section III.G.2 even if the NRC previously issued an SE that found the manual actions acceptable. This exemption provides the formal vehicle for NRC approval for the use of the specified operator manual actions instead of the options specified in 10 CFR part 50, Appendix R, Section III.G.2 for PBAPS Units 2 and 3.

In summary, by letter dated October 5, 2007, and supplemental letters dated May 1, 2008, and December 11, 2008 (ADAMS Accession Numbers ML081220873 and ML083470170) responding to the NRC staff's request for additional information, Exelon submitted a request for exemption from 10 CFR Part 50, Appendix R, Section III.G, "Fire Protection of Safe Shutdown Capability," for the use of 25 operator manual actions as described in Table 1 in lieu of the requirements specified in Section III.G.2.

3.0 Discussion

Pursuant to 10 CFR 50.12, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR Part 50 when: (1) the exemptions are authorized by law, will not present an undue risk to public health or safety, and are consistent with the common defense and security; and (2) when special circumstances are present. One of these special circumstances, described in 10 CFR 50.12(a)(2)(ii), is that the application of the regulation in the particular circumstances would not serve the underlying purpose of the rule, or is not necessary to achieve the underlying purpose of the rule.

The underlying purpose of 10 CFR part 50, Appendix R, Section III.G.2 is to ensure that one of the redundant trains necessary to achieve and maintain hot shutdown conditions remains free of fire damage in the event of a fire. Section III.G.2 provides the following means to ensure that a redundant train of safe shutdown cables and equipment is free of fire damage, where redundant trains are located in the same fire area outside of primary containment:

- a. Separation of cables and equipment by a fire barrier having a 3-hour rating;
- b. Separation of cables and equipment by a horizontal distance of more than 20 feet with no intervening combustibles or fire hazards and with fire detectors and an automatic fire suppression system installed in the fire area; or
- c. Enclosure of cables and equipment of one redundant train in a fire barrier having a 1-hour rating and with fire detectors and an automatic fire

suppression system installed in the fire area.

Exelon indicated that the operator manual actions listed in their October 5, 2007, exemption request are those that were previously included in correspondence with the NRC and were found acceptable in a Fire Protection SE dated September 16, 1993 (ADAMS Accession Number ML081690220). The introductory letter to this SE states, in part,

The NRC staff has completed a review of the "Fire Protection Program" document through Revision 4 as well as certain other documents related to the implementation of Appendix R requirements. The enclosed safety evaluation (SE) concludes that the safe shutdown capability at Peach Bottom, as described in the PBAPS Fire Protection Program, with approved exemptions, satisfies the requirements of Section III.G and III.L of Appendix R to 10 CFR Part 50.

Section 2.6 titled "Manual Operations," of the September 16, 1993, SE states, in part,

Each of the four shutdown methods identified by the licensee in the FPP, (Methods A, B, C, and D), require that manual actions be performed outside of the control room to achieve shutdown following fires in certain fire areas. Table A-4 of the FPP describes the manual operations that may be required and the fire areas that may require manual actions. [* * *] Based on the review conducted as part of Inspection Report 87-30 and the closure of Open Item 87-30-02, the NRC staff finds the manual operations described in the FPP acceptable.

A cross reference between Table A-4 of the PBAPS Units 2 and 3 FPP, Revision 3, titled "Operations that may be Required to be Performed Outside the Control Room," and the operator manual actions identified in the October 5, 2007, Request for Exemption was provided in table format in the May 1, 2008, Response to Request for Additional Information. This information is provided in Table 1 of this exemption titled, "Cross-Reference Between Peach Bottom Fire Protection Program, Revision 3, Table A-4 and Operator Manual Actions." There are a total of 25 operator manual actions listed in the exemption that occur in 11 different fire areas.

Exelon indicated in the May 1, 2008, Response to Request for Additional Information that in several cases, certain individual operator manual actions that were approved in the SE are divided into separate tasks for clarity as part of the exemption request. Also, in several cases, additional tasks are specified. The additional tasks are listed when the tasks are performed in a different room from the main action. Exelon states that this was done to clearly identify the

areas in which the manual actions are performed and are not new actions that did not previously exist.

In the December 11, 2008, Response to Request for Additional Information, the licensee outlined the approach that was taken to evaluate and assess the effectiveness of the operator manual actions included in the request. The cross-reference information provided in Table 1 provides an explanation for where each operator manual action is located and the role of the actions in achieving safe shutdown. The response also contains a discussion and justification for why the operator manual actions are appropriate for maintaining consistency with the intent of Section III.G.2 of Appendix R.

The NRC staff reviewed the licensee's evaluation in support of the subject exemption request for the use of operator manual actions in lieu of the requirements specified in Section III.G.2 of Appendix R, and concluded that given the existing fire protection features in the affected fire zones, Exelon continues to meet the underlying purpose of 10 CFR Part 50, Appendix R, Section III.G.2 for the PBAPS Units 2 and 3 fire areas described in Table 1. The following technical evaluation provides the basis for this conclusion.

3.1 Fire Prevention

Fire areas 2, 6S, 13N, 13S, 26, 38, 54 and 57 all have limited or low combustible fuel loading (equivalent fire severity of less than 45 minutes) and fire areas 4, 50 and 58 have low to moderate combustible fuel loading (equivalent fire severity of less than 105 minutes). Fire area 50 also contains some individual rooms, such as the lube oil rooms, that include high combustible fuel loading (equivalent fire severity of greater than 105 minutes). Areas with moderate or greater fuel loading have adequate detection and suppression systems appropriate for the hazard as described below.

The primary fixed ignition sources in the areas are limited to cables and electrical equipment. It is noted that in all areas where a postulated fire included an electrical cable fire, all exposed cables have fire retardant insulation material and that the use of wood is restricted to fire retardant wood (except for large cribbing).

The NRC staff finds that for all of the areas related to this exemption, the level of fire protection combined with the limited fuel load and minimal ignition sources in the fire areas associated with this exemption results in a low likelihood of a fire occurring and spreading to adjacent fire areas or equipment.

3.2 Detection, Control and Suppression

The NRC staff evaluated the fire detection, control and suppression systems associated with the areas related to this exemption. All fire areas included in this exemption have smoke detection systems installed. Fire areas 4, 13S, 26, 38, 54, 57 and 58 have full-area smoke detection coverage. Fire area 2 is provided with smoke or heat detection in most rooms with the exception of some of the radwaste pump and tank rooms that are locked high radiation areas. Fire areas 6S and 13N have smoke detection coverage on each elevation except the refueling floor, where there are no cables associated with safe shutdown. Fire area 50 has smoke and/or heat detection systems installed in certain individual rooms within the turbine building to address specific fire hazards.

Fire areas 2, 4, 38, 57 and 58 also have full-area automatic fire suppression systems installed to mitigate any specific or elevated fire hazards in those areas. An example of a specific or elevated fire hazard would be the cable insulation, lube oil, charcoal filters or trash/paper noted as being postulated fires in fire area 2. These fire hazards are mitigated by the installation of carbon dioxide systems in each High Pressure Coolant Injection pump room, pre-action sprinklers over the motor generator set lube oil pumps, wet pipe sprinklers in the radwaste trash area and water spray for the charcoal filters that are part of the standby gas treatment system. Fire Area 57 is equipped with a pre-action sprinkler system to protect the corridor that passes between the 4kV bus rooms and the radwaste building.

Fire area 50 has fire detection and local automatic fire suppression systems installed in specific areas to suppress fires that may occur at the specific hazard source or to protect access through the area. For example, the licensee noted in the December 11, 2008, Response to Request for Additional Information, that some high combustible fuel load areas, such as the lube oil, moisture separator, feed pump rooms, turbine bearings and the common hatch area, are located in fire area 50 and that these spaces were equipped with wet-pipe sprinkler systems. The licensee also noted that the hydrogen seal skid on each unit is equipped with an automatic deluge system and that a pre-action sprinkler system is installed over the 13kV switchgear cabinets in fire area 50.

The NRC staff finds that for the areas described in the request for exemption, the fire detection, control and

suppression systems are adequate to mitigate any specific or elevated fire hazards in those areas.

3.3 Preservation of Safe Shutdown Capability

The NRC staff has evaluated the feasibility review provided by the licensee in the December 11, 2008, Response to Request for Additional Information. The feasibility review documents that procedures are in place, in the form of Transient Response Implementing Plan procedures, to ensure that clear and accessible instructions on how to perform the manual actions are available to the operators. Several potential environmental concerns are also evaluated, such as radiation levels, temperature/humidity conditions and the ventilation configuration and fire effects that the operators may encounter during certain emergency scenarios. The licensee's feasibility review concluded that the operator manual actions were feasible because the operators performing the manual actions would not be exposed to adverse or untenable conditions during any particular operator manual action procedure or during the time to perform the procedure.

The NRC staff reviewed the required operator manual action completion time limits versus the time before the action becomes critical to safely shutting down the unit as presented in the feasibility analyses. In one case the action must be completed within 30 minutes. This action is identified in Table 1 as 30S546 and requires an operator to travel from the control room to the cable spreading room and perform the action of operating a key switch. The combined time to complete the travel and specified action requires a total of 5 minutes. Given the low complexity of this action the NRC staff finds that this action is feasible. In addition, the fire areas described in this exemption are separated from adjacent fire areas by fire-rated barriers or water curtains to provide a level of compartmentalization between the fire areas and/or buildings. This compartmentalization helps to ensure that fires will not spread to adjacent fire areas and that any fire damage will be limited to the fire area of origin. The NRC staff finds that there is a sufficient amount of time available to complete the proposed operator manual actions specified in Table 1 of this exemption.

3.4 Evaluation

As stated in 10 CFR Part 50, Appendix R, Section II:

The fire protection program shall extend the concept of defense-in-depth to fire protection with the following objectives:

1. To prevent fires from starting,
2. To detect rapidly, control, and extinguish promptly those fires that do occur, and
3. To provide protection for structures, systems, and components important to safety so that a fire that is not promptly extinguished by the fire suppression activities will not prevent the safe shutdown of the plant.

The NRC staff has evaluated the elements of defense-in-depth used for fire protection at PBAPS, applicable to the fire zones under review. Based upon consideration of the limited fire ignition sources and fire hazards in the affected areas, and the existing fire protection measures at PBAPS, the NRC staff concludes that objective one of defense-in-depth is adequately met.

Based on the evaluation of fire detection and suppression systems provided in the affected fire zones, the NRC staff determined that any postulated fire is expected to be promptly detected by the available automatic fire detection systems in the associated fire areas. The available fire detection and suppression equipment in these fire areas ensure that a postulated fire will not be left unchallenged. In addition, all fire areas are separated from adjacent fire areas by fire-rated barriers or water curtains to provide a level of compartmentalization between the fire areas and/or buildings. This compartmentalization helps to ensure that fires will not spread to adjacent fire areas and that any fire damage will be limited to the fire area of origin. In addition, when fires are contained in the fire area of origin, the licensee has demonstrated that the manual actions are feasible. Therefore, the NRC staff concludes that objectives 2 and 3 of defense-in-depth are adequately met.

Therefore, the NRC staff concludes that the requested exemption to use operator manual actions in lieu of the requirements of 10 CFR Part 50, Appendix R, Section III.G.2 is consistent with the defense-in-depth methodology necessary at nuclear power plants and will not impact PBAPS post-fire safe-shutdown capability.

3.5 Authorized by Law

This exemption would allow PBAPS the use of operator manual actions in lieu of meeting the requirements specified in 10 CFR Part 50, Appendix R, Section III.G.2. As stated above, 10 CFR 50.12 allows the NRC to grant exemptions from the requirements of 10 CFR Part 50. The NRC staff has determined that granting of the

licensee's proposed exemption will not result in a violation of the Atomic Energy Act of 1954, as amended, or the Commission's regulations because special circumstances exist that warrant the use of the operator manual actions to achieve safe shutdown. Therefore, the exemption is authorized by law.

3.6 No Undue Risk to Public Health and Safety

The underlying purpose of 10 CFR part 50, Appendix R, Section III.G.2 is to ensure that one of the redundant trains necessary to achieve and maintain hot shutdown conditions remains free of fire damage in the event of a fire. Based on the existing fire barriers, fire detectors, automatic and manual fire suppression equipment, fire protection requirements, and the absence of significant combustible loads and ignition sources in the fire areas associated with this exemption, the NRC staff has concluded that application of 10 CFR part 50, Appendix R, Section III.G.2 for these fire areas is not necessary to achieve the underlying purpose of this regulation.

The NRC staff has determined that the exemption to allow PBAPS the use of operator manual actions in lieu of the requirements specified in 10 CFR part 50, Appendix R, Section III.G.2 does not increase the probability or consequences of previously evaluated accidents. This determination is based on the NRC staff finding that the operator manual actions are not the sole form of protection relied upon due to the other fire protection features in place and the manual actions are considered feasible and provide safe shutdown capability following a fire. The combination of the operator manual actions, in conjunction with all of the measures and systems discussed above, results in an adequate level of protection. No new accident initiators are created by allowing use of operator manual actions in the fire areas identified in the exemption and the probability of postulated accidents is not increased. Similarly, the consequences of postulated accidents are not increased. Therefore, there is no undue risk (since risk is probability multiplied by consequences) to public health and safety.

3.7 Consistent With Common Defense and Security

The proposed exemption would allow PBAPS the use of specific operator manual actions in lieu of meeting the requirements specified in 10 CFR part 50, Appendix R, Section III.G.2. This change, to the operation of the plant, has no relation to security issues nor does it diminish the level of safety from

what was intended by the requirements contained in Section III.G.2. Therefore, the common defense and security is not impacted by this exemption.

3.8 Special Circumstances

One of the special circumstances described in 10 CFR 50.12(a)(2)(ii) is that the application of the regulation is not necessary to achieve the underlying purpose of the rule. The underlying purpose of 10 CFR Part 50, Appendix R, Section III.G.2 is to ensure that one of the redundant trains necessary to achieve and maintain hot shutdown conditions remains free of fire damage in the event of a fire. For the fire areas specified in Table 1 of this exemption, the NRC staff finds that the operator manual actions are feasible and can be reliably performed and the existing configuration described herein will ensure that a redundant train necessary to achieve and maintain safe shutdown of the plant will remain free of fire damage in the event of a fire in these fire zones. Since the underlying purpose of 10 CFR part 50, Appendix R, Section III.G is achieved, the special circumstances required by 10 CFR 50.12(a)(2)(ii) for the granting of an exemption from 10 CFR part 50, Appendix R, Section III.G.2 exist.

4.0 Conclusion

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12(a), the exemption is authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security. Also, special circumstances are present such that application of the regulation in these particular circumstances is not necessary to achieve the underlying purpose of the rule. Therefore, the Commission hereby grants Exelon an exemption from the requirements of Section III.G.2 of Appendix R of 10 CFR Part 50, to PBAPS Units 2 and 3 for the 25 operator manual actions specified in Table 1.

Pursuant to 10 CFR 51.32, the Commission has determined that the granting of this exemption will not have a significant effect on the quality of the human environment (74 FR 5191).

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 30th day of January 2009.

For the Nuclear Regulatory Commission
Joseph G. Giitter,
Director, Division of Operating Reactor
Licensing, Office of Nuclear Reactor
Regulation.

TABLE 1—CROSS-REFERENCE BETWEEN PEACH BOTTOM FIRE PROTECTION PROGRAM, REVISION 3, TABLE A-4 AND OPERATOR MANUAL ACTIONS

Operator manual action number	Table A-4 cross reference	Purpose	Fire affected component information	Initiating fire area (FA)	Actions	Action locations	Notes
1	2AP35	Defeat 2A residual heat removal (RHR) pump (2AP35) trip signal generated by fire damage to Unit 3 RHR Logic.	External wiring (located in the initiating fire areas) to the Unit 3 RHR logic in panel 30C33 (located in Room (Rm) 302, FA 25).	2, 57	Install U3 plug-in test switch 3-10A-J1B at Panel 30C33.	Cable Spreading Room, Rm 302, FA 25.	Note 1 Note 2
2	2BS456 ..	Transfer 125 VDC Battery Charger 2BD003 from normal source (E224-T-B) to its alternate source (E234-T-B) due to fire damage.	Loss of power (due to fire damage in initiating fire areas) to 125 VDC Battery Charger 2BD003 (located in Rm 226, FA 36).	2, 4, 6S, 57.	1. Verify Breaker 52-6011 at E234-T-B is closed prior to operating switch 2BS456. 2. Operate switch 2BS456 to restore power for Battery Charger 2BD003 from an alternate power source.	1. E-23 Bus Room, Rm 263, FA 35. 2. E-42 Bus Room, Rm 226, FA 36.	Note 1 Note 4
3	2DS456 ..	Transfer 125 VDC Battery Charger 2DD003 from normal source (E424-W-A) to its alternate source (E234-T-B) due to fire damage.	Loss of power (due to fire damage in initiating fire areas) to 125 VDC Battery Charger 2DD003 (located in Rm 226, FA 36).	2, 6S, 38, 57.	1. Verify Breaker 52-6022 at E234-T-B is closed prior to operating switch 2DS456. 2. Operate switch 2DS456 to restore power for Battery Charger 2DD003 from an alternate power source.	1. E-23 Bus Room, Rm 263, FA 35. 2. E-42 Bus Room, Rm 226, FA 36.	Note 1 Note 4 Note 5
4	3BP35	Defeat 3B RHR pump (3BP35) trip signal generated by fire damage to Unit 2 RHR logic.	External wiring (located in initiating fire areas) to the Unit 2 RHR logic in panel 20C32 (located in Rm 302, FA 25).	2, 57	Install U2 plug-in test switch into test jack 2-10A-J1A at panel 20C32.	Cable Spreading Room, Rm 302, FA 25.	Note 1 Note 2
5	30S546 ..	Transfer instrument power supplies from normal source (panel 30Y050) to alternate power source (panel 20Y033) due to fire damage.	Loss of power (due to fire in initiating fire area) to instrument power supply panel 30Y050 (located in Rm 302, FA 25).	13N	Operate key switch 30S546 to restore power to instrument panel from 20Y033.	Cable Spreading Room, Rm 302, FA 25.	
6	3AS456 ..	Transfer 125 VDC Battery Charger 3AD003 from its normal power source (E134-T-B) to its alternate power source (E124-T-B) due to fire damage.	Loss of power (due to fire damage in initiating fire area) to 125 VDC Battery Charger 3AD003 (located in Rm 261, FA 32).	13N	1. Verify Breaker 52-5934 at E124-T-B is closed prior to operating switch 3AS456. 2. Operate switch 3AS456 to restore power for Battery Charger 3AD003 from an alternate power source.	1. E-12 Bus Room, Rm 227, FA 39. 2. E-33 Bus Room, Rm 261, FA 32.	Note 4

TABLE 1—CROSS-REFERENCE BETWEEN PEACH BOTTOM FIRE PROTECTION PROGRAM, REVISION 3, TABLE A-4 AND OPERATOR MANUAL ACTIONS—Continued

Operator manual action number	Table A-4 cross reference	Purpose	Fire affected component information	Initiating fire area (FA)	Actions	Action locations	Notes
7	3CS456 ..	Transfer 125 VDC Battery Charger 3CD003 from its normal power source (E334-R-B) to its alternate power source (E124-T-B) due to fire damage.	Loss of power (due to fire damage in initiating fire areas) to 125 VDC Battery Charger 3CD003 (located in Rm 261, FA 32).	13N, 13S, 26, 57, 58.	1. Verify Breaker 52-5911 at E124-T-B is closed prior to operating switch 3CS456. 2. Operate switch 3CS456 to restore power for Battery Charger 3CD003 from an alternate power source.	1. E-12 Bus Room, Rm 227, FA 39. 2. E-33 Bus Room, Rm 261, FA 32.	Note 1 Note 3 Note 4 Note 6
8	MO3-10-89A.	Manually operate MO-3-10-089A if electrical operating capability is lost due to fire damage.	Loss of power (due to fire damage in the initiating fire area) to MO-3-10-089A, 3A RHR Heat Exchanger High Pressure Service Water Heat Outlet (located in Rm 156, FA 2).	13N	1. Open breaker 52-3623 at E134-W-A. 2. Manually open MO-3-10-089A.	1. U3 RBCCW Room, Rm 162, FA 2. 2. U3 RHR Pump Room, Rm 156, FA 2.	
9	MO-2486	Manually operate valve MO-2486 upon loss of electrical operating capability due to fire damage.	Loss of power (due to fire damage in the initiating fire areas) to MO-2486, High Pressure Service Water Normal Discharge Valve (located in Rm 815, FA 54).	50, 54	1. Open breaker 52-5442 at E234-D-A. 2. Manually open MO-2486.	1. E2 Diesel Generator Room, Rm 817, FA 45. 2. Cardox Room, Rm 815, FA 54.	Note 7
10	MO-2486	Locally operate MO-2486 from the MCC if the fire has caused loss of remote operating capability.	Loss of power (due to fire damage in the initiating fire areas) to MO-2486, High Pressure Service Water Normal Discharge Valve (located in Rm 815, FA 54).	4, 38, 57	1. Open breaker 52-5442 at E234-D-A. 2. Open valve using contactor at MCC.	1 and 2. E2 Diesel Generator Room, Rm 817, FA 45.	Note 1
11	MO-3486	Manually operate valve MO-3486 upon loss of electrical operating capability due to fire damage.	Loss of power (due to fire damage in the initiating fire areas) to MO-3486, High Pressure Service Water Normal Discharge Valve (located in Rm 815, FA 54).	50, 54	1. Open breaker 52-5441 at E234-D-A. 2. Manually open MO-3486.	1. E2 Diesel Generator Room, Rm 817, FA 45. 2. Cardox Room, Rm 815, FA 54.	Note 7

TABLE 1—CROSS-REFERENCE BETWEEN PEACH BOTTOM FIRE PROTECTION PROGRAM, REVISION 3, TABLE A-4 AND OPERATOR MANUAL ACTIONS—Continued

Operator manual action number	Table A-4 cross reference	Purpose	Fire affected component information	Initiating fire area (FA)	Actions	Action locations	Notes
12	MO-3486	Locally operate MO-3486 from the motor control center (MCC) if the fire has caused loss of remote operating capability.	Loss of power (due to fire damage in the initiating fire areas) to MO-3486, High Pressure Service Water Normal Discharge Valve (located in Rm 815, FA 54).	57, 58	1. Open breaker 52-5441 at E234-D-A. 2. Open valve using contactor at MCC.	1 and 2. E2 Diesel Generator Room, Rm 817, FA 45.	Note 1 Note 3
13	MO2-10-034A.	Manually open valve MO-2-10-034A if electrical operating capability is lost due to fire damage.	Loss of power (due to fire damage in the initiating fire areas) to MO-2-10-034A, RHR Loop A Full Flow Test Valve (located in Rm 1, FA 5).	4, 57	1. Open breaker 52-3832 at E324-R-B. 2. Manually open MO-2-10-034A.	1. U2 Reactor Bldg, Rm 212, FA 6S. 2. U2 Torus Room, Rm 1, FA 5.	Note 1
14	MO2-10-039A.	Manually open valve MO-2-10-039A if electrical operating capability is lost due to fire damage.	Loss of power (due to fire damage in the initiating fire areas) to MO-2-10-039A, RHR Loop A Torus Header Valve (located in Rm 1, FA 5).	4, 57	1. Open breaker 52-3831 at E324-R-B. 2. Manually open MO-2-10-039A.	1. U2 Reactor Bldg, Rm 212, FA 6S. 2. U2 Torus Room, Rm 1, FA 5.	Note 1
15	MO3-10-034A.	Manually open valve MO-3-10-034A if electrical operating capability is lost due to fire damage.	Loss of power (due to fire damage in the initiating fire areas) to MO-3-10-034A, RHR Loop A Full Flow Test Valve (located in Rm 37, FA 12).	13N, 26 ..	1. Open breaker 52-3832 at E334-R-B. 2. Manually open MO-3-10-034A.	1. U3 Reactor Bldg, Rm 257, FA 13S. 2. U3 Torus Room, Rm 37, FA 12.	
16	MO3-10-039A.	Manually open valve MO-3-10-039A if electrical operating capability is lost due to fire damage.	Loss of power (due to fire damage in the initiating fire areas) to MO-3-10-039A, RHR Loop A Torus Header Valve (located in Rm 37, FA 12).	13N, 26 ..	1. Open breaker 52-3831 at E334-R-B. 2. Manually open MO-3-10-039A.	1. U3 Reactor Bldg, Rm 257, FA 13S. 2. U3 Torus Room, Rm 37, FA 12.	
17	MO2-10-034B.	Manually open valve MO-2-10-034B if electrical operating capability is lost due to fire damage.	Loss of power (due to fire damage in the initiating fire area) to MO-2-10-034B, RHR Loop B Full Flow Test Valve (located in Rm 1, FA 5).	6S	1. Open breaker 52-3933 at E424-W-A. 2. Manually open MO-2-10-034B.	1. U2 RBCCW Room, Rm 105, FA 2. 2. U2 Torus Room, Rm 1, FA 5.	

TABLE 1—CROSS-REFERENCE BETWEEN PEACH BOTTOM FIRE PROTECTION PROGRAM, REVISION 3, TABLE A-4 AND OPERATOR MANUAL ACTIONS—Continued

Operator manual action number	Table A-4 cross reference	Purpose	Fire affected component information	Initiating fire area (FA)	Actions	Action locations	Notes
18	MO2-10-039B.	Manually open valve MO-2-10-039B if electrical operating capability is lost due to fire damage.	Loss of power (due to fire damage in the initiating fire area) to MO-2-10-039B, RHR Loop B Torus Header Valve, (located in Rm 1, FA 5).	6S	1. Open breaker 52-3942 at E424-W-A.	1. U2 RBCCW Room, Rm 105, FA 2.	
19	MO2-10-89D.	Manually open valve MO-2-10-089D if electrical operating capability is lost due to fire damage.	Loss of power (due to fire damage in the initiating fire area) to MO-2-10-089D, 2D RHR Heat Exchanger High Pressure Service Water Outlet Valve (located in Rm 104, FA 2).	6S	1. Open breaker 52-3931 at E424-W-A.	1. U2 RBCCW Room, Rm 105, FA 2.	
20	MO3-10-034B.	Manually open valve MO-3-10-034B if electrical operating capability is lost due to fire damage.	Loss of power (due to fire damage in the initiating fire areas) to MO-3-10-034B, RHR Loop B Full Flow Test Valve (located in Rm 37, FA 12).	2, 57, 58	1. Open breaker 52-3933 at E434-R-B.	1. U3 Reactor Bldg, Rm 250, FA 13N.	Note 1 Note 3
21	MO3-10-039B.	Manually open valve MO-3-10-039B if electrical operating capability is lost due to fire damage.	Loss of power (due to fire damage in the initiating fire areas) to MO-3-10-039B, RHR Loop B Torus Header Valve (located in Rm 37, FA 12).	2, 57, 58	1. Open breaker 52-3942 at E434-R-B.	1. U3 Reactor Bldg, Rm 250, FA 13N.	Note 1 Note 3
22	MO3-10-89D.	Manually operate MO-3-10-089D if electrical operating capability is lost due to fire damage.	Loss of power (due to fire damage in the initiating fire area) to MO-3-10-089D, 3D RHR Heat Exchanger High Pressure Service Water Outlet Valve (located in Rm 159, FA 10).	58	1. Open breaker 52-3931 at E434-R-B.	1. U3 Reactor Bldg, Rm 250, FA 13N.	Note 3
23	MO2-10-25B.	Manually operate MO-2-10-025B if electrical operating capability is lost due to fire damage.	Loss of power (due to fire damage in the initiating fire area) to MO-2-10-025B, RHR Loop B In-board Discharge Valve (located in Rm 204, FA 6N).	6S	1. Open breaker 52-25B02 at N210025B, LPCI Swing Bus B.	1. U2 Reactor Bldg, Rm 205, FA 6N.	
					2. Manually open MO-2-10-025B.	2. U2 Reactor Bldg, Rm 204, FA 6N.	

TABLE 1—CROSS-REFERENCE BETWEEN PEACH BOTTOM FIRE PROTECTION PROGRAM, REVISION 3, TABLE A-4 AND OPERATOR MANUAL ACTIONS—Continued

Operator manual action number	Table A-4 cross reference	Purpose	Fire affected component information	Initiating fire area (FA)	Actions	Action locations	Notes
24	MO3-10-25A.	Manually operate MO-3-10-025A if electrical operating capability is lost due to fire damage.	Loss of power (due to fire damage in the initiating fire area) to MO-3-10-25A RHR Loop A In-board Discharge Valve (located in Rm 248, FA 13S).	13N	1. Open breaker 52-25A02 at N310025A, LPCI Swing Bus A. 2. Manually open valve MO-3-10-025A.	1. U3 Reactor Bldg, Rm 257, FA 13S. 2. U3 Reactor Bldg, Rm 248, FA 13S.	
25	MO3-10-25B.	Manually operate MO-3-10-025B if electrical operating capability is lost due to fire damage.	Loss of power (due to fire damage in the initiating fire area) to MO-3-10-025B, RHR Loop B In-board Discharge Valve (located in Rm 249, FA 13N).	13S	1. Open breaker 52-25B02 at N310025B LPCI Swing Bus B. 2. Open MO-3-10-025B from MCC Contactor.	1 and 2. U3 Reactor Bldg, Rm 250, FA 13N.	

Table Notes:

Note 1: Fire Area 57 was originally part of Fire Area 2 and was subsequently made a separate Fire Area.

Note 2: This action has been slightly modified from that described in the original submittal to make the action simpler to perform, but the action location, timing and outcome are the same. The original action was to reach inside the logic cabinet and physically manipulate a relay. A plug-in switch was fabricated so the operator would not have to handle an energized relay. The outcome is the same (the relay is actuated).

Note 3: Fire Area 58 was originally part of Fire Area 2 and was subsequently made a separate Fire Area.

Note 4: When the station procedures were developed, an initial step of verification of the breaker position (closed) of the alternate power source was added. Appendix R permits the assumption that equipment that is not fire affected will be in its expected position. So verification of this breaker position is not required for Appendix R compliance. Operations determined that they wanted to add a step to verify the position of the breaker as a precaution. This extra step was added to this Table since the action is performed in a different fire area than the steps associated with operating the switch. It is important to show that all actions taken by the operators are not in the same fire area where the fire is postulated.

Note 5: Fire Area 2 was omitted from the table in Revision 4. Fire Area 2 is listed in the revision 0, 1 and 2 tables. Fire Area 2 (which subsequently was split into Fire Area 2, 57 and 58) fire guide has always contained the attachment to transfer 125 VDC battery charger 2DD003 from the normal to the backup source.

Note 6: Fire Area 4 no longer credits use of this manual action.

Note 7: The action to manually open MO-2486 and MO-3486 (physically open the valve at the valve itself) is performed in the same fire area as the initiating fire area. There is 150 minutes (2.5 hours) between the start of the event and when the valve is to be opened. A fire in the Cardox Room will be extinguished and the smoke vented from the area long before the action needs to be performed. The operators will not have any delay or need Self Contained Breathing Apparatus to perform this action.

General Note: Table A-4 Revision 4 was a summary of information that was in the Peach Bottom Cable/Raceway analysis. This program deleted a "zero" that padded many component numbers, and some hyphens. The component number provided in the above table uses the correct nomenclature that is also used in the post-fire shutdown fire guides, safe shutdown calculations and plant labels.

[FR Doc. E9-2615 Filed 2-6-09; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[NRC-2009-0049]

Final Memorandum of Understanding Between the U.S. Nuclear Regulatory Commission and the State of Texas

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice.

FOR FURTHER INFORMATION CONTACT: Robert Stransky, Senior Emergency Response Coordinator, Operations Branch, Division of Preparedness and

Response, Office of Nuclear Security and Incident Response, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Telephone: (301) 415-6411; fax number: (301) 415-6382; e-mail: *Robert.Stransky@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Introduction

This notice is to advise the public of the issuance of a Final Memorandum of Understanding (MOU) between the U.S. Nuclear Regulatory Commission (NRC) and the State of Texas. The MOU provides the basis for mutually agreeable procedures whereby the State of Texas may utilize the NRC Emergency Response Data System (ERDS) to receive data during an emergency at a commercial nuclear

power plant whose 10-mile Emergency Planning Zone lies within the State of Texas.

II. Effective Date

This MOU is effective January 23, 2009.

III. Further Information

Documents related to this action, including the application for amendment and supporting documentation, are available electronically at the NRC's Electronic Reading Room at <http://www.nrc.gov/reading-rm/adams.html>. From this site, you can access the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public

documents. The ADAMS accession number for the document related to this notice is: Memorandum of Understanding Between the NRC and the State of Texas ML 090230637. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1-800-397-4209, 301-415-4737 or by e-mail to pdr@nrc.gov.

These documents may also be viewed electronically on the public computers located at the NRC's Public Document Room (PDR), O 1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee.

Dated at Rockville, Maryland this 2nd day of February 2009.

For the Nuclear Regulatory Commission.

William A. Gott,

Chief, Operations Branch, Division of Preparedness and Response, Office of Nuclear Security and Incident Response.

Memorandum of Understanding Pertaining To the Emergency Response Data System Between The U.S. Nuclear Regulatory Commission And The State of Texas

I. Authority

The U.S. Nuclear Regulatory Commission (NRC) and the State of Texas enter into this Memorandum of Understanding (MOU) under the authority of Section 274i of the Atomic Energy Act of 1954, as amended.

The State of Texas recognizes the Federal Government, primarily the NRC, as having the exclusive authority and responsibility to regulate the radiological and national security aspects of the construction and operation of nuclear production or utilization facilities, except for certain authority over air emissions granted to States by the Clean Air Act. Nothing in this MOU is intended to restrict or expand the scope of regulatory authority of either the NRC or the State of Texas.

II. Background

A. The Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974, as amended, authorize the NRC to license and regulate, among other activities, the manufacture, construction, and operation of utilization facilities (nuclear power plants) in order to assure common defense and security and to protect the public health and safety. Under these statutes, the NRC is the agency responsible for regulating nuclear power plant safety.

B. NRC believes that its mission to protect public health and safety can be served by a policy of cooperation with State governments and has formally adopted a policy statement on "Cooperation with States at Commercial Nuclear Power Plants and Other Nuclear Production or Utilization Facilities" (54 FR 7530, February 25, 1992). The policy statement provides that NRC will consider State proposals to enter into instruments of cooperation for certain programs when these programs have provisions to ensure close cooperation with NRC. This MOU is intended to be consistent with, and implement the provisions of, the NRC's policy statement.

C. NRC fulfills its statutory mandate to regulate nuclear power plant safety by, among other things, responding to emergencies at licensee facilities and monitoring the status and adequacy of licensees' responses to emergency situations.

D. The State of Texas fulfills its statutory mandate to provide for preparedness, response, mitigation, and recovery in the event of an accident at a nuclear power plant through its statutes located in Chapter 418, Texas Disaster Act of 1975, Texas Government Code.

III. Scope

A. This MOU defines the way in which NRC and the State of Texas intend to cooperate in planning and maintaining the capability to transfer reactor plant data via the Emergency Response Data System (ERDS) during emergencies at commercial nuclear power plants in the State of Texas that have implemented an ERDS interface, and for which any portion of the plant's 10-mile Emergency Planning Zone (EPZ) lies within the State of Texas.

B. It is understood by the NRC and the State of Texas that ERDS data will only be transmitted to the State of Texas during emergencies classified at the Alert Level or above, during scheduled tests, or during exercises when available.

C. Nothing in this MOU is intended to restrict or expand the statutory authority of the NRC, the State of Texas, or to affect or otherwise alter the terms of any agreement in effect under the authority of Section 274b of the Atomic Energy Act of 1954, as amended; nor is anything in this MOU intended to restrict or expand the authority of the State of Texas on matters not within the scope of this MOU.

D. Nothing in this MOU confers upon the State of Texas the authority to (1) interpret or modify NRC regulations and NRC requirements imposed on the

licensee; (2) take enforcement actions; (3) issue confirmatory letters; (4) amend, modify, or revoke a license issued by the NRC; or (5) direct or recommend nuclear power plant employees to take, or not take, any action. Authority for all such actions is reserved exclusively to the NRC.

E. This MOU does not confer any binding obligation or right of action on either party. This MOU does not obligate any funds and is subject to the availability of appropriated funds.

IV. NRC's General Responsibilities

Under this MOU, the NRC will maintain ERDS. ERDS is a system designed to receive, store, and retransmit data from in-plant data systems at nuclear power plants during emergencies. The NRC will provide the State of Texas, up to 10 digital certificates for use by State designated personnel in accessing ERDS data during emergencies at nuclear power plants which have implemented an ERDS interface, and for which any portion of the plant's 10-mile EPZ lies within the of State of Texas. The NRC reserves the right to revoke digital certificates at any time.

V. State of Texas' General Responsibilities

A. The State of Texas, through its lead radiological agency, will, in cooperation with the NRC, establish a capability to receive ERDS data. To this end, the State of Texas will provide the necessary computer hardware and commercially licensed software required for ERDS data transfer to users.

B. The State of Texas will provide the NRC with an initial, and periodically updated, list of designated persons serving as holders of ERDS digital certificates.

C. The State of Texas will use ERDS only to access data, at the Alert level or higher, from nuclear power plants for which all or a portion of the 10-mile EPZ falls within its State boundary.

D. For the purpose of minimizing the impact on plant operators, the State of Texas will seek clarification of ERDS data through the NRC.

VI. Implementation

A. The State of Texas and the NRC agree to work in concert to assure that the following communications and information exchange protocol regarding ERDS are followed:

a. The State of Texas and the NRC agree in good faith to make available to each other information within the intent and scope of this MOU.

b. NRC and the State of Texas agree to meet as necessary to exchange

information on matters of common concern pertinent to this MOU. Unless otherwise agreed, such meetings will be held in the NRC Headquarters Operations Center. The affected utilities will be kept informed of pertinent information covered by this MOU.

c. To preclude the premature release of sensitive information, NRC will protect sensitive information to the extent permitted by the Freedom of Information Act, 5 U.S.C. 552, Title 10 of the Code of Federal Regulations, Part 2.790, and all other applicable authority. The State of Texas will protect sensitive information to the extent of the Texas Government Code, Chapter 552, Public Information.

d. NRC will conduct periodic tests of licensee ERDS data links. A copy of the test schedule will be provided to the Texas Department of State Health Services by the NRC. The Texas Department of State Health Services may test its ability to access ERDS data during these scheduled tests, or may schedule independent tests of the State link with the NRC.

e. NRC will provide access to ERDS for emergency exercises with reactor units capable of transmitting exercise data to ERDS. For exercises in which the NRC is not participating, the Texas Department of State Health Services will coordinate with the NRC in advance to ensure ERDS availability. NRC reserves the right to preempt ERDS use for any exercise in progress in the event of an actual event at any licensed nuclear power plant.

VII. Contacts

A. The principal senior management contacts for this MOU will be the Director, Division of Preparedness and Response, Office of Nuclear Security and Incident Response for the NRC, and the Director, Client Services Contracting Unit, Texas Department of State Health Services, for the State of Texas. These individuals may designate appropriate staff representatives for the purpose of administering this MOU.

B. Identification of these contacts is not intended to restrict communication between NRC and Texas Department of State Health Services staff members on technical and other day-to-day activities.

VIII. Resolution of Disagreements

A. If disagreements arise about matters within the scope of this MOU, NRC and the State of Texas will work together to resolve these differences.

B. Differences between the State of Texas and NRC staff over issues arising out of this MOU will, if they cannot be resolved in accordance with Section

VIII.A, be resolved by the Director of the NRC Division of Preparedness and Response, Office of Nuclear Security and Incident Response.

C. Differences which cannot be resolved in accordance with Sections VIII.A and VIII.B will be reviewed and resolved by the NRC's Director, Office of Nuclear Security and Incident Response.

D. The NRC's General Counsel has the final authority to provide legal interpretation of the Commission's regulations.

IX. Effective Date

This MOU will take effect after it has been signed by both parties.

X. Duration

A formal review, not less than 1 year after the effective date, will be performed by the NRC to evaluate implementation of the MOU and resolve any problems identified. This MOU will be subject to periodic reviews and may be amended or modified upon written agreement by both parties, and may be terminated upon 30 days written notice by either party.

XI. Separability

If any provision(s) of this MOU, or the application of any provision(s) to any person or circumstances is held invalid, the remainder of this MOU and the application of such provisions to other persons or circumstances will not be affected.

For the U.S. Nuclear Regulatory Commission.

Dated: January 23, 2009.

R. William Borchardt,
*Executive Director for Operations, U.S.
Nuclear Regulatory Commission.*

For the State of Texas.

Dated: January 6, 2009.

Bob Burnette,
*Director, Client Services Contracting Unit,
Department of State Health Services.*

[FR Doc. E9-2617 Filed 2-6-09; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS) Meeting of the Subcommittee on Digital Instrumentation and Control Systems; Notice of Meeting

The ACRS Subcommittee on Digital Instrumentation and Control Systems will hold a meeting on February 26-27, 2009, in Room T-2B3, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland.

A portion of this meeting may be closed to discuss and protect information classified as National Security Information as well as Safeguards Information pursuant to 5 U.S.C. 552b(c)(1) and (3).

The agenda for the subject meeting shall be as follows:

Thursday, February 26, 2009—8:30 a.m., Until the Conclusion of Business; Friday, February 27, 2009—8:30 a.m., Until the Conclusion of Business

The Subcommittee will review Draft ISG-5 "Highly-Integrated Control Rooms—Human Factors Issues" on manual operator actions, Draft ISG-6 "Licensing Process" and Draft RG 5.71 "Cyber Security Programs for Nuclear Facilities." In addition, the Subcommittee will discuss Draft NUREG/CR-xxxx, "Diversity Strategies for Nuclear Power Plant Instrumentation and Control Systems," and operating experience insights on Common-Cause Failures and Benefits and Risks Associated with expanding Automated Diverse Actuation System Functions, and other related matters. The Subcommittee will hear presentations by and hold discussions with representatives of the NRC staff, Nuclear Energy Institute, and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official, Ms. Christina Antonescu (telephone 301/415-6792) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Electronic recordings will be permitted. Detail procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 6, 2008, (73 FR 58268-58269)

Further information regarding this meeting can be obtained by contacting the Designated Federal Official between 7:15 a.m. and 5 p.m. (ET). Persons planning to attend this meeting are urged to contact the above named individual at least two working days prior to the meeting to be advised of any potential changes to the agenda.

Dated: February 3, 2009.

Antonio Dias,
*Chief, Reactor Safety Branch B, Advisory
Committee on Reactor Safeguards.*

[FR Doc. E9-2622 Filed 2-6-09; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS) Subcommittee Meeting on Thermal-Hydraulic Phenomena; Notice of Meeting

The ACRS Subcommittee on Thermal-Hydraulic Phenomena will hold a meeting on February 27, 2009, in Room T-2B3, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland.

A portion of the meeting may be closed to discuss and protect information that is proprietary to General Electric—Hitachi, and its contractors pursuant to 5 U.S.C 552b(c)(4).

The agenda for the subject meeting shall be as follows:

Friday, February 27, 2009—8:30 a.m. Until the Conclusion of Business

The Subcommittee will discuss the applicability of the TRACE code to the ESBWR design. The Subcommittee will hear presentations by and hold discussions with representatives of the NRC staff, consultants to the staff, and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Officer, Mr. David Bessette at 301-415-8065, five days prior to the meeting, if possible, so that appropriate arrangements can be made. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 6, 2008, (73 FR 58268-58269).

Further information regarding this meeting can be obtained by contacting the Designated Federal Officer between 7:45 a.m. and 4:30 p.m. (ET). Persons planning to attend this meeting are urged to contact the above named individual at least two working days prior to the meeting to be advised of any potential changes to the agenda.

Dated: February 3, 2009.

Antonio Dias,

Chief, Reactor Safety Branch B, Advisory Committee on Reactor Safeguards.

[FR Doc. E9-2625 Filed 2-6-09; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[NRC-2009-0013]

Safety Culture Policy Statement Development: Public Meeting and Request for Public Comments

AGENCY: U.S. Nuclear Regulatory Commission (NRC).

ACTION: Notice of Public Meeting and request for comments.

SUMMARY: The NRC is developing an update to its policy statement on safety culture to include the unique aspects of security and to ensure that the policy applies to all licensees and certificate holders. The NRC is conducting a public meeting to solicit public input on topics relating to the development of the policy statement. In addition to announcing the public meeting, the NRC is using this notice to request comments on the topics discussed in this notice. These topics can be found in section D (Topics for Discussion) of the **SUPPLEMENTARY INFORMATION**.

DATES:

Public Meeting Dates: The NRC will take public comments at the public meeting on February 3, 2009.

Comment Dates: Comments are requested by February 11, 2009. Comments received after this date will be considered if it is practical to do so, but the NRC is able to assure consideration only for comments received on or before this date. The NRC will also take public comments on the questions raised in this notice at a public meeting on February 3, 2009. Please refer to the **SUPPLEMENTARY INFORMATION** section for additional information, including the topics and associated questions to which NRC is requesting input.

ADDRESSES: The public meeting will be held on February 3, 2009, in the Commissioners' Hearing Room of the NRC Headquarters building at 11555 Rockville Pike, Rockville, MD 20852, which is across the street from the White Flint Metro stop. The most convenient transportation to the meeting venue is via Metro since there is extremely limited on-street parking. Please take Metro to the White Flint Metro stop on the Red Line. Please allow time to register with building security and to check with the entry guard station for signs for the Safety Culture Policy Statement Public Meeting room as you enter the building. Users unable to travel to the NRC Headquarters may participate by Webinar or teleconference. Please see the meeting notice, which is posted on

the NRC public meeting schedule Web site: <http://www.nrc.gov/public-involve/public-meetings/index.cfm?fuseaction=Search.Detail&MC=20080837&NS=0&CFID=264654&CFTOKEN=94010205>, for instructions on how to register for the workshop.

After the conduct of the public meeting, members of the public are invited and encouraged to submit comments by February 11, 2009, by mail to June Cai, Concerns Resolution Branch, Office of Enforcement, Mail Stop O-4 A15A, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, or by e-mail to june.cai@nrc.gov.

To ensure efficient consideration of your comments, please identify the related topic and specific question numbers with your comments when applicable. When commenting, please exercise caution with regard to site-specific security-related information. Comments will be made available to the public in their entirety. Personal information, such as your name, address, telephone number, e-mail address, etc. will not be removed from your submission.

You can access publicly available documents related to this notice using the following methods:

NRC's Public Document Room (PDR): The public may examine and have copied for a fee, publicly available documents at the NRC's PDR, Public File Area O-1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

NRC's Agencywide Documents Access and Management System (ADAMS): Publicly available documents created or received at the NRC after November 1, 1999, are available electronically at the NRC's Electronic Reading Room at <http://www.nrc.gov/reading-rm/adams.html>. From this site, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR Reference staff at 1-800-397-4209, (301) 415-4737 or by e-mail to pdr.resource@nrc.gov.

FOR FURTHER INFORMATION CONTACT: June Cai, (301) 415-5192, june.cai@nrc.gov of the Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. Public meeting attendees are requested to register with one of the meeting contacts by January 30, 2009. Please let the meeting contacts know if special services, such as for the hearing impaired, are necessary.

SUPPLEMENTARY INFORMATION: A.

Purpose of the Public Meeting: The purpose of this meeting is to solicit the views of interested stakeholders on topics related to safety culture that were provided in the Commission's Staff Requirements Memoranda (SRM)—COMGBJ—08—0001 (ML080560476), "A Commission Policy Statement on Safety Culture," dated February 25, 2008, which are presented in Section D, below. The NRC will consider the input received during the meeting in the development of the draft policy statement(s) addressing safety culture and security culture.

B. Public Meeting Agenda: A meeting notice and detailed agenda is available on the NRC public meeting schedule Web site: <http://www.nrc.gov/public-involve/public-meetings/index.cfm?fuseaction=Search.Detail&MC=20080837&NS=0&CFID=264654&CFTOKEN=94010205>. The meeting notice has information on how to participate via Webinar or teleconference. Concurrent with the meeting, there will be an open house poster session throughout the day to provide additional opportunities for attendees to provide input. The information presented at the open house will also be made available at the Web site listed above, to allow those unable to attend the meeting or attending through the Webinar or teleconference to view the information and have an opportunity to provide their input on the topics addressed at the open house.

C. Background: The NRC recognizes the importance of licensees to establish and maintain a strong safety culture—a work environment where management and employees are dedicated to putting safety first. The Commission previously addressed this topic on January 24, 1989 (54 FR 3424) in "Policy Statement on the Conduct of Nuclear Power Plant Operations" (<http://www.nrc.gov/about-nrc/regulatory/enforcement/54fr3424.pdf>)—the Commission's policy statement on safety culture—where it described expectations for such a safety culture and how it supports the agency's mission to protect public health and safety. Although the policy statement was issued to make clear the Commission's expectation of utility management and licensed operators with respect to the conduct of nuclear power plant operations, the Commission intended for the policy statement to help foster the development and maintenance of a safety culture at every facility licensed by the NRC. In the Policy Statement, safety culture is described as "the necessary full attention to safety matters," and the "personal dedication and accountability

of all individuals engaged in any activity which has a bearing on the safety of nuclear power plants. A strong safety culture is one that has a strong safety-first focus."

The Commission has referenced the International Nuclear Safety Advisory Group's (INSAG) definition of safety culture as follows: "Safety Culture is that assembly of characteristics and attitudes in organizations and individuals which establishes that, as an overriding priority, nuclear safety issues receive the attention warranted by their significance."

On May 14, 1996, the Commission published its policy, "Freedom of Employees in the Nuclear Industry to Raise Safety Concerns without Fear of Retaliation" (61 FR 24336) (<http://www.nrc.gov/about-nrc/regulatory/allegations/scwe-frn-5-14-96.pdf>), which expressed the Commission's expectation that licensees and other employers subject to NRC authority will establish and maintain a safety conscious environment in which employees feel free to raise safety concerns, both to their management and to the NRC, without fear of retaliation. A safety conscious work environment is one facet of a strong safety culture. On August 25, 2005, the NRC issued Regulatory Issue Summary 2005—018 (ML052220239), "Guidance for Establishing and Maintaining a Safety Conscious Work Environment," to provide guidance on maintaining a safety conscious work environment.

In SRM—COMGBJ—08—0001 (ML080560476), "A Commission Policy Statement on Safety Culture," dated February 25, 2008, the Commission directed staff to "expand the Commission's policy of safety culture to address the unique aspects of security and to ensure the resulting policy is applicable to all licensees and certificate holders," and to conduct a "broad review of issues related to safety culture as part of the effort for developing the oversight process and for revising or developing additional Commission Policy Statement(s)."

The Commission directed the staff to complete its evaluation, provide a recommendation to the Commission on how best to update the Commission policy, and provide draft policy statement(s) on safety culture to the Commission for its consideration. In its review, the staff should, at a minimum, evaluate the following key areas:

- (1) Whether safety culture as applied to reactors needs to be strengthened.
- (2) How to increase attention to safety culture in the materials area.
- (3) How stakeholder involvement can most effectively be used to address

safety culture for all NRC and Agreement State licensees and certificate holders, including any unique aspects of security. The staff should, as part of its public stakeholder outreach, reach out to all types of licensees and certificate holders, including power reactors (including new reactors), research and test reactors, fuel facilities, spent fuel shipping and storage cask vendors, and the materials community, including industrial, academic, and medical users. The assessment should also involve outreach activities to Members of Congress, the Agreement States, and other stakeholders.

(4) Whether publishing NRC's expectations for safety culture and for security culture is best accomplished in one safety/security culture statement or in two separate statements, one each for safety and security, while still considering the safety and security interfaces.

A Safety Culture Policy Statement Task Group and Steering Committee have been established to address this direction. The Task Group has been conducting review and analysis of various information and data sources in order to inform and provide the basis for the draft policy statement(s) and recommendations development. Examples of these sources are information from existing agency activities in the safety culture and security culture area and information and insights from relevant industry activities, international activities and organizations, and the organizational research literature.

The Task Group has also been conducting outreach activities with stakeholders to raise awareness of safety culture and to provide information about this activity. The Task Group is holding the public meeting on February 3, 2009, to provide opportunity for stakeholders to offer input on the draft policy statement(s) development and on key topics related to the Commission direction.

D. Topics for Discussion: The NRC is seeking input on key topics related to the direction from the Commission on the Safety Culture Policy Statement development. Specifically, the NRC is seeking input on the following topics:

1. Should NRC combine its expectations in the policy statement for safety culture and security culture or should NRC keep its expectations separate?
2. How should NRC increase attention by NRC, licensees, and certificate holders to safety culture in the materials area?

3. Does safety culture as applied to reactors need to be strengthened?

Obtaining public input on these topics will be the focus of the February 3, 2009, public meeting. The NRC has developed a series of questions relating to each of these topics to foster discussion and to solicit specific information relating to the Commission direction.

The following format is used in the presentation of the topics below. Each topic is assigned a number and a short title, and a list of questions for consideration then follows. Each question, or set of questions, is also assigned a number. When providing written comments, please list the relevant topic and question numbers when appropriate.

Topic 1: Should NRC combine its expectations in the policy statement for safety culture and security culture or should NRC keep its expectations separate?

Q1.1. Within organizations, one can think about safety and security in different ways. For example, safety may take precedence over security, security may take precedence over safety, or both may be treated equally. Different types of licensees, certificate holders and organizations have a variety of experiences and perspectives. How do you generally view the relationship or hierarchy between safety and security functions and decision making?

Q1.2. While efforts to maintain safety and security have the same common goal of protecting public health and safety, there can be distinct differences in the approach used to achieve that goal and that may have competing outcomes. One example is how information is shared to mitigate risks, where increased sharing of information may contribute to maintaining safety, but presents increased security risks. Are there other examples where efforts to maintain safety and security require different approaches or result in competing outcomes that need to be addressed to achieve the desired outcome or goal?

Q1.3. When resolving differences or conflicts while seeking to maintain safety and security—such as when managing risk, sharing information, planning work, correcting problems, etc.—and where changes or actions that are taken to address either a safety issue or a security issue could have an adverse effect on the other (i.e., security or safety, respectively); what challenges does your organization face?

Q1.4. What challenges or complexities arise when licensees and certificate holders work with contractors and

vendors where the organizations either take different approaches to resolving conflicting outcomes when they seek to maintain safety and security or the organizations may balance the conflicting outcomes of efforts to maintain safety and security differently?

Q1.5. What practices have been used to effectively address the conflicts to achieve the desired outcomes or goals?

Q1.6. Given that there are several ways to think about safety culture and security culture within organizations, the NRC wishes to express a policy in a way that best furthers its goals of protecting the public and environment and ensuring the secure use and management of radioactive materials.

If the above issues are viewed in terms of safety culture and security culture implementation, what benefits or challenges would licensees, certificate holders, Agreement States, or others foresee with a single policy statement? Two separate policy statements?

Q1.7. How can the NRC best express a policy that gives appropriate weight to safety culture and security culture across the range of licensees and certificate holders?

Q1.8. Given the diversity among the licensees and certificate holders regulated by the NRC and the Agreement States, how should the policy statement address any differences in emphasis on safety and security at the different types of licensees and certificate holders?

Topic 2: How should NRC increase attention by licensees and certificate holders to safety culture in the materials area?

Q2.1. What is the NRC doing that is working well to help materials licensees and certificate holders to maintain their safety culture and security culture?

Q2.2. What might the NRC do differently, or that it is not currently doing, to increase NRC, licensee, or certificate holder attention to safety culture at materials licensees and certificate holders?

Q2.3. How could the NRC better interact with materials licensees and certificate holders to help them to pay greater attention to maintaining their safety culture and/or security culture?

Q2.4. If the NRC expresses a policy for materials licensees and certificate holders to maintain safety culture and security culture, or made its references to safety culture and security culture more explicit in its interactions with these licensees and certificate holders, how would their performance change?

Q2.5. What should the NRC consider when developing policy statement(s) on safety culture and security culture?

Q2.5.1. What is the current level of understanding of materials licensees and certificate holders of the NRC's expectations that they maintain a safety culture that is cognizant of issues relating to security? How does this level of understanding change with the type of licensee or certificate holder?

Q2.5.2. How should the NRC consider the different activities (e.g., risk, type of material, quantities of materials, how the material is used, location, etc.) conducted at materials licensees and certificate holders when evaluating whether, or how, to express its policy?

Q2.5.3. How should NRC consider differences in the materials licensees and certificate holders (e.g., size of workforce, relationship to activities not regulated by the NRC, etc.) when evaluating whether, or how, to express its policy? What differences should the NRC consider?

Q2.5.4. What are the unique aspects of security at materials licensees and certificate holders that the NRC should consider when expressing its policy?

Q2.5.5. What topics should be addressed in the policy statement(s) that would be of value to materials licensees and certificate holders?

Q2.5.6. How could the policy statement(s) effectively address issues that involve both safety and security (at the safety/security interface) at materials licensees and certificate holders?

Q2.5.7. How can the NRC best express a policy that gives appropriate weight to safety culture and security culture across the range of licensees and certificate holders?

Q2.5.8. Given the diversity among the licensees and certificate holders regulated by the NRC and the Agreement States, how should the policy statement address any differences in emphasis on safety and security at the different types of licensees and certificate holders?

Q2.6. How should the NRC work with the Agreement States to encourage increased attention being focused on safety culture, including the unique aspects of security, at Agreement State licensees?

Q2.6.1. What is the level of understanding at Agreement State licensees regarding the value in maintaining safety culture and security culture?

Q2.6.2. What is the level of understanding of safety culture and security culture within the Agreement States?

Q2.6.3. How do the Agreement States view the NRC's goal of increasing the

attention paid to safety culture and security culture at materials licensees and certificate holders?

Q2.6.4. What topics do the Agreement States believe should be addressed in the policy statement(s)?

Q2.6.5. How could the NRC help the Agreement States to increase attention to safety culture and security culture at their licensees?

Q2.6.6. How should the NRC address safety culture and security culture at Agreement State licensees that engage in activities within NRC jurisdiction under reciprocity?

Q2.6.7. How might NRC use stakeholder involvement to increase the attention that materials licensees and certificate holders give to maintaining a safety culture, including the unique aspects of security?

Topic 3: Does safety culture as applied to reactors need to be strengthened?

A number of enhancements were made to the ROP in 2006 to address safety culture (for example: safety culture cross-cutting aspect assignment to findings; identifying substantive cross-cutting issues; performing an independent NRC safety culture assessment for licensees in Column 4 of the ROP Action Matrix).

Q3.1. What are the strengths and weaknesses of the current approach for evaluating licensee safety culture in the ROP?

Q3.2. How has the use of safety culture cross-cutting aspects that are assigned to inspection findings helped to identify potential safety culture issues? Suggest any alternative approaches that licensees could use to identify potential safety culture issues.

Q3.3. What may be better or more effective methods or tools that the NRC could use to help identify precursors to future plant performance deficiencies?

Q3.4. In the following situations the NRC may/or will request a licensee to perform a safety culture assessment (licensee self-assessment, independent assessment, or a third-party assessment): (a) The same substantive cross-cutting issue had been identified in three consecutive assessment letters (generated from assessments conducted at 6 month intervals); (b) a 95002 inspection (Inspection for One Degraded Cornerstone or Any Three White Inputs in a Strategic Performance Area) that confirmed the licensee had not identified a safety culture component that either caused or significantly contributed to the risk-significant performance issue that resulted in the supplemental inspection; and (c) a plant enters Column 4 of the Action Matrix.

Under what other situations should the NRC consider requesting that a licensee perform a safety culture assessment?

Another ROP enhancement was for the NRC to perform an independent safety culture assessment for plants that enter the multiple repetitive/degraded cornerstone column (column 4).

Q3.5. In what other circumstances might the NRC consider performing an independent safety culture assessment?

Q3.6. What other entity, other than the NRC, could perform an independent safety culture assessment or simply verify the results of the licensee's assessments and corrective actions?

Q3.7. What additional safety culture related ROP changes could help the NRC to improve the focus of NRC and licensee attention on site safety culture issues?

The NRC has held public meetings where draft changes to several ROP guidance documents resulting from a lessons learned evaluation of the initial implementation period of the ROP safety culture enhancements have been made available for public comment.

Q3.8. What areas beyond the draft changes (for example, a provision in Inspection Procedure 95003 for the NRC to be able to conduct a graded safety culture assessment) presented by the NRC have the potential to further enhance how the ROP addresses safety culture?

Q3.8.1. How would these potential changes enhance or improve how the NRC addresses safety culture through the ROP?

Q3.9. In what ways does the current process lead to consistency/predictability of implementation by the NRC? Provide examples to support your view.

Q3.9.1. In what ways does it lead to inconsistency or unpredictability?

Q3.10. How effective is the ROP in addressing security culture issues?

Q3.10.1. What ROP changes could help the NRC to improve the focus of NRC and licensee attention on site security culture issues?

In previous public meetings, the NRC has discussed using the ROP safety culture components and modified aspects as a tool to understand the challenges to safety culture during new reactor construction.

Q3.11. How can challenges to safety culture in new reactor construction be identified and addressed in regulatory oversight?

Dated at Rockville, Maryland, this 27th day of January, 2009.

For the Nuclear Regulatory Commission.

Stewart L. Magruder,

Deputy Director, Office of Enforcement.

[FR Doc. E9-2621 Filed 2-6-09; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[Docket No. 040-08502; NRC-2009-0036]

Notice of Request To Renew Source Materials License SUA-1341, COGEMA Mining, Inc., Christensen and Irigaray Ranch Facilities, Johnson and Campbell Counties, WY, and Opportunity To Request a Hearing

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of license renewal request and opportunity to request a hearing.

DATES: A request for a hearing must be filed by April 10, 2009.

FOR FURTHER INFORMATION CONTACT: Ron C. Linton, Project Manager, Uranium Recovery Licensing Branch, Division of Waste Management and Environmental Protection, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555. *Telephone:* (301) 415-7777; *fax number:* (301) 415-5369; *e-mail:* ron.linton@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

By letter dated May 30, 2008, COGEMA Mining, Inc. (COGEMA), submitted a License Renewal Application to the U.S. Nuclear Regulatory Commission (NRC) to renew Source Materials License SUA-1341 for the Christensen and Irigaray Ranch Facilities in Johnson and Campbell Counties, Wyoming (ADAMS Accession Package No. ML081850689). COGEMA has requested that the license be renewed as a performance-based license, which is its current form. COGEMA also requested that the renewal be for ten (10) years, consistent with the last renewal. The renewal, if granted, would allow for continued uranium production operations and the recovery of uranium by in situ recovery (ISR) extraction techniques as previously licensed by the NRC. An NRC administrative review, documented in a letter to COGEMA dated December 29, 2008 (ADAMS Accession No. ML082760265), found the amendment request acceptable to begin a technical review. Before approving the license amendment, the

NRC findings required by the Atomic Energy Act of 1954, the National Environmental Policy Act (NEPA) and NRC's regulations, will have been made. These findings will be documented in a Safety Evaluation Report and a site-specific environmental review consistent with the provisions in 10 CFR part 51.

II. Opportunity To Request a Hearing

The May 30, 2008 renewal request pertains to COGEMA's 10 CFR part 40 source materials license, and is COGEMA's proposal to continue uranium production operations at its facilities in Johnson and Campbell Counties, Wyoming. Any person whose interest may be affected by this proposal, and who desires to participate as a party in an NRC adjudicatory proceeding, must file a request for a hearing. The hearing request must include a specification of the contentions which the person seeks to have litigated, and must be filed in accordance with the NRC E-Filing rule, which the NRC promulgated on August 28, 2007 (72 FR 49139). The E-Filing rule requires participants to submit and serve documents over the internet or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the petitioner/requester must contact the Office of the Secretary by e-mail at HEARINGDOCKET@NRC.GOV, or by calling (301) 415-1677, to request (1) a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances in which the petitioner/requester (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each petitioner/requester will need to download the Workplace Forms Viewer(tm) to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The Workplace Forms Viewer(tm) is free and is available at <http://www.nrc.gov/site-help/e-submittals/install-viewer.html>. Information about applying for a digital ID certificate is available on NRC's public Web site at <http://www.nrc.gov/site-help/e-submittals/apply-certificates.html>.

Once a petitioner/requester has obtained a digital ID certificate, has a

docket created, and downloaded the EIE viewer, the petitioner/requester can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at <http://www.nrc.gov/site-help/e-submittals.html>. A filing is considered complete at the time the filer submits its documents through EIE. To be timely, an electronic filing must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically may seek assistance through the "Contact Us" link located on the NRC Web site at <http://www.nrc.gov/site-help/e-submittals.html> or by calling the NRC Meta-System Help Desk, which is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday. The Meta-System Help Desk can be contacted by telephone at 1-866-672-7640 or by e-mail at MSHD.Resource@nrc.gov.

Participants who believe that they have good cause for not submitting documents electronically must file a motion, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, *Attention: Rulemaking and Adjudications Staff*; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, *Attention: Rulemaking and Adjudications Staff*. Participants filing a document in this manner are responsible for serving the document on all other participants.

Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Non-timely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer, or the Atomic Safety and Licensing Board that the petition and/or request should be granted and/or the contentions should be admitted based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)-(viii). To be timely, filings must be submitted no later than 11:59 p.m. Eastern Time on the due date.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at http://ehd.nrc.gov/EHD_Proceeding/home.asp, unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include social security numbers in their filings. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submissions.

The formal requirements for documents contained in 10 CFR 2.304(c)-(e) must be met. If the NRC grants an electronic document exemption in accordance with 10 CFR 2.302(g)(3), then the requirements for paper documents, set forth in 10 CFR 2.304(b) must be met.

In accordance with 10 CFR 2.309(b), a request for a hearing must be filed by April 10, 2009.

In addition to meeting other applicable requirements of 10 CFR 2.309, a request for a hearing filed by a person other than an applicant or licensee must state:

1. The name, address, and telephone number of the requester;
 2. The nature of the requester's right under the Act to be made a party to the proceeding;
 3. The nature and extent of the requester's property, financial, or other interest in the proceeding;
 4. The possible effect of any decision or order that may be issued in the proceeding on the requester's interest; and
 5. The circumstances establishing that the request for a hearing is timely in accordance with 10 CFR 2.309(b).
- In accordance with 10 CFR 2.309(f)(1), a request for hearing or petitions for

leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

1. Provide a specific statement of the issue of law or fact to be raised or controverted;
2. Provide a brief explanation of the basis for the contention;
3. Demonstrate that the issue raised in the contention is within the scope of the proceeding;
4. Demonstrate that the issue raised in the contention is material to the findings that the NRC must make to support the action that is involved in the proceeding;
5. Provide a concise statement of the alleged facts or expert opinions which support the requester's/petitioner's position on the issue and on which the requester/petitioner intends to rely to support its position on the issue; and
6. Provide sufficient information to show that a genuine dispute exists with the applicant or licensee on a material issue of law or fact. This information must include references to specific portions of the amendment request that the requester/petitioner disputes and the supporting reasons for each dispute, or, if the requester/petitioner believes the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the requester's/petitioner's belief.

In addition, in accordance with 10 CFR 2.309(f)(2), contentions must be based on documents or other information available at the time the petition is to be filed, such as the amendment request, other supporting documents filed by an applicant or licensee, or otherwise available to the petitioner. On issues arising under NEPA, the requester/petitioner must file contentions based on environmental information supplied by the licensee or previous environmental analysis. The requester/petitioner may amend those contentions or file new contentions if there are data or conclusions in the NRC draft, or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's or licensee's documents. Otherwise, contentions may be amended or new contentions filed after the initial filing only with leave of the presiding officer.

Requesters/petitioners should, when possible, consult with each other in preparing contentions and combine similar subject matter concerns into a joint contention, for which one of the co-sponsoring requesters/petitioners is designated the lead representative.

Further, in accordance with 10 CFR 2.309(f)(3), any requester/petitioner that wishes to adopt a contention proposed by another requester/petitioner must do so, in accordance with the E-Filing rule, within ten (10) days of the date the contention is filed, and designate a representative who shall have the authority to act for the requester/petitioner.

In accordance with 10 CFR 2.309(g), a request for hearing and/or petition for leave to intervene may also address the selection of the hearing procedures, taking into account the provisions of 10 CFR 2.310.

III. Further Information

Documents related to this action are available electronically at the NRC's Electronic Reading Room at <http://www.nrc.gov/reading-rm/adams.html>. From this site, you can access the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The ADAMS package accession number for the documents related to this Notice is ML081850689, COGEMA Mining, Inc., Irigaray and Christensen Ranch Projects, Licensing Renewal Application. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1-800-397-4209, 301-415-4737, or by e-mail to pdr.resource@nrc.gov. These documents may also be viewed electronically on the public computers located at the NRC's PDR, O 1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee.

Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information for Contention Preparation

1. This order contains instructions regarding how potential parties to this proceeding may request access to documents containing sensitive unclassified information. A suggested schedule is provided as Attachment 1 to this order.

2. Within ten (10) days after publication of this notice of opportunity for hearing any potential party as defined in 10 CFR 2.4 who believes access to SUNSI is necessary for a response to the notice may request access to such information. A "potential party" is any person who intends or may intend to participate as a party by demonstrating standing and the filing of an admissible contention under 10 CFR 2.309. Requests submitted later than ten

(10) days will not be considered absent a showing of good cause for the late filing, addressing why the request could not have been filed earlier.

3. The requester shall submit a letter requesting permission to access SUNSI to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, *Attention: Rulemakings and Adjudications Staff*, and provide a copy to the Associate General Counsel for Hearings, Enforcement and Administration, Office of the General Counsel, Washington, DC 20555-0001. The expedited delivery or courier mail address for both offices is U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, MD 20852. The e-mail address for the Office of the Secretary and the Office of the General Counsel are HearingDocket@nrc.gov and OGCmail@nrc.gov, respectively.¹

The request must include the following information:

- a. A description of the licensing action with a citation to this **Federal Register** notice of opportunity for hearing;
- b. The name and address of the potential party and a description of the potential party's particularized interest that could be harmed, if the licensing action is taken;
- c. The identity of the individual requesting access to Sensitive Unclassified Non-Sensitive Information (SUNSI) and the requester's need for the information in order to meaningfully participate in this adjudicatory proceeding, particularly why publicly available versions of the application would not be sufficient to provide the basis and specificity for a proffered contention;

4. Based on an evaluation of the information submitted under items 2 and 3.a through 3.c, above, the NRC staff will determine within ten (10) days of receipt of the written access request whether (1) there is a reasonable basis to believe the petitioner is likely to establish standing to participate in this NRC proceeding, and (2) there is a legitimate need for access to SUNSI.

5. A request for access to SUNSI will be granted if:

- a. The request has demonstrated that there is a reasonable basis to believe that a potential party is likely to establish standing to intervene or to otherwise participate as a party in this proceeding;

¹ See footnote 4. While a request for hearing or petition to intervene in this proceeding must comply with the filing requirements of the NRC's "E-Filing Rule," the initial request to access SUNSI under these procedures should be submitted as described in this paragraph.

b. The proposed recipient of the information has demonstrated a need for SUNSI;

c. The proposed recipient of the information has executed a Non-Disclosure Agreement or Affidavit and agrees to be bound by the terms of a Protective Order setting forth terms and conditions to prevent the unauthorized or inadvertent disclosure of SUNSI; and

d. The presiding officer has issued a protective order concerning the information or documents requested.² Any protective order issued shall provide that the petitioner must file SUNSI contentions 25 days after receipt of (or access to) that information. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI contentions by that later deadline.

6. If the request for access to SUNSI is granted, the terms and conditions for access to such information will be set forth in a draft protective order and affidavit of non-disclosure appended to a joint motion by the NRC staff, any other affected parties to this proceeding,³ and the petitioner(s). If the diligent efforts by the relevant parties or petitioner(s) fail to result in an agreement on the terms and conditions

for a draft protective order or non-disclosure affidavit, the relevant parties to the proceeding or the petitioner(s) should notify the presiding officer within five (5) days, describing the obstacles to the agreement.

7. If the request for access to SUNSI is denied by the NRC staff after a determination on standing, the NRC staff shall briefly state the reasons for the denial. Before the Office of Administration makes an adverse determination regarding access, the proposed recipient must be provided an opportunity to correct or explain information. The requester may challenge the NRC staff's adverse determination with respect to access to SUNSI or with respect to standing, by filing a challenge within five (5) days of receipt of that determination with (a) the presiding officer designated in this proceeding; (b) if no presiding officer has been appointed, the Chief Administrative Judge, or if he or she is unavailable, another administrative judge, or an administrative law judge with jurisdiction pursuant to 10 CFR 2.318(a); or (c) if another officer has been designated to rule on information access issues, with that officer.

In the same manner, a party other than the requester may challenge an NRC staff determination granting access to SUNSI whose release would harm that party's interest independent of the

proceeding. Such a challenge must be filed within five (5) days of the notification by the NRC staff of its grant of such a request.

If challenges to the NRC staff determinations are filed, these procedures give way to the normal process for litigating disputes concerning access to information. The availability of interlocutory review by the Commission of orders ruling on such NRC staff determinations (whether granting or denying access) is governed by 10 CFR 2.311.⁴

8. The Commission expects that the NRC staff and presiding officers (and any other reviewing officers) will consider and resolve requests for access to SUNSI, and motions for protective orders, in a timely fashion in order to minimize any unnecessary delays in identifying those petitioners who have standing and who have propounded contentions meeting the specificity and basis requirements in 10 CFR part 2.

Dated at Rockville, Maryland, this 3rd day of February 2009.

For the Nuclear Regulatory Commission.
Annette L. Vietti-Cook,
Secretary of the Commission.

Attachment 1—General Target Schedule for Processing and Resolving Requests for Access to Sensitive Unclassified Non-Safeguards Information in This Proceeding

Day	Event
0	Publication of [Federal Register notice/other notice of proposed action and opportunity for hearing], including order with instructions for access requests.
10	Deadline for submitting requests for access to Sensitive Unclassified Non-Safeguards Information (SUNSI) with information: Supporting the standing of a potential party identified by name and address; describing the need for the information in order for the potential party to participate meaningfully in an adjudicatory proceeding; demonstrating that access should be granted.
[20, 30 or 60]	Deadline for submitting petition for intervention containing: (i) Demonstration of standing; (ii) all contentions whose formulation does not require access to SUNSI (+25 Answers to petition for intervention; +7 petitioner/requestor reply).
20	NRC staff informs the requester of the staff's determination whether the request for access provides a reasonable basis to believe standing can be established and shows need for SUNSI. NRC staff also informs any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information. If NRC staff makes the finding of need for SUNSI and likelihood of standing, NRC staff begins document processing (preparation of redactions or review of redacted documents).
25	If NRC staff finds no "need," "need to know," or likelihood of standing, the deadline for petitioner/requester to file a motion seeking a ruling to reverse the NRC staff's denial of access; NRC staff files copy of access determination with the presiding officer (or Chief Administrative Judge or other designated officer, as appropriate). If NRC staff finds "need" for SUNSI, the deadline for any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information to file a motion seeking a ruling to reverse the NRC staff's grant of access.
30	Deadline for NRC staff reply to motions to reverse NRC staff determination(s).
40	(Receipt +30) If NRC staff finds standing and need for SUNSI, deadline for NRC staff to complete information processing and file motion for Protective Order and draft Non-Disclosure Affidavit. Deadline for applicant/licensee to file Non-Disclosure Agreement for SUNSI.

² If a presiding officer has not yet been designated, the Chief Administrative Judge will issue such orders, or will appoint a presiding officer to do so.

³ Parties/persons other than the requester and the NRC staff will be notified by the NRC staff of a favorable access determination (and may participate

in the development of such a motion and protective order) if it concerns SUNSI and if the party/person's interest independent of the proceeding would be harmed by the release of the information (e.g., as with proprietary information).

⁴ As of October 15, 2007, the NRC's final "E-Filing Rule" became effective. See Use of

Electronic Submissions in Agency Hearings (72 FR 49139; Aug. 28, 2007). Requesters should note that the filing requirements of that rule apply to appeals of NRC staff determinations (because they must be served on a presiding officer or the Commission, as applicable), but not to the initial SUNSI requests submitted to the NRC staff under these procedures.

Day	Event
190	(Receipt +180) If NRC staff finds standing and trustworthiness and reliability, deadline for NRC staff to file motion for Protective Order and draft Non-disclosure Affidavit. Note: Before the Office of Administration makes an adverse determination regarding access, the proposed recipient must be provided an opportunity to correct or explain information.
205	Deadline for petitioner to seek reversal of a final adverse NRC staff determination either before the presiding officer or another designated officer.
A	If access granted: Issuance of presiding officer or other designated officer decision on motion for protective order for access to sensitive information (including schedule for providing access and submission of contentions) or decision reversing a final adverse determination by the NRC staff.
A+3	Deadline for filing executed Non-Disclosure Affidavits. Access provided to SUNSI consistent with decision issuing the protective order.
A+28	Deadline for submission of contentions whose development depends upon access to SUNSI. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI contentions by that later deadline.
A+53 (Contention receipt +25).	Answers to contentions whose development depends upon access to SUNSI.
A+60 (Answer receipt +7) ..	Petitioner/Intervenor reply to answers.
B	Decision on contention admission.

[FR Doc. E9-2619 Filed 2-6-09; 8:45 am]

BILLING CODE 7590-01-P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Andean Trade Preference Act (ATPA), as Amended: Request for Public Comments Regarding Beneficiary Countries

AGENCY: Office of the United States
Trade Representative.

ACTION: Notice; request for comments.

SUMMARY: In compliance with section 203(f) of the ATPA, as amended, 19 U.S.C. 3202(f)(2), the Office of the United States Trade Representative (USTR) is requesting the views of interested parties on whether the designated beneficiary countries are meeting the eligibility criteria under the ATPA. (See 19 U.S.C. 3203(b)(6)(B).) This information will be used in the preparation of a report to the Congress on the operation of the program.

DATES: Public comments are due no later than 5 p.m., March 6, 2009.

ADDRESSES: Comments should be submitted electronically via the Internet at <http://www.regulations.gov>. Business confidential information only may be submitted via e-mail to FR0518@ustr.eop.gov. See below for details.

FOR FURTHER INFORMATION CONTACT: For procedural questions concerning written comments, contact Gloria Blue, Executive Secretary, Trade Policy Staff Committee, at (202) 395-3475. All other questions regarding the ATPA should be directed to Bennett Harman, Deputy Assistant USTR for Latin America, at (202) 395-9446.

SUPPLEMENTARY INFORMATION: The ATPA, as amended by the Andean Trade Promotion and Drug Eradication Act of 2002 (ATPDEA) in the Trade Act of 2002, 19 U.S.C. 3201 *et seq.*, provides trade benefits for eligible Andean countries. In Proclamation 7616 of October 31, 2002, the President designated Bolivia, Colombia, Ecuador, and Peru as ATPDEA beneficiary countries. In Proclamation 8323 of November 25, 2008, the President determined that Bolivia no longer satisfies the eligibility criteria and suspended Bolivia's status as a beneficiary country for purposes of the ATPA and ATPDEA. Section 203(f) of the ATPA (19 U.S.C. 3202(f)) requires the USTR, not later than April 30, 2009, to submit to Congress a report on the operation of the ATPA. Before submitting such report, USTR is required to request comments on whether beneficiary countries are meeting the criteria set forth in 19 U.S.C. 3203(b)(6)(B) (which incorporates by reference the criteria set forth in sections 3202(c) and (d)). USTR refers interested parties to the **Federal Register** notice published on August 15, 2002 (67 FR 53379), for a full list of the eligibility criteria.

Requirements for Submissions. Persons submitting comments must do so in English and must identify (on the first page of the submission) the "ATPA Beneficiary Countries." Written comments must be received by March 6, 2009.

In order to ensure the most timely and expeditious receipt and consideration of comments, USTR has arranged to accept on-line submissions, with the exception of business confidential submissions, via <http://www.regulations.gov>. To submit testimony and comments via <http://www.regulations.gov>, enter

docket number USTR-2009-0006 on the home page and click "go". The site will provide a search-results page listing all documents associated with this docket. Find a reference to this notice by selecting "Notice" under "Document Type" on the left side of the search-results page, and click on the link entitled "Send a Comment or Submission." (For further information on using the <http://www.regulations.gov> Web site, please consult the resources provided on the Web site by clicking on "How to Use This Site" on the left side of the home page.)

The <http://www.regulations.gov> Web site provides the option of making submissions by filling in a "General Comments" field, or by attaching a document. We expect that most submissions will be provided in an attached document. If a document is attached, it is sufficient to type "See attached" in the "General Comments" field.

Submissions in Microsoft Word (.doc) or Adobe Acrobat (.pdf) are preferred. If an application other than those two is used, please identify in your submission the specific application used.

Persons wishing to submit business confidential information must submit that information by electronic mail to FR0518@ustr.eop.gov. Only business confidential submissions will be accepted at FR0518@ustr.eop.gov, and business confidential submissions will not be accepted at <http://www.regulations.gov>; however, public or non-confidential submissions that accompany business confidential submissions should be submitted at <http://www.regulations.gov>. For any comments submitted electronically containing business confidential information, the file name of the business confidential version should

begin with the characters "BC". Any page containing business confidential information must be clearly marked "BUSINESS CONFIDENTIAL" on the top of that page. Filers of submissions containing business confidential information must also submit a public version of their comments. The file name of the public version should begin with the character "P". The "BC" and "P" should be followed by the name of the person or entity submitting the comments or reply comments. Filers submitting comments containing no business confidential information should name their file using the character "P", followed by the name of the person or entity submitting the comments or reply comments. Electronic submissions should not contain separate cover letters; rather, information that might appear in a cover letter should be included in the submission itself. Similarly, to the extent possible, any attachments to a submission should be included in the same file as the submission itself and not as separate files. All non-confidential comments and reply comments will be placed on the USTR Web site, <http://www.ustr.gov> pursuant to 15 CFR 2003.5.

Carmen Suro-Bredie,

Chairman, Trade Policy Staff Committee.

[FR Doc. E9-2601 Filed 2-6-09; 8:45 am]

BILLING CODE 3190-W9-P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Notice of Correction to General Notes 11(a) and 11(d) of the Harmonized Tariff Schedule of the United States

AGENCY: Office of the United States Trade Representative.

ACTION: Notice.

SUMMARY: This notice makes a rectification to the Harmonized Tariff Schedule of the United States (HTS) to reflect that Peru remains a designated beneficiary country for purposes of the Andean Trade Preference Act and the Andean Trade Promotion and Drug Eradication Act.

DATES: Effective February 1, 2009.

FOR FURTHER INFORMATION CONTACT:

María L. Pagán, Associate General Counsel, Office of the United States Trade Representative, (202) 395-7305.

SUPPLEMENTARY INFORMATION: In Proclamation 8341 (January 16, 2009) (74 FR 4105), the President proclaimed certain changes to the HTS in order to implement the United States-Peru Trade Promotion Agreement and for other

purposes. Annex I of Publication 4058 of the United States International Trade Commission, incorporated by reference into Proclamation 8341, incorrectly deleted Peru from the enumeration of designated beneficiary countries in General Notes 11(a) and 11(d) of the HTS.

In Proclamation 6969 (January 27, 1997) (62 FR 4415), the President delegated to the United States Trade Representative (USTR) the authority under section 604 of the Trade Act of 1974 (19 U.S.C. 2483) to make rectifications, technical or conforming changes, or similar modifications to the HTS and to embody those changes in the HTS. Pursuant to the authority delegated to the USTR in Proclamation 6969, General Notes 11(a) and 11(d) of the HTS are rectified by inserting "Peru" in alphabetical sequence in the list of designated beneficiary countries.

Everett H. Eissenstat,

Assistant U.S. Trade Representative for the Americas.

[FR Doc. E9-2637 Filed 2-4-09; 4:15 pm]

BILLING CODE 3190-W9-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59337; File No. SR-BX-2009-004]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing of Proposed Rule Change To Establish Fees for Members

February 2, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on January 14, 2009, NASDAQ OMX BX, Inc. (the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt a new member fee schedule for the resumption of its cash equities trading business. The text of the proposed rule change is available from the principal office of the Exchange and from the

Commission, and is also available at <http://www.nasdaqtrader.com/Trader.aspx?id=BSEIRules2008>.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On August 29, 2008, the Exchange was acquired by The NASDAQ OMX Group, Inc. ("NASDAQ OMX"). At the time of this acquisition, the Exchange was not operating a venue for trading cash equities. Pursuant to SR-BSE-2008-48, the Exchange has adopted a new rulebook with rules governing membership, the regulatory obligations of members, listing, and equities trading.³ The new rules, which are designated as the "Equity Rules," are based to a substantial extent on the rules of The NASDAQ Stock Market LLC (the "NASDAQ Exchange"). The Equity Rules leave in effect the Exchange's pre-existing rules (the "Options Rules") for the purpose of governing trading on the Exchange's Boston Options Exchange facility ("BOX").

In this filing, the Exchange is proposing new fees to be charged to members in connection with the resumption of its cash equities trading business. The fee schedules are structurally similar to those of the NASDAQ Exchange, but with the omission of many fees that are not pertinent to the Exchange's planned business and with several differences in the level of certain fees.

Membership Fees

As provided in proposed Equity Rule 7001, the Exchange will charge a \$2,000 membership application fee, a \$3,000 annual membership fee, and a \$500

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Securities Exchange Act Release No. 59154 (December 23, 2008), 73 FR 80468 (December 31, 2008) (SR-BSE-2008-48).

monthly trading rights fee.⁴ In recognition of the Exchange's temporary cessation of equities trading, the trading rights fee will be waived for the first month during which the Exchange's new equities trading system, the NASDAQ OMX BX Equities Market, operates, and for each month prior to that time; the annual membership fee will be waived for all of 2008 and will be reduced pro rata with respect to any months of 2009 during which the trading rights fee is waived;⁵ and the application fee will be waived for applicants for membership that apply prior to the time that the NASDAQ OMX BX Equities Market commences operations.

As provided in Equity Rule 7002, the Exchange will charge a Sales Fee to offset the fees that the Exchange must pay to the Commission under Section 31 of the Act.⁶ Equity Rule 7003(a) will cover registration and processing fees collected by the Financial Industry Regulatory Authority ("FINRA") with respect to registration of associated persons of Exchange members, while Equity Rule 7003(b) will provide for the registration fees collected by the Exchange. In the latter case, the fees are being kept at the levels previously set by the Exchange, rather than at the levels in effect at the NASDAQ Exchange. Thus, the fees will be \$60 for each initial Form U4 filed for the registration of a representative or principal; \$40 for each transfer or re-licensing of a representative of principal; and an annual fee of \$50 for each registered representative or principal. However, in recognition of the fact that the relaunch of equities trading by the Exchange may cause additional firms to become members of the Exchange and may cause pre-existing members to register additional representatives or principals, the Exchange is waiving these fees for a period of time. In the case of the fees for initial registration and transfer or re-licensing, the fees will be waived for the period from January 1, 2009 to July 1, 2009. Registration events occurring after July 1, 2009 would be subject to the fees. The annual fee, which has historically been collected in December of a year to cover the succeeding year, will be waived for the period from January 1, 2009 until such time as the Exchange submits a proposed rule change to reinstate it. The Exchange

⁴ The fees are identical to the comparable fees of the NASDAQ Exchange.

⁵ Thus, if as expected, the NASDAQ OMX BX Equities Market commences operations on January 16, 2009, the trading rights fee would be waived for January 2009 and the membership fee for 2009 would be \$2750.

⁶ 15 U.S.C. 78ee.

expects that it would not submit such a filing until at least 2010. Thus, the Exchange would not collect the annual fee in December 2009.

Access Services Fees

As provided in proposed Equity Rule 7015, access to the NASDAQ OMX BX Equities Market will be provided through the OUCH, FIX, and RASH access protocols, with drop copies provided through the DROP protocol. Connections will be available through extranets, direct connection, and Internet-based virtual private networks. The fees will be \$400 per month for each port pair, with an additional \$200 per month charged for each Internet port that requires additional bandwidth.⁷ These fees are comparable to the fees charged by the NASDAQ Exchange for comparable access. In contrast to the NASDAQ Exchange, however, which charges certain access fees to persons that are not members of the NASDAQ Exchange—for example, FINRA-only members that use NASDAQ technology to access the FINRA/NASDAQ Trade Reporting Facility—the Exchange's fees for ports for market access will be charged only to members.⁸

Execution Fees

Execution fees will be uniform for all types of securities and members.⁹ Specifically, for securities executed at prices of \$1 or more, the Exchange will charge \$0.0022 per share executed and pay a liquidity provider rebate of \$0.002 per share executed. For executions below \$1, the execution fee will be 0.1% of the total transaction cost, and the rebate will be \$0.

Other Fees

Other fee rules relate to installation, removal or relocation of equipment at a subscriber's premises¹⁰ and administrative reports¹¹ and are

⁷ See proposed Equity Rule 7015.

⁸ The Exchange also plans to charge for ports used to receive market data from the Exchange. Unlike the access ports that are the subject of this filing, ports used to receive market data will be available to non-members as well as members and therefore will be addressed in a separate filing submitted under Section 19(b)(2) of the Act, 15 U.S.C. 78s(b)(2). Pending approval of that filing, ports to receive market data will be provided free of charge.

⁹ See proposed Equity Rule 7018. By contrast, the NASDAQ Exchange's execution fees range from \$0.0029 to \$0.0035, but rebates range from \$0.0015 to \$0.0031, depending on the type of security traded, the order type, and the market participant's average daily trading volumes.

¹⁰ See proposed Equity Rule 7029. The provision allows the Exchange to pass through any costs it incurs.

¹¹ See proposed Equity Rule 7022. An administrative report is prepared at a member's request regarding its activities to assist the firm in activities such as auditing its internal systems,

comparable to corresponding NASDAQ Exchange rules. Rule 7027, which relates to aggregating the activity of affiliated Exchange members for purposes of volume pricing discounts, would not be immediately operative, since the Exchange will not initially offer such discounts, but is being adopted at this time to address any such discounts adopted in the future.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,¹² in general and with Section 6(b)(4) of the Act,¹³ as stated above, in that it provides an equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. The Exchange makes all services and products subject to these fees available on a non-discriminatory basis to similarly situated recipients. All fees are structured in a manner comparable to corresponding fees of the NASDAQ Exchange already in effect, and are generally set at levels equal to or lower than the levels of the comparable NASDAQ Exchange fees. Moreover, each proposed fee is set at a level that is uniform for all members.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Despite its long history, the Exchange will effectively be entering the competitive markets for equities trading as a start-up venture. Accordingly, its fees must be set at a level that will promote competition in these markets, or potential users of its services will simply continue to obtain services from the Exchange's multiple competitors. If the Exchange sets fees at inappropriately high levels, market participants will seek to avoid using the Exchange. Thus, the products and services introduced by the Exchange will promote competition if they succeed in providing market participants with viable and cost-effective alternatives to existing competitors. Conversely, they will impose no burden on competition if they fail to provide such alternatives.

verifying back-office processing, or projecting monthly costs. The fee is \$25 per month.

¹² 15 U.S.C. 78f.

¹³ 15 U.S.C. 78f(b)(4).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act¹⁴ and subparagraph (f)(2) of Rule 19b-4 thereunder.¹⁵ At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form <http://www.sec.gov/rules/sro.shtml>; or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-BX-2009-004 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090. All submissions should refer to File Number SR-BX-2009-004. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than

those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on business days between the hours of 10 a.m. and 3 p.m., located at 100 F Street, NE., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-BX-2009-004 and should be submitted on or before March 2, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁶

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9-2578 Filed 2-6-09; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59341; File No. SR-BX-2009-006]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Eliminate the Market Hours Day Time-in-Force

February 2, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on January 15, 2009, NASDAQ OMX BX, Inc. (the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as constituting a non-controversial rule change under Section 19(b)(3)(A) of the Act³ and Rule 19b-4(f)(6) thereunder,⁴ which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

¹⁶ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6).

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to eliminate the order time-in-force of "Market Hours Day" ("MDAY") from the NASDAQ OMX BX Equities Market. The Exchange proposes to implement the change as soon as practicable following the effectiveness of the filing.

The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's Internet Web site at http://nasdaqtrader.com/Trader.aspx?id=Boston_Stock_Exchange.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to amend the rules governing its new equity trading platform, the NASDAQ OMX BX Equities Market (the "System"), to eliminate the time-in-force of Market Hours Day for orders entered into the System. MDAY orders may be entered beginning at 7 a.m., but may only execute during the Exchange's regular market hours from 9:30 a.m. to 4 p.m. The Exchange proposes to eliminate this time-in-force to prevent MDAY orders entered prior to 9:30 a.m. from queuing and subsequently attempting to execute simultaneously at 9:30 a.m.

The Exchange, unlike the NASDAQ Stock Market, does not have an opening cross in which stocks' opening prices are established through a process that involves dissemination of information about orders being entered into the cross in the time immediately prior to market open. Eliminating the MDAY order will prevent large numbers of executions from occurring at 9:30 a.m. without the benefit of the sort of pricing information provided through an opening cross. In keeping with the other times-in-force

¹⁴ 15 U.S.C. 78s(b)(3)(a)(ii).

¹⁵ 17 CFR 240.19b-4(f)(2).

available in the System, orders entered prior to 9:30 a.m. will all be eligible for execution during the Exchange's pre-market trading session, from 8 a.m. to 9:30 a.m. Market participants that seek to limit their trading activity to regular market hours may do so by limiting the times of their order entry to those hours.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,⁵ in general and with Section 6(b)(5) of the Act,⁶ in particular, in that it would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system, and, in general, protect investors and the public interest by prevent [sic] orders from queuing in the System prior to 9:30 a.m. The Exchange believes that this will provide for more orderly executions in the Exchange at that time.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; or (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act⁷ and Rule 19b-4(f)(6) thereunder.⁸

⁵ 15 U.S.C. 78f.

⁶ 15 U.S.C. 78f(b)(5).

⁷ 15 U.S.C. 78s(b)(3)(A).

⁸ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such

The Exchange has asked the Commission to waive the operative delay to permit the proposed rule change to become operative prior to the 30th day after filing. The Commission has determined that waiving the 30-day operative delay of the Exchange's proposal is consistent with the protection of investors and the public interest because such waiver will enable the Exchange to promote more orderly executions at the beginning of its regular trading hours, without delay.⁹ Therefore, the Commission designates the proposal operative upon filing.

At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File No. SR-BX-2009-006 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090. All submissions should refer to File Number SR-BX-2009-006. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the

shorter time as designated by the Commission. The Exchange has satisfied this requirement.

⁹For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-BX-2009-006 and should be submitted on or before March 2, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9-2579 Filed 2-6-09; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59345; File No. SR-NYSE-2009-10]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by New York Stock Exchange LLC Amending NYSE Rules 116 and 123C To Create a Single Closing Print To Be Reported to the Consolidated Tape for Each Security

February 3, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")² and Rule 19b-4 thereunder,³ notice is hereby given that, on January 30, 2009, New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. NYSE filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act⁴ and Rule 19b-4(f)(6) thereunder,⁵ which renders it

¹⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

⁴ 15 U.S.C. 78s(b)(3)(A).

⁵ 17 CFR 240.19b-4(f)(6).

effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Rules 116 ("Stop" Constitutes Guarantee) and 123C (Market On The Close Policy And Expiration Procedures) to create a single closing print to be reported to the Consolidated Tape for each security.

The text of the proposed rule change is available at <http://www.nyse.com>, the Exchange, and the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Through this filing the Exchange seeks to amend NYSE Rules 116 and 123C to create a single closing print to be reported to the Consolidated Tape for each security.

Current Reporting of Closing Transactions

NYSE Rules 116.40 and 123C prescribe, *inter alia*, the procedures for the execution of the entry of market at-the-close ("MOC") and limit at-the-close ("LOC") orders⁶ and the determination of the closing print(s) to be reported to the Consolidated Tape for each security at the close of trading.

Pursuant to NYSE Rule 123C market participants may enter an MOC order to have that order executed as part of the closing transaction at the price of the close.⁷ Similar to a market order, an

⁶ In the NYSE Rules and for the purposes of this discussion, the terms "market-on-close" and "limit-on-close" are used interchangeably with "market-at-the-close" and "limit-at-the-close".

⁷ See NYSE Rule 123C(1).

MOC order is to be executed in its entirety at the closing price; however, if the order is not executed as a result of a trading halt or because of its terms (e.g., buy minus or sell plus), the MOC order is cancelled.⁸

Market participants that seek to have their orders executed on the close but are sensitive to price may, pursuant to NYSE Rule 123C, enter LOC orders that will be eligible for execution in the closing transaction, provided that the closing price is at or within the limit specified.⁹ An LOC order is not guaranteed an execution in the closing transaction; rather, only an LOC order with a limit price that is better¹⁰ than the closing price in the subject security is guaranteed an execution.¹¹ An LOC order limited at the closing price is sequenced with other LOC orders on the NYSE Display Book[®]¹² ("Display Book") in time priority and will be available for execution after all other orders on the Display Book at the closing price are executed regardless of when such other orders are received.¹³

Pursuant to NYSE Rule 123C(5), at 3:40 p.m. if a security has a disparity between MOC and marketable LOC interest to buy and MOC and marketable LOC interest to sell of 50,000 shares or more the assigned DMM is required to send a message from Display Book that is published to the Consolidated Tape informing the investing public of the disparity ("Mandatory Indication"). The Mandatory Indication includes the symbol, the amount and the side of the imbalance. In addition, to the Mandatory Indication, a DMM may, with Floor Official approval, disseminate an imbalance publication that is for a disparity of less than 50,000 shares when the imbalance in the security is significant in relation to the average daily trading volume in the security. At 3:50 p.m. the DMM is required to provide an update of the previous imbalance publications.

⁸ See *Id.*

⁹ See NYSE Rule 123C(2).

¹⁰ As used herein, better than the closing price means an order that is lower than the bid in the case of an order to sell or higher than the offer in the case of an order to buy.

¹¹ It should be noted that orders are cancelled if there is a trading halt in the security that is not lifted prior to the close of trading.

¹² The Display Book system is an order management and execution facility. The Display Book system receives and displays orders to the DMM, contains the Book, and provides a mechanism to execute and report transactions and publish results to the Consolidated Tape. The Display Book system is connected to a number of other Exchange systems for the purposes of comparison, surveillance, and reporting information to customers and other market data and national market systems.

¹³ See NYSE Rule 123C(2).

At the close of trading, any closing imbalance of MOC and marketable LOC orders are calculated by netting (*i.e.*, pairing off) the aggregate amount of MOC and marketable LOC buy orders against the aggregate amount of MOC and marketable LOC sell orders.¹⁴ Exchange systems calculate the number of MOC and marketable LOC orders on each side of the market and pair them off. Where there is an imbalance (*i.e.*, more orders to buy than sell or vice versa), the shares constituting the imbalance are executed against the offer (in case of a buy imbalance) or the bid (in the case of a sell imbalance).¹⁵ This transaction is reflected on the first closing print from the NYSE to the Consolidated Tape for the particular security.¹⁶ The DMM then pairs off the remaining MOC and marketable LOC buy and sell orders against each other at the price at which the imbalanced shares were executed.¹⁷ This "pair off" transaction is reported as a second closing print from the NYSE to the Consolidated Tape as "stopped stock."¹⁸

If there is no imbalance, the aggregate buy and sell MOC and marketable LOC orders are paired off at the price of the last sale of the subject security on the Exchange prior to the close of trading in the security.¹⁹ This transaction is reported to the Consolidated Tape in a single closing print as "stopped stock."²⁰

Proposed Single Closing Print

The closing transaction on the Exchange continues to be a manual auction in order to facilitate greater price discovery and allow for the maximum interaction between market participants. Currently, increased volatility in the market has given rise to the need to simplify procedures. In order to continue to provide timely closing of securities, the Exchange believes that it is necessary to reduce the manual processing required of the DMM to promote an even more efficient close. As such, the Exchange seeks to create a single closing print to be reported to the Consolidated Tape for each security. The Exchange believes that this will work to optimize the efficient operation of the closing process.

The Exchange therefore proposes to amend NYSE Rules 116 and 123C(3) to

¹⁴ See NYSE Rules 116.40 and 123C(3).

¹⁵ See NYSE Rules 116.40(B) and 123C(3)(A).

¹⁶ See *Id.*

¹⁷ See NYSE Rule 123C(3)(A).

¹⁸ See NYSE Rules 116.40(C) and 123C(3)(A).

¹⁹ See NYSE Rules 116.40(C) and 123C(3)(B).

²⁰ See *Id.*

provide for a single closing print to be reported to the Consolidated Tape system for each listed security. Currently, the DMM is required to manually enter the imbalance and the paired prints to Exchange systems for reporting to the Consolidated Tape. Requiring two prints impedes DMMs' efficiency in reporting the closing transaction.

Multiple closing prints were used to provide information about the share imbalances that impacted the closing price of a security on the Exchange. In May 2008, the Exchange amended NYSE Rule 123C to allow Exchange systems to disseminate a data feed of real-time order imbalances that accumulate prior to the close of trading on the Exchange ("Order Imbalance Information").²¹ Order Imbalance Information is supplemental information disseminated by the Exchange prior to a closing transaction.²² Specifically, Order Imbalance Information is disseminated every fifteen seconds between 3:40 p.m. and 3:50 p.m.; thereafter, it is disseminated every five seconds between 3:50 p.m. and 4 p.m. On any day that the scheduled close of trading on the Exchange is earlier than 4 p.m., the dissemination of Order Imbalance Information commences 20 minutes before the scheduled closing time. On those days, Order Imbalance Information is disseminated every fifteen seconds for approximately 10 minutes; thereafter, the Order Imbalance Information is disseminated every five seconds until the scheduled closing time.

The Exchange believes that the Order Imbalance Information achieves the goal of providing real-time detail and transparency for market participants about the factors that impact the closing price of a security. The Exchange further notes that the current imbalance publications pursuant to NYSE Rule 123C(5) will continue to be disseminated in accordance with the provisions of the rule. As such, the Exchange believes that there no longer exists a need for the dissemination of two separate prints at the close.

The Exchange therefore proposes that the imbalance, if any, paired off closing transactions and stop orders elected for

execution on the close be reported to the Consolidated Tape System as a single transaction and print.²³ The Exchange proposes to amend the text of NYSE Rule 116.40(C) to remove language that states that "pair off" transactions should be printed to the Consolidated Tape as stopped stock. Similarly, the Exchange proposes to amend NYSE Rule 123C(3) (Closing Prints) to state that the imbalance and the pair off amounts shall be printed to the Consolidated Tape as a single transaction.

Pursuant to the above proposed changes, a single print close in a security would occur as described in the example below.

The DMM for stock XYZ has determined that the closing price in the stock will be \$30.25. The last sale price on the Exchange was \$30.00. The DMM has 6,000,000 shares of MOC and marketable LOC buy orders up to a price of \$30.25. On the sell side, there are 5,000,000 MOC and marketable LOC sell orders down to a price of \$30.24. The DMM pairs 5,000,000 shares of MOC and marketable LOC buy orders against the 5,000,000 shares of MOC and marketable LOC sell orders at a price of \$30.25, leaving an imbalance of 1,000,000 shares on the buy side. On the Display Book, the DMM has 700,000 shares of limit sell orders at various prices marketable up to a price of \$30.25, and there is also Crowd interest of 300,000 shares at that price. The DMM will use the 700,000 shares of limit sell orders on the Display Book and 300,000 shares of Crowd interest to offset the remaining 1,000,000 shares of MOC and marketable buy LOC imbalance.

In the above example, the DMM would continue to arrange the closing transaction as set forth in 123C(3) and NYSE Rule 116.40; however, rather than reporting two separate closing prints to the Consolidated Tape, a single closing print reflecting the execution of 6,000,000 shares at \$30.25 would be reported. The 6,000,000 share volume in the single print close includes: (1) The 1,000,000 share buy order imbalance; and (2) the 5,000,000 shares of MOC and marketable LOC buy and sell orders that were paired off.

The Exchange believes that the consolidation of the separate closing transactions and prints will reduce the amount of manual information to be reported by the DMM thus increasing the speed and efficiency of the closing process ultimately improving the quality of the Exchange market with timelier reporting of closing transactions.

²³ The Exchange formally eliminated the percentage orders (referred to as a "CAP" order) as a valid order type on the NYSE. See Securities Exchange Act Release No. 58013 (June 24, 2008), 73 FR 37521 (July 1, 2008) (SR-NYSE-2008-46) [sic].

Proposed Technical Amendment to NYSE Rule 123C(3)

On October 24, 2008, the Commission approved the operation of a pilot for the Exchange's New Market Model.²⁴ As part of its new model, the Exchange rescinded percentage orders as a valid order type on the Exchange. As part of the New Market Model filing, the Exchange inadvertently failed to eliminate a reference to percentage orders in NYSE Rule 123C(3). The Exchange therefore seeks to correct this oversight by deleting that reference through this filing given that percentage orders are no longer valid order types on the Exchange.

Proposed Changes to NYSE Alternext Rules

The Exchange notes that parallel changes are proposed to be made to the rules of the NYSE Alternext Exchange (formerly the American Stock Exchange) through a separate filing to be submitted on a later date.

Operative Date

The Exchange proposes that the amendments herein will be operative as of February 6, 2009.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the "Act"),²⁵ in general, and furthers the objectives of Section 6(b)(5) of the Act,²⁶ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes the proposed rule change will facilitate the timely and efficient closing of securities on the Exchange and thus ultimately serve to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

²¹ See Securities Exchange Act Release Nos. 57862 (May 23, 2008), 73 FR 31174 (May 30, 2008) (SR-NYSE-2008-41) and 57861 (May 23, 2008), 73 FR 31905 (June 4, 2008) (SR-NYSE-2008-42). On December 19, 2008, the Exchange filed with the Securities and Exchange Commission to offer, for a separate fee, the Order Imbalance Information datafeed as a stand alone market data product. See Securities Exchange Act Release No. 59202 (January 6, 2009) 74 FR 1744 (January 13, 2009) (SR-NYSE-2008-132).

²² See NYSE Rule 123C(6).

²⁴ See Securities Exchange Act Release No. 58845 (October 24, 2008), 73 FR 64379 (October 29, 2008) (SR-NYSE-2008-46) (approving certain rules to operate as a pilot scheduled to end October 1, 2009).

²⁵ 15 U.S.C. 78f(b).

²⁶ 15 U.S.C. 78f(b)(5).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms, does not become operative for 30 days after the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act²⁷ and Rule 19b-4(f)(6) thereunder.²⁸

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative for 30 days after the date of filing.²⁹ However, Rule 19b-4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requested that the Commission waive the 30-day operative delay, as specified in Rule 19b-4(f)(6)(iii),³⁰ and has proposed to make the rule change operative as of February 6, 2009.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because doing so will enable the Exchange to immediately implement a more efficient closing process, thereby providing for timelier reporting of the closing transaction. Additionally, the Commission notes that the Exchange will continue to publish the Mandatory Indication when there is a significant imbalance before the close, as required under Rule 123C(5). Accordingly, the Commission designates the proposed rule change as operative as of February 6, 2009.³¹

²⁷ 15 U.S.C. 78s(b)(3)(A).

²⁸ 17 CFR 240.19b-4(f)(6).

²⁹ 17 CFR 240.19b-4(f)(6)(iii). In addition, Rule 19b-4(f)(6)(iii) requires the self-regulatory organization to give the Commission notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. NYSE has satisfied this requirement.

³⁰ 17 CFR 240.19b-4(f)(6)(iii).

³¹ For purposes only of waiving the operative delay for this proposal, the Commission has

at any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.³²

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSE-2009-10 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2009-10. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted

considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

³² 15 U.S.C. 78s(b)(3)(C).

without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2009-10 and should be submitted on or before March 2, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³³

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9-2650 Filed 2-6-09; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59344; File No. SR-NYSEALTR-2009-03]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Alternext U.S. LLC Making Changes to Certain NYSE Alternext Equities Rules to Conform With Amendments to Corresponding Rules Recently Filed for Immediate Effectiveness by the New York Stock Exchange LLC and To Make Other Technical Changes

February 2, 2009.

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the "Act")² and Rule 19b-4 thereunder,³ notice is hereby given that, on January 23, 2009, NYSE Alternext U.S. LLC (the "Exchange" or "NYSE Alternext") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. NYSE Alternext filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act⁴ and Rule 19b-4(f)(6) thereunder,⁵ which renders it effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to (i) make changes to certain NYSE Alternext Equities Rules to conform with

³³ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

⁴ 15 U.S.C. 78s(b)(3)(A).

⁵ 17 CFR 240.19b-4(f)(6).

amendments to corresponding rules recently filed for immediate effectiveness by the New York Stock Exchange LLC (“NYSE”);⁶ and (ii) make technical changes to Rule 431—NYSE Alternext Equities.

The text of the proposed rule change is available at <http://www.nyse.com>, the Exchange, and the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule changes is to (i) make changes to certain NYSE Alternext Equities Rules to conform with amendments to corresponding NYSE Rules recently filed for immediate effectiveness by the NYSE; and (ii) make technical changes to Rule 431—NYSE Alternext Equities.

Background

As described more fully in a related rule filing,⁷ NYSE Euronext acquired The Amex Membership Corporation (“AMC”) pursuant to an Agreement and Plan of Merger, dated January 17, 2008 (the “Merger”). In connection with the Merger, the Exchange’s predecessor, the American Stock Exchange LLC (“Amex”), a subsidiary of AMC, became a subsidiary of NYSE Euronext called NYSE Alternext U.S. LLC, and continues to operate as a national securities exchange registered under Section 6 of the Act.⁸ The effective date of the Merger was October 1, 2008.

In connection with the Merger, on December 1, 2008, the Exchange

⁶ See Securities Exchange Act Release No. 59077 (December 10, 2008), 73 FR 76691 (December 17, 2008) (SR–NYSE–2008–127) (clean-up amendments related to the New Market Model).

⁷ See Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR–NYSE–2008–60 and SR–Amex 2008–62) (approving the Merger).

⁸ 15 U.S.C. 78f.

relocated all equities trading conducted on the Exchange legacy trading systems and facilities located at 86 Trinity Place, New York, New York, to trading systems and facilities located at 11 Wall Street, New York, New York (the “Equities Relocation”). The Exchange’s equity trading systems and facilities at 11 Wall Street (the “NYSE Alternext Trading Systems”) are operated by the NYSE on behalf of the Exchange.⁹

As part of the Equities Relocation, NYSE Alternext adopted NYSE Rules 1–1004, subject to such changes as necessary to apply the Rules to the Exchange, as the NYSE Alternext Equities Rules to govern trading on the NYSE Alternext Trading Systems.¹⁰ The NYSE Alternext Equities Rules, which became operative on December 1, 2008, are substantially identical to the current NYSE Rules 1–1004 and the Exchange continues to update the NYSE Alternext Equities Rules as necessary to conform with rule changes to corresponding NYSE Rules filed by the NYSE.

Proposed Conforming Amendments to Certain NYSE Alternext Equities Rules:

As noted above, the Exchange proposes to make changes to certain NYSE Alternext Equities Rules to conform with amendments to corresponding NYSE Rules recently filed for immediate effectiveness by the NYSE. Unless specifically noted, and subject to such technical changes as are necessary to apply the Rules to the Exchange, NYSE Alternext is proposing to adopt the NYSE’s rule changes in the form that they were filed with the Commission. The NYSE’s rule changes and the Exchange’s proposed conforming rule changes are described below.

⁹ See Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex 2008–63) (approving the Equities Relocation).

¹⁰ See Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex 2008–63) (approving the Equities Relocation); Securities Exchange Act Release No. 58833 (October 22, 2008), 73 FR 64642 (October 30, 2008) (SR–NYSE–2008–106) and Securities Exchange Act Release No. 58839 (October 23, 2008), 73 FR 64645 (October 30, 2008) (SR–NYSEALTR–2008–03) (together, approving the Bonds Relocation); Securities Exchange Act Release No. 59022 (November 26, 2008), 73 FR 73683 (December 3, 2008) (SR–NYSEALTR–2008–10) (adopting amendments to NYSE Alternext Equities Rules to track changes to corresponding NYSE Rules); Securities Exchange Act Release No. 59027 (November 28, 2008), 73 FR 73681 (December 3, 2008) (SR–NYSEALTR–2008–11) (adopting amendments to Rule 62—NYSE Alternext Equities to track changes to corresponding NYSE Rule 62).

NYSE Rule Filing SR–NYSE–2008–127¹¹

In this filing, the NYSE proposed to (i) amend the operative duration of Rule 104T (Dealings by DMMs), (ii) delete text from Rules 104T and 123 (Record of Orders) relating to orders received by NYSE systems and DMM yielding, (iii) change internal cross-references in Rules 98 (Operation of a DMM Unit) and 123E (DMM Combination Review Policy), (iv) add the terms “market maker” and “market making” to certain provisions of Rule 431 (Margin Requirements), and (v) make technical “clean-up” changes to other NYSE Rules by substituting “DMM” for “specialist”.

Most of the changes noted above were adopted by the Exchange for the NYSE Alternext Equities Rules in a prior filing tracking changes to NYSE Rules.¹² However, the Exchange proposes the following conforming changes that still need to be made to the NYSE Alternext Equities Rules: (i) In Rule 70.25(a)(viii) clarifying “DMM unit” rather than “DMM”; (ii) in Rule 98(c)(2)(D), removing the cross-reference to paragraph (b) of Rule 103.20; (iii) in Rule 431(f)(2)(M)(iv)(10)(F) adding in the terms “market maker” and “market making”; and (iv) in the chart contained in Rule 900(b), clarifying that, for Rule 98A, the second sentence of the first paragraph of that Rule does not apply to after-hours trading on the Exchange.

Proposed Technical Amendments to Rule 431—NYSE Alternext Equities

The Exchange also proposes to make additional technical changes to Rule 431—NYSE Alternext Equities to correct references to “specialist” that were incorrectly changed to “DMM” in a prior rule filing.¹³ The term “specialist” as used in that Rule is used in conformity with federal rules and, unlike the term “DMM”, is not Exchange-specific.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁴ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹⁵ in particular, in that it is designed to promote just and equitable principles of

¹¹ See Securities Exchange Act Release No. 59077 (December 10, 2008), 73 FR 76691 (December 17, 2008).

¹² See Securities Exchange Act Release No. 59022 (November 26, 2008), 73 FR 73683 (December 3, 2008) (SR–NYSEALTR–2008–10).

¹³ See Securities Exchange Act Release No. 59022 (November 26, 2008), 73 FR 73683 (December 3, 2008) (SR–NYSEALTR–2008–10).

¹⁴ 15 U.S.C. 78f(b).

¹⁵ 15 U.S.C. 78f(b)(5).

trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in, securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposal also supports the principles of Section 11A(a)(1)¹⁶ of the Act in that it seeks to ensure the economically efficient execution of securities transactions, to make it practicable for brokers to execute investors' orders in the best market, and to provide an opportunity for investors' orders to be executed without the participation of a dealer.

The Exchange believes that the proposed rule changes are necessary and appropriate to update the NYSE Alternext Equities Rules in conformity with changes made to the corresponding NYSE Rules on which they are based and to make other technical amendments to correct the Rules. To the extent the Exchange has proposed changes that differ from the NYSE version of the Rules, such changes are technical in nature and do not change the substance of the proposed Rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms, does not become operative for 30 days after the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to

Section 19(b)(3)(A) of the Act¹⁷ and Rule 19b-4(f)(6) thereunder.¹⁸

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative for 30 days after the date of filing.¹⁹ However, Rule 19b-4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requested that the Commission waive the 30-day operative delay, as specified in Rule 19b-4(f)(6)(iii),²⁰ which would make the rule change effective and operative upon filing.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will conform the rule text to language that was previously approved by the Commission in prior proposed rule changes, and make technical clarifications to those rules.²¹ Waiving the operative delay will ensure that the rule text of the Exchange is accurate and will avoid potential confusion by eliminating technical errors. Accordingly, the Commission designates the proposed rule change as operative upon filing with the Commission.²²

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.²³

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

¹⁷ 15 U.S.C. 78s(b)(3)(A).

¹⁸ 17 CFR 240.19b-4(f)(6).

¹⁹ 17 CFR 240.19b-4(f)(6)(iii). In addition, Rule 19b-4(f)(6)(iii) requires the self-regulatory organization to give the Commission notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. NYSE has satisfied this requirement.

²⁰ 17 CFR 240.19b-4(f)(6)(iii).

²¹ See *supra* notes 11 and 12.

²² For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

²³ 15 U.S.C. 78s(b)(3)(C).

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or

- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEALTR-2009-03 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEALTR-2009-03. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEALTR-2009-03 and should be submitted on or before March 2, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁴

Florence E. Harmon,
Deputy Secretary.

[FR Doc. E9-2580 Filed 2-6-09; 8:45 am]

BILLING CODE 8011-01-P

²⁴ 17 CFR 200.30-3(a)(12).

¹⁶ 15 U.S.C. 78k-1(a)(1).

DEPARTMENT OF STATE

[Public Notice 6517]

Culturally Significant Objects Imported for Exhibition Determinations: "Gustave Caillebotte: Impressionist Paintings From Paris to the Sea"

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the objects in the exhibition: "Gustave Caillebotte: Impressionist Paintings from Paris to the Sea," imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Brooklyn Museum, Brooklyn, NY, from on or about March 27, 2009, until on or about July 5, 2009, and at possible additional exhibitions or venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Julie Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202-453-8050). The address is U.S. Department of State, SA-44, 301 4th Street, SW., Room 700, Washington, DC 20547-0001.

Dated: February 3, 2009.

C. Miller Crouch,*Assistant Secretary for Educational and Cultural Affairs, Department of State.*

[FR Doc. E9-2640 Filed 2-6-09; 8:45 am]

BILLING CODE 4710-05-P

DEPARTMENT OF TRANSPORTATION**Office of the Secretary****Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (Formerly Subpart Q) During the Week Ending January 24, 2009**

The following Applications for Certificates of Public Convenience and

Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (See 14 CFR 301.201 *et seq.*).

The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: DOT-OST-2009-0017.

Date Filed: January 23, 2009.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: February 13, 2009.

Description:

Application of ExecuJet Europe A/S ("ExecuJet") requesting an exemption and foreign air carrier permit authority permitting ExecuJet to conduct charter foreign air transportation of persons, property, and mail to the full extent authorized by the Air Transport Agreement Between the United States and the European Community and the Member States of the European Community ("US-EU Agreement") to engage in: (i) Charter foreign air transportation of persons, property, and mail between any point or points behind any member state of the European Union via any point or points in any member state and via intermediate points to any point or points in the United States or beyond; (ii) charter foreign passenger air transportation of persons, property, and mail between any point or points in the United States and any point or points in any member of the European Common Aviation Area; (iii) other charters pursuant to the prior approval requirements; and (iv) transportation authorized by any additional route rights that may be made available to European Union carriers in the future. ExecuJet also requests an exemption to the extent necessary to enable it to provide the services described above pending issuance of ExecuJet's foreign air carrier permit and such other relief as the Department may deem necessary or appropriate.

Renee V. Wright,*Program Manager, Docket Operations, Federal Register Liaison.*

[FR Doc. E9-2626 Filed 2-6-09; 8:45 am]

BILLING CODE 4910-9X-P

DEPARTMENT OF TRANSPORTATION**Office of the Secretary****Aviation Proceedings, Agreements Filed the Week Ending January 24, 2009**

The following Agreements were filed with the Department of Transportation under the Sections 412 and 414 of the Federal Aviation Act, as amended (49 U.S.C. 1382 and 1384) and procedures governing proceedings to enforce these provisions. Answers may be filed within 21 days after the filing of the application.

Docket Number: DOT-OST-2009-0018.

Date Filed: January 23, 2009.

Parties: Members of the International Air Transport Association.

Subject: TC3 Within South East Asia between Malaysia and Guam Resolutions & Specified Fares Tables, (Memo 1258). Minutes: TC3 Bangkok, 10-15 November 2008, (Memo 1269). Intended effective date: 1 April 2009.

Docket Number: DOT-OST-2009-0019.

Date Filed: January 23, 2009.

Parties: Members of the International Air Transport Association.

Subject: TC3 Japan-Korea, Resolutions & Specified Fares Tables, (Memo 1259). Minutes: TC3 Bangkok, 10-15 November 2008, (Memo 1269). Intended effective date: 1 April 2009.

Docket Number: DOT-OST-2009-0020.

Date Filed: January 23, 2009.

Parties: Members of the International Air Transport Association.

Subject: TC3 Within South Asian Subcontinent. Resolutions & Specified Fares Tables, (Memo 1260). Minutes: TC3 Bangkok, 10-15 November 2008, (Memo 1269). Intended effective date: 1 April 2009.

Docket Number: DOT-OST-2009-0021.

Date Filed: January 23, 2009.

Parties: Members of the International Air Transport Association.

Subject: TC3 South East Asia—South Asian Subcontinent. Resolutions & Specified Fares Tables, (Memo 1261). Minutes: TC3 Bangkok, 10-15 November 2008, (Memo 1269). Intended effective date: 1 April 2009.

Renee V. Wright,*Program Manager, Docket Operations, Federal Register Liaison.*

[FR Doc. E9-2628 Filed 2-6-09; 8:45 am]

BILLING CODE 4910-9X-P

DEPARTMENT OF TRANSPORTATION**Federal Motor Carrier Safety Administration**

[FMCSA Docket No. FMCSA-2008-0341]

Qualification of Drivers; Exemption Applications; Diabetes**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.**ACTION:** Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt eighty-four individuals from its rule prohibiting persons with insulin-treated diabetes mellitus (ITDM) from operating commercial motor vehicles (CMVs) in interstate commerce. The exemptions will enable these individuals to operate CMVs in interstate commerce.

DATES: The exemptions are effective February 9, 2009. The exemptions expire on February 9, 2011.

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Director, Medical Programs, (202) 366-4001, fmcsamedical@dot.gov, FMCSA, Room W64-224, Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:**Electronic Access**

You may see all the comments online through the Federal Document Management System (FDMS) at: <http://www.regulations.gov>.

Docket: For access to the docket to read background documents or comments, go to <http://www.regulations.gov> and/or Room W12-140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: Anyone may search the electronic form of all comments received into any of DOT's dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, or other entity). You may review DOT's complete Privacy Act Statement in the **Federal Register** (65 FR 19477, Apr. 11, 2000). This statement is also available at <http://Docketinfo.dot.gov>.

Background

On December 12, 2008, FMCSA published a notice of receipt of Federal diabetes exemption applications from

eighty-four individuals, and requested comments from the public (73 FR 75794). The public comment period closed on January 12, 2009 and six comments were received.

FMCSA has evaluated the eligibility of the eighty-four applicants and determined that granting the exemptions to these individuals would achieve a level of safety equivalent to, or greater than, the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(3).

Diabetes Mellitus and Driving Experience of the Applicants

The Agency established the current standard for diabetes in 1970 because several risk studies indicated that diabetic drivers had a higher rate of crash involvement than the general population. The diabetes rule provides that "A person is physically qualified to drive a commercial motor vehicle if that person has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control" (49 CFR 391.41(b)(3)).

FMCSA established its diabetes exemption program, based on the Agency's July 2000 study entitled "A Report to Congress on the Feasibility of a Program to Qualify Individuals with Insulin-Treated Diabetes Mellitus to Operate in Interstate Commerce as Directed by the Transportation Act for the 21st Century." The report concluded that a safe and practicable protocol to allow some drivers with ITDM to operate CMVs is feasible. The 2003 notice in conjunction with the November 8, 2005 (70 FR 67777) **Federal Register** Notice provides the current protocol for allowing such drivers to operate CMVs in interstate commerce.

These eighty-four applicants have had ITDM over a range of 1 to 36 years. These applicants report no hypoglycemic reaction that resulted in loss of consciousness or seizure, that required the assistance of another person, or resulted in impaired cognitive function without warning symptoms in the past 5 years (with one year of stability following any such episode). In each case, an endocrinologist has verified that the driver has demonstrated willingness to properly monitor and manage their diabetes, received education related to diabetes management, and is on a stable insulin regimen. These drivers report no other disqualifying conditions, including diabetes-related complications. Each meets the vision standard at 49 CFR 391.41(b)(10).

The qualifications and medical condition of each applicant were stated

and discussed in detail in the December 12, 2008, **Federal Register** Notice (73 FR 75794). Therefore, they will not be repeated in this notice.

Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the diabetes standard in 49 CFR 391.41(b)(3) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. The exemption allows the applicants to operate CMVs in interstate commerce.

To evaluate the effect of these exemptions on safety, FMCSA considered medical reports about the applicants' ITDM and vision, and reviewed the treating endocrinologist's medical opinion related to the ability of the driver to safely operate a CMV while using insulin.

Consequently, FMCSA finds that exempting these applicants from the diabetes standard in 49 CFR 391.41(b)(3) is likely to achieve a level of safety equal to that existing without the exemption.

Conditions and Requirements

The terms and conditions of the exemption will be provided to the applicants in the exemption document and they include the following: (1) That each individual submit a quarterly monitoring checklist completed by the treating endocrinologist as well as an annual checklist with a comprehensive medical evaluation; (2) that each individual reports within 2 business days of occurrence, all episodes of severe hypoglycemia, significant complications, or inability to manage diabetes; also, any involvement in an accident or any other adverse event in a CMV or personal vehicle, whether or not they are related to an episode of hypoglycemia; (3) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (4) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the certification when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

Discussion of Comments

FMCSA received six comments in this proceeding. The Pennsylvania Department of Transportation expressed that it had reviewed the driving records

for Robert S. Althouse, Tyson C. Johnson, Steven F. Kohalmi, Theodore Stanley Pankiewicz and Gary E. Stone, and was in favor of granting the Federal diabetes exemptions to these applicants. Two of the comments were recommendations in favor of granting the Federal diabetes exemption for Mr. William G. Hansen. The letters were written by Mr. Eric D. Stubblefield and Ms. Charlene Ruth LaForest, who state that Mr. Hansen has not had problems with his diabetes to preclude him from operating a commercial motor vehicle safely. Three of the comments were recommendations in favor of granting Federal diabetes exemptions to individuals with ITDM and suggested streamlining the process of granting exemptions.

Conclusion

After considering the comments to the docket, and based upon its evaluation of the eighty-four exemption applications, FMCSA exempts, Robert S. Althouse, Edwin K. Anderson, James G. Arnoldussen, Sr., William B. Bailor, Kenneth E. Benoit, Thomas S. Benson, Dennis A. Boelens, Melvin J. Boney, Christopher D. Bostic, Walter R. Braxton, Gordon M. Caldwell, Jake C. Cogswell, Eric W. Crawford, Merle N. Cromwell, Trenn A. Davis, Bobby J. Davison, Donald J. DeBaets, Anthony Espinosa, Gregory W. Eylar, Stephen R. Ferrario, Raymond J. Ford, Kevin J. Fries, Fred L. Frisch, Douglas E. Fuller, Daniel D. Greenwell, William G. Hansen, George H. Hayes, Jr., Danny E. Hillier, John H. Hilliges, Thomas Hogan, Harvey J. Hollins, John Horta, Paris J. Howell, Eric J. Huffman, Tyson C. Johnson, Ken M. Jorgenson, Barry J. Kelley, John H. Kingsley, Gary J. Klostermann, Steven F. Kohalmi, Peter D. Krenz, Robert J. Lampman, Jason C. Lang, Kevin J. Lavoie, Dennis M. Lester, Dario Lopez, Jerard L. Marquardt, Robert H. McCann, III, Lewis S. Needles, Derald W. Newton, Galen L. Nightingale, Chris C. Northway, John D. Owens, Theodore S. Pankiewicz, Jody A. Peckels, James H. Pfeiffer, Marc R. Pream, Travis W. Proctor, William B. Racobs, Remson H. Rawson, Ann M. Reinke, Frank W. Reynolds, Vincente L. Rodriguez, Bradley C. Roen, Thomas C. Routon, Tyler A. Russell, Randy L. Schroeder, Michael W. Sharp, Nathaniel B. Shaw, Sean L. Shidell, Wendell R. Shults, Joseph B. Simon, David E. Steinke, Floyd T. Stokes, Gary E. Stone, Timothy D. Stone, Anthony A. Thomas, William J. Thomas, Kaleo B. Tokunaga, John R. Turcotte, Danny J. Watson, Eric W. Williams, Russell A. Williams, and Kimberly A. Woehrman, from the ITDM standard in 49 CFR 391.41(b)(3), subject

to the conditions listed under "Conditions and Requirements" above. In accordance with 49 U.S.C. 31136(e) and 31315 each exemption will be valid for two years unless revoked earlier by FMCSA. The exemption will be revoked if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315. If the exemption is still effective at the end of the 2-year period, the person may apply to FMCSA for a renewal under procedures in effect at that time.

Issued on: January 29, 2009.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. E9-2451 Filed 2-6-09; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Notice of Application for Approval of Discontinuance or Modification of a Railroad Signal System or Relief From the Requirements of Title 49 Code of Federal Regulations Part 236

Pursuant to Title 49 Code of Federal Regulations (CFR) Part 235 and 49 U.S.C. 20502(a), the following railroad has petitioned the Federal Railroad Administration (FRA) seeking approval for the discontinuance or modification of the signal system or relief from the requirements of 49 CFR part 236, as detailed below.

[Docket Number FRA-2009-0003]

Applicant: CSX Transportation, Incorporated, Mr. C. M. King, Chief Engineer, Communications and Signals, 500 Water Street, SC J-350, Jacksonville, Florida 32202.

The CSX Transportation, Incorporated seeks approval of the proposed discontinuance of CP Barbourville Station (MP CA-494.37), including the conversion of the power-operated switch to hand operation, and the discontinuance and removal of dispatcher controlled signals 42R, 44R, 46L, 46RA, and 46RB on Main Tracks #1 and #2, on the Huntington Division, Kanawha Subdivision, at CP Barbourville Station, milepost CA-494.37.

The reason given for the proposed changes is a pole line elimination project and that the power-operated switch and signals at the east leg of wye

are no longer needed for present day operations.

Any interested party desiring to protest the granting of an application shall set forth specifically the grounds upon which the protest is made, and include a concise statement of the interest of the party in the proceeding. Additionally, one copy of the protest shall be furnished to the applicant at the address listed above.

FRA expects to be able to determine these matters without an oral hearing. However, if a specific request for an oral hearing is accompanied by a showing that the party is unable to adequately present his or her position by written statements, an application may be set for public hearing.

All communications concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket Number FRA-2009-0003) 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 February 2, 2009.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. E9-2591 Filed 2-6-09; 8:45 am]

BILLING CODE 4910-06-P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA-2009-0003; Notice 1]

General Motors Corporation, Receipt of Petition for Decision of Inconsequential Noncompliance

General Motors Corporation (GM) has determined that certain model year 2009 Chevrolet Cobalt and Pontiac G5 passenger cars did not fully comply with paragraphs S4.3(c) and S4.3(d) 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*. GM 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), GM 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 GM'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 6,619 model year 2009 Chevrolet Cobalt and Pontiac G5 passenger cars built from April 2008 through November 12, 2008.

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. * * *

(c) Vehicle manufacturer's recommended cold tire inflation pressure for front, rear and spare tires, subject to the limitations of S4.3.4. For full size spare tires, the statement "see above" may, at the manufacturer's option replace manufacturer's recommended cold tire inflation pressure. If no spare tire is provided, the word "none" must replace the manufacturer's recommended cold tire inflation pressure.

(d) Tire size designation, indicated by the headings "size" or "original tire size" or "original size," and "spare tire" or "spare," for the tires installed at the time of the first purchase for purposes other than resale. For full size spare tires, the statement "see above" may, at the manufacturer's option replace the tire size designation. If no spare tire is provided, the word "none" must replace the tire size designation. * * *

In its petition, GM explained that the noncompliances with FMVSS No. 110 exist due to errors in the vehicle tire and loading information placards that it affixed to the vehicles. GM explains that the subject vehicles were originally designed to be equipped with spare tires as standard equipment. The vehicle owner's manuals and tire and information placards included all required information associated with the spare tire equipped vehicles. When a production change substituted a Tire Sealant and Compressor Kit (inflator kit) for the spare tire, the vehicle tire and information placards should have been revised to comply with paragraphs S4.3(c) and S4.3(d) FMVSS No. 110, but were not.

GM described the noncompliances as the following errors on the tire and loading information placard:

(1) The tire size designation shows a spare tire size appropriate for the subject vehicles instead of the word "none".

(2) The manufacturer's recommended cold tire inflation pressure shows inflation pressure appropriate for the subject spare tire instead of the word "none".

GM also stated that all other information (front and rear tire size designations and their respective cold tire inflation pressures as well as seating capacity and vehicle capacity weight) on the subject placards is correct and that it was not aware of any field or owner complaints associated with these noncompliances.

GM additionally stated that it believes that this noncompliance is inconsequential to motor vehicle safety for the following reasons:

(1) All information required for maintaining and/or replacing the front and rear tires, as well as the seating capacity and vehicle capacity weight are correct on the tire and loading information placard on the subject vehicles.

(2) The vehicle price label (a.k.a., the Monroney label) has the correct information, whether the vehicle is equipped with an inflator kit or a spare tire. Therefore, original purchase owners should already know if their vehicle is equipped with an inflator kit in place of a spare tire.

(3) In addition to the FMVSS 138 required owner's manual language of checking the inflation pressures of all tires including the spare monthly, the owner's manual also recommends the owner to check the tires including the compact spare once a month or more. The tire information placard on the subject vehicles contains spare tire size and recommended cold tire inflation pressure instead of the word "none" as required by FMVSS No. 110. The inflator kit is located in the same location where a spare tire would be for vehicles ordered with an optional spare tire. Therefore, if an owner were to look for the spare tire, he/she would find the inflator kit, and realize that the vehicle is equipped with an inflator kit instead of a spare tire.

(4) In the event of a flat tire, the inflator kit serves the purpose of getting back on the road. Since the inflator kit is located in the same location as the spare tire, the customer should have no problem finding it. The owner's manual provides the instructions for using the inflator kit as well as installing the spare tire. There is a label with instructions on the sealant canister of the inflator kit as well.

(5) The inflator kit includes a tire sealant canister, an air compressor as well as a pressure gage in one unit. The inflator kit can be used to inflate one or more tires regardless of whether the

vehicle has a punctured tire or not. The sealant of the GM sealant canister does not damage the TPMS pressure sensor, and the TPMS continues to function.

(6) On Star e-mail service subscribers get monthly reminders on tire pressure maintenance, including the recommended cold tire inflation pressures and status of their tire pressures.

(7) Risk to the public is negligible because the vehicle does have an inflator kit.

(8) GM is not aware of any incidents or injuries related to the subject condition.

GM 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, GM 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 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: March 11, 2009.

Authority: (49 U.S.C. 30118, 30120; delegations of authority at CFR 1.50 and 501.8).

Issued on: February 3, 2009.

Claude H. Harris,
Director, Office of Vehicle Safety Compliance.
[FR Doc. E9-2666 Filed 2-6-09; 8:45 am]

BILLING CODE 4910-59-P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

February 3, 2009.

The Department of Treasury will submit the following public information

collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104-13 on or after the date of publication of this notice. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, and 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before March 11, 2009, to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545-1953.

Type of Review: Revision.

Title: REG-140029-07 Substantiation and Reporting Requirements for Cash and Noncash Charitable Contributions and Deductions—(Previously Notice 2006-96).

Description: The information collected under § 170(f)(11) will be used by taxpayers to substantiate claimed charitable contribution deductions in excess of \$500; some of the information will be required to be included with the taxpayer's tax return. The information collected under § 170(f)(17) will be used by taxpayers to substantiate claimed charitable contributions of cash, check, or other monetary gifts; the information must be maintained by taxpayers but will not be required to be included with the taxpayer's return.

Respondents: Individuals or Households.

Estimated Total Burden Hours: 226,419 hours.

Clearance Officer: Glenn P. Kirkland, (202) 622-3428, Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Shagufta Ahmed, (202) 395-7873, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Celina Elphage,

Treasury PRA Clearance Officer.

[FR Doc. E9-2630 Filed 2-6-09; 8:45 am]

BILLING CODE 4830-01-P



Federal Register

**Monday,
February 9, 2009**

Part II

Securities and Exchange Commission

**17 CFR Parts 240, 243, and 249b
Re-Proposed Rules for Nationally
Recognized Statistical Rating
Organizations; Amendments to Rules for
Nationally Recognized Statistical Rating
Organizations; Final Rule and Proposed
Rule**

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 249b

[Release No. 34-59342; File No. S7-13-08]

RIN 3235-AK14

Amendments to Rules for Nationally Recognized Statistical Rating Organizations

AGENCY: Securities and Exchange Commission ("Commission").

ACTION: Final rule.

SUMMARY: The Commission is adopting rule amendments that impose additional requirements on nationally recognized statistical rating organizations ("NRSROs") in order to address concerns about the integrity of their credit rating procedures and methodologies.

DATES: Effective Date: April 10, 2009.

Compliance Date: April 10, 2009, except that the compliance date for the amendment to § 240.17g-2(d) is August 10, 2009.

FOR FURTHER INFORMATION CONTACT:

Michael A. Macchiaroli, Associate Director, at (202) 551-5525; Thomas K. McGowan, Assistant Director, at (202) 551-5521; Randall W. Roy, Branch Chief, at (202) 551-5522; Joseph I. Levinson, Special Counsel, at (202) 551-5598; Carrie A. O'Brien, Special Counsel, at (202) 551-5640; Sheila D. Swartz, Special Counsel, at (202) 551-5545; Rose Russo Wells, Special Counsel, at (202) 551-5527; Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-6628

SUPPLEMENTARY INFORMATION:

I. Background

On June 16, 2008, the Commission, in the first of three related actions, proposed a series of amendments to its existing rules governing the conduct of NRSROs.¹ The proposed amendments

¹ *Proposed Rules for Nationally Recognized Statistical Rating Organizations*, Exchange Act Release No. 57967 (June 16, 2008), 73 FR 36212 (June 25, 2008) ("June 16, 2008 Proposing Release"). The existing NRSRO rules were adopted by the Commission in 2007. See *Oversight of Credit Rating Agencies Registered as Nationally Recognized Statistical Rating Organizations*, Exchange Act Release No. 55857 (June 5, 2007), 72 FR 33564 (June 18, 2007) ("June 5, 2007 Adopting Release"). The second action taken by the Commission (also on June 16, 2008) was to propose a new rule that would require NRSROs to distinguish their ratings for structured finance products from other classes of credit ratings by publishing a report with the rating or using a different rating symbol. See *June 16, 2008 Proposing Release*. The third action taken by the Commission was to propose a series of amendments

were designed to address concerns about the integrity of the process by which NRSROs rate structured finance products, particularly mortgage related securities.² Today, the Commission is adopting, with revisions, a majority of the rule amendments proposed in the first action.³ These new requirements are designed to address practices identified, in part, by the Commission staff during its examination of the three largest NRSROs.⁴ In particular, the requirements are intended to increase the transparency of the NRSROs' rating methodologies, strengthen the NRSROs' disclosure of ratings performance, prohibit the NRSROs from engaging in certain practices that create conflicts of interest, and enhance the NRSROs' recordkeeping and reporting obligations to assist the Commission in performing its regulatory and oversight functions.⁵ The Commission received 61 comment letters on the amendments as proposed.⁶

to rules under the Exchange Act, Securities Act of 1933 ("Securities Act"), and Investment Company Act of 1940 ("Investment Company Act") that would end the use of NRSRO credit ratings in the rules. See *References to Ratings of Nationally Recognized Statistical Rating Organizations*, Exchange Act Release No. 58070 (July 1, 2008), 73 FR 40088 (July 11, 2008); *Securities Ratings*, Securities Act Release No. 8940 (July 1, 2008), 73 FR 40106 (July 11, 2008); *References to Ratings of Nationally Recognized Statistical Rating Organizations*, Investment Company Act Release No. 28327 (July 1, 2008), 73 FR 40124 (July 11, 2008). The second and third actions are not being finalized in this release.

² The term "structured finance product" as used throughout this release refers broadly to any security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction. This broad category of financial instrument includes, but is not limited to, asset-backed securities such as residential mortgage-backed securities ("RMBS") and to other types of structured debt instruments such as collateralized debt obligations ("CDOs"), including synthetic and hybrid CDOs.

³ The *June 16, 2008 Proposing Release* included amendments to paragraphs (a) and (b) of Rule 17g-5 that are not being adopted today. Instead, in part, in response to the many comments received on these proposed amendments identifying substantial issues as to how they would operate in practice, the Commission today is re-proposing these amendments in a separate release. In addition, the Commission is also proposing potential additional requirements to the final amendment to paragraph (d) of Rule 17g-2 being adopted today.

⁴ See *June 16, 2008 Proposing Release*, 73 FR at 36213; *Summary Report of Issues Identified in the Staff's Examinations of Select Credit Rating Agencies* (July 2008). The report can be accessed at <http://www.sec.gov/news/studies/2008/craexamination070808.pdf>.

⁵ The *June 16, 2008 Proposing Release* contains a detailed discussion of concerns the final rules are intended to address, particularly with respect to the NRSROs' role in the credit market turmoil. See *June 16, 2008 Proposing Release*, 73 FR at 36213-36218.

⁶ Letter dated June 10, 2008 from Deborah A. Cunningham and Boyce I. Greer, Co-Chairs Company, Co-Chairs, SIFMA Credit Rating Agency Task Force ("First SIFMA Letter"); letter dated June 12, 2008 from G. Brooks Euler ("Euler Letter"); letter dated June 19, 2008 from Rupert Schoder,

Financial Engineer, Socit Gnrale, France ("SGF Letter"); letter dated July 8, 2008 from William Morris, Principal, The Morris Group ("Morris Letter"); letter dated July 8, 2008 from Elaine Wieche ("Wieche Letter"); letter dated July 13, 2008 from Walter C. Hamscher, Member, XBRL International Board of Directors ("Hamscher Letter"); letter dated July 14, 2008 from Robert Dobilas, President, CEO, Realpoint LLC ("Realpoint Letter"); letter dated July 21, 2008 from Dottie Cunningham, Chief Executive Officer, Commercial Mortgage Securities Association ("CMSA Letter"); letter dated July 21, 2008 from Bruce Goldstein, SunTrust Robinson Humphrey ("STRH Letter"); letter dated July 21, 2008 from Raymond E. Petersen, President, Inland Mortgage Capital Corporation ("Inland Letter"); letter dated July 21, 2008 from Leonard W. Cotton, Vice Chairman, Centerline Capital Group ("Centerline Letter"); letter dated July 21, 2008 from Gregg Rademacher, Chief Executive Officer, Los Angeles County Employees Retirement Association ("LACERA Letter"); letter dated July 22, 2008 from Kevin Kohler, VP—Levered Finance, Capmark Investments LP ("Capmark Letter"); letter dated July 22, 2008 from Richard Metcalf, Director, Corporate Affairs Department, Laborers' International Union of North America ("LIUNA Letter"); letter dated July 22, 2008 from Mary A. Downing, Director—Surveillance and Due Diligence, Hillenbrand Partners ("Hillenbrand Letter"); letter dated July 23, 2008 from Kent Wideman, Group Managing Director, Policy & Rating Committee and Mary Keogh, Managing Director, Policy & Regulatory Affairs, DBRS ("DBRS Letter"); letter dated July 24, 2008 from Takefumi Emori, Managing Director, Japan Credit Rating Agency, Ltd. ("JCR Letter"); letter dated July 24, 2008 from J. Douglas Adamson, Executive Vice President, Technical Services, American Bankers Association ("ABA Letter"); letter dated July 24, 2008 from Amy Borrus, Deputy Director, Council of Institutional Investors ("Council Letter"); letter dated July 24, 2008 from Joseph A. Hall and Michael Kaplan, Davis Polk, and Wardwell ("DPW Letter"); letter dated July 24, 2008 from Vickie A. Tillman, Executive Vice President, Standard & Poor's Ratings Services ("S&P Letter"); letter dated July 24, 2008 from Deborah A. Cunningham and Boyce I. Greer, Co-Chairs Company, Co-Chairs, SIFMA Credit Rating Agency Task Force ("Second SIFMA Letter"); letter dated July 24, 2008 from Alex J. Pollock, Resident Fellow, American Enterprise Institute ("Pollock Letter"); letter dated July 25, 2008 from Sally Scutt, Managing Director, and Pierre de Lauzun, Chairman, Financial Markets Working Group, International Banking Federation ("IBFED Letter"); letter dated July 25, 2008 from Eric Sanitas, President, Association federative internationale des porteurs d'emprunts russe ("AFIPER Letter"); letter dated July 25, 2008 from Denise L. Nappier, Treasurer, State of Connecticut ("Nappier Letter"); letter dated July 25, 2008 from Suzanne C. Hutchinson, Mortgage Insurance Companies of America ("MICA Letter"); letter dated July 25, 2008 from Kieran P. Quinn, Chairman, Mortgage Bankers Association ("MBA Letter"); letter dated July 25, 2008 from Sean J. Egan, President, Egan-Jones Ratings Co. ("Egan-Jones Letter"); letter dated July 25, 2008 from Frank Chin, Chairman, Municipal Securities Rulemaking Board ("MSRB Letter"); letter dated July 25, 2008 from Charles D. Brown, General Counsel, Fitch Ratings ("Fitch Letter"); letter dated July 25, 2008 from Bill Lockyer, State Treasurer, California ("Lockyer Letter"); letter dated July 25, 2008 from Jeremy Reifsnnyder and Richard Johns, Co-Chairs, American Securitization Forum Credit Rating Agency Task Force ("ASF Letter"); letter dated July 25, 2008 from Annemarie G. DiCola, Chief Executive Officer, Trepp, LLC ("Trepp Letter"); letter dated July 25, 2008 from Francisco Paez, Metropolitan Life Insurance Company ("MetLife Letter"); letter dated July 25, 2008 from Cate Long, Multiple-Markets

Many commenters expressed general support for the proposals and the ends they were designed to achieve.⁷ At the same time, commenters raised concerns about the practicality and costs of the

("Multiple-Markets Letter"); letter dated July 25, 2008 from Kurt N. Schacht, Executive Director and Linda L. Rittenhouse, Senior Policy Analyst, CFA Institute Centre for Financial Market Integrity ("CFA Institute Letter"); letter dated July 25, 2008 from Lawrence J. White, Professor of Economics, Stern School of Business, New York University ("White Letter"); letter dated July 25, 2008 from Jack Davis, Head of Fixed Income Research, Schroder Investment Management North America Inc. ("Schroders Letter"); letter dated July 25, 2008 from Karrie McMillan, General Counsel, Investment Company Institute ("ICI Letter"); letter dated July 25, 2008 from Michael Decker, Co-Chief Executive Officer and Mike Nicholas, Co-Chief Executive Officer, Regional Bond Dealers Association ("RBDA Letter"); letter dated July 25, 2008 from Richard M. Whiting, Executive Director and General Counsel, Financial Services Roundtable ("Roundtable Letter"); letter dated July 25, 2008 from James H. Gellert, Chairman and CEO and Dr. Patrick J. Caragata, Founder and Executive Vice Chairman, Rapid Ratings International Inc. ("Rapid Ratings Letter"); letter dated July 25, 2008 from Alan P. Kress, Counsel, Principal Global Investors, LLC ("Principal Global Letter"); letter dated July 25, 2008 from James A. Kaitz, President and CEO, Association for Financial Professionals ("AFP Letter"); letter dated July 25, 2008 from Gregory W. Smith, General Counsel, Colorado Public Employees' Retirement Association ("Colorado PERA Letter"); letter dated July 25, 2008 from Cleary Gottlieb Steen & Hamilton LLP, "CGSH Letter"); letter dated July 25, 2008 from Keith A. Strycula, Chairman, Structured Products Association ("SPA Letter"); letter dated July 25, 2008 from Yasuhiro Harada, Chairman and Co-CEO, Rating and Investment Information, Inc. ("R&I Letter"); letter dated July 28, 2008 from Michel Madelain, Chief Operating Officer, Moody's Investors Service ("Moody's Letter"); letter dated July 28, 2008 from Keith F. Higgins, Chair, Committee on Federal Regulation of Securities and Vicki O. Tucker, Chair, Committee on Securitization and Structured Finance, American Bar Association ("ABA Business Law Committees Letter"); letter dated July 28, 2008 from Morris C. Foutch ("Foutch Letter"); letter dated July 29, 2008 from Glenn Reynolds, CEO and Peter Petas, President CreditSights, Inc. ("CreditSights Letter"); letter dated July 31, 2008 from Robert S. Khuzami, Managing Director and General Counsel, Deutsche Bank Americas ("DBA Letter"); letter dated August 5, 2008 from John Taylor, President and CEO, National Community Reinvestment Coalition ("NCRC Letter"); letter dated August 8, 2008 from Jeffrey A. Perlowitz, Managing Director and Co-Head of Global Securitized Markets, and Myongsu Kong, Director and Counsel, Citigroup Global Markets Inc. ("Citi Letter"); letter dated August 12, 2008 from John J. Niebuhr, Managing Director, Lehman Brothers, Inc. ("Lehman Letter"); letter dated August 15, 2008 from Steve Linehan, Executive Vice-President and Treasurer, Capital One Financial Corporation ("Capital One Letter"); letter dated August 17, 2008 from Olivier Raingard, Ph.D. ("Raingard Letter"); letter dated August 22, 2008 from Robert Dobilas, CEO and President, Realpoint LLC ("Second Realpoint Letter"); letter dated August 27, 2008 from Larry G. Mayewski, Executive Vice President & Chief Rating Officer, A.M. Best Company ("A.M. Best Letter").

⁷ See, e.g., LACERA Letter; LIUNA Letter; Council Letter; Second SIFMA Letter; Nappier Letter; RBDA Letter; Colorado PERA Letter; CGSH Letter; SPA Letter; R&I Letter; Moody's Letter; CreditSights Letter; DBA Letter; NCRC Letter; Lehman Letter; Capital One Letter.

proposals.⁸ The rules being adopted today incorporate many aspects of the rules as proposed, but also include significant revisions based on the comments received.⁹ The revisions seek to address practical impediments identified by commenters while at the same time continuing to promote the substantive goals of the proposed rules (increasing transparency and disclosure, diminishing conflicts, and strengthening oversight) and of the Credit Rating Agency Reform Act of 2006 ("Rating Agency Act").¹⁰

In summary, the rule amendments require: (1) An NRSRO to provide enhanced disclosure of performance measurements statistics and the procedures and methodologies used by the NRSRO in determining credit ratings for structured finance products and other debt securities on Form NRSRO; ¹¹ (2) an NRSRO to make, keep and preserve additional records under Rule 17g-2; ¹² (3) an NRSRO to make publicly available on its Internet Web site in XBRL format a random sample of 10% of the ratings histories of credit ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated ("issuer-paid credit ratings") in each class of credit ratings for which it is registered and has issued 500 or more issuer-paid credit ratings, with each new ratings action to be reflected in such histories no later than six months after they are taken; ¹³ and (4) an NRSRO to furnish the Commission with an additional annual report.¹⁴

II. The Final Rule Amendments

A. Amendments to the Instructions for Form NRSRO

Form NRSRO contains 8 line items and requires 13 Exhibits. The line items elicit information about the applicant credit rating agency or NRSRO such as: its address; corporate form; credit rating affiliates that would be, or are, a part of its registration; the classes of credit ratings for which it is seeking, or is, registered as an NRSRO; the number of

⁸ See, e.g., White Letter; Roundtable Letter; Rapid Ratings Letter; ABA Business Law Committees Letter; Raingard Letter.

⁹ These comments are available on the Commission's Internet Web site, located at <http://www.sec.gov/comments/s7-13-08/s71308.shtml>, and in the Commission's Public Reference Room in its Washington DC headquarters.

¹⁰ See Report of the Senate Committee on Banking, Housing, and Urban Affairs to Accompany S. 3850, Credit Rating Agency Reform Act of 2006, S. Report No. 109-326, 109th Cong., 2d Sess. (Sept. 6, 2006) ("Senate Report"), p. 2.

¹¹ See amendments to Form NRSRO.

¹² 17 CFR 240.17g-2.

¹³ See Rule 17g-2(a)(8) and (d).

¹⁴ See Rule 17g-3(a)(6).

credit ratings it has issued in each class and the date it began issuing credit ratings in each class; and whether it or a person associated with it has committed or omitted any act, been convicted of any crime, or is subject to any order identified in Section 15(d) of the Exchange Act. The 13 Exhibits to Form NRSRO elicit the information required under Sections 15E(a)(1)(B)(i) through (ix) of the Exchange Act and additional information the Commission prescribed under authority in Section 15E(a)(1)(B)(x) of the Exchange Act.¹⁵

The Commission proposed amending the instructions to Form NRSRO to enhance the disclosures NRSROs make in Exhibits 1 and 2. As discussed below, the Commission is adopting the changes with certain modifications that respond, in part, to points raised by commenters.

1. Enhanced Ratings Performance Measurement Statistics on Form NRSRO

Exhibit 1 to Form NRSRO elicits the information required by Section 15E(a)(1)(B)(i) of the Exchange Act: credit ratings performance measurement statistics over short-term, mid-term, and long-term periods (as applicable) of the credit rating agency.¹⁶ The instructions for the Exhibit provide that an applicant and NRSRO must include in the Exhibit definitions of the credit ratings (*i.e.*, an explanation of each category and notch) and explanations of the performance measurement statistics, including the metrics used to derive the statistics.

The first proposed amendment to the Exhibit 1 instructions would enhance the disclosure by requiring separate sets of default and transition statistics for different classes of credit ratings.

Specifically, as proposed, the instructions would require separate sets of statistics for each class of credit rating for which an applicant is seeking registration as an NRSRO or an NRSRO is registered as well as for any other broad class of credit ratings issued by the NRSRO.

The Commission received eight comment letters on this amendment.¹⁷ One commenter noted that separating performance measurements by classes of credit ratings would help market participants make informed decisions.¹⁸ Commenters suggested that the Commission refine the classes of credit ratings and raised concerns about how to interpret the catchall phrase in the rule "any other broad class of credit

¹⁵ 15 U.S.C. 78o-7(a)(1)(B)(i)-(x).

¹⁶ 15 U.S.C. 78o-7(a)(1)(B)(i).

¹⁷ See Second SIFMA Letter; Fitch Letter; Lockyer Letter; Multiple-Markets Letter; ICI Letter; AFP Letter; ABA Business Law Committees Letter; Raingard Letter.

¹⁸ See AFP Letter.

rating.” For example, one commenter argued that such a category “would capture a variety of operational and qualitative scales, such as servicer and bank support ratings, for which default and/or transition studies are of limited or no value.”¹⁹ The same commenter suggested that the single category encompassing government securities, municipal securities and foreign government securities be divided into three separate classes (sovereigns, United States public finance, and international public finance) to account for the different types of investors each such class of securities attracts as well as the potential for the much greater amount of data on public finance issuance in the United States to overwhelm the sovereign and international public finance data, thus making the statistics less useful to investors.²⁰

In response to commenters’ concerns, the Commission is adopting the proposed amendments to the instructions but not adopting the “catchall” requirement to which commenters objected. Eliminating the catchall will remove ambiguity in the rule. In addition, the Commission is adding language to the instructions as amended that divide government securities into three classes: sovereigns, United States public finance, and international public finance. This will make the performance statistics for these classes of credit ratings more meaningful, since the types of rated obligors and instruments in each class will be more similar.

As proposed, the first amendment to the Exhibit 1 instructions also would require an NRSRO registered in the class of credit ratings described in Section 3(a)(62)(B)(iv) of the Rating Agency Act²¹ (or an applicant seeking registration in that class) when generating the performance statistics for that class to include credit ratings of any security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction. This was designed to include ratings actions for credit ratings of structured finance products that do not meet the narrower statutory definition of “issuers of asset-backed securities (as that term is defined in section 1101(c) of part 229 of title 17, Code of Federal Regulations).”²² The Commission received no comment on this aspect of

the amendment and is adopting it as proposed.

This first amendment to the Exhibit 1 instructions, modified as described above, will result in the generation of performance statistics that will make it easier for users of credit ratings to compare the accuracy of NRSRO credit ratings on a class-by-class basis. For the reasons discussed, the Commission is adopting the amendment to the instructions with the modifications described above.

As proposed, the second amendment to the Exhibit 1 instructions would require that the class-by-class disclosures be broken out over 1, 3 and 10-year periods. Section 15E(a)(1)(B)(i) of the Exchange Act requires that the performance statistics be over short, mid, and long-term periods, which is also the language currently used in Form NRSRO.²³ The purpose of this amendment was to prescribe periods in specific years so that the performance statistics generated by the NRSROs are more easily comparable.

The Commission received 12 comments on the amendment.²⁴ Most of the commenters supported the amendment, including the 1, 3, and 10 year time frames. These comments supported the Commission’s view that 1, 3, and 10 year periods are reasonable definitions of the terms “short-term, mid-term, and long-term periods” as used in Section 15E(a)(1)(B)(i) of the Exchange Act.²⁵ Commenters believed the proposed statistics would provide investors additional information to make informed investment decisions.²⁶ Several commenters asked that the Commission clarify whether the default rates were for the most recent 1, 3, and 10 year periods or the average over multiple 1, 3, and 10 year periods.²⁷ The Commission intended the default statistics to be for the most recent 1, 3, and 10 year periods. The Commission is adopting the amendment to the instructions as proposed.

As proposed, the third amendment to the Exhibit 1 instructions would clarify the type of ratings actions that are required to be included in these performance measurement statistics. Specifically, it would change the instruction requiring that the performance statistics show “downgrade and default rates” with an

instruction that they show “ratings transition and default rates.” The switch to “ratings transition” rates from “downgrade” rates was designed to clarify that upgrades (as well as downgrades) should be included when generating the statistics. The Commission did not receive any comments on this amendment to the instructions and is adopting it as proposed.

Finally, the Commission proposed an amendment to the instructions of Exhibit 1 that would specify that the default statistics required under the exhibit must show defaults relative to the initial rating and incorporate defaults that occur after a credit rating is withdrawn. The proposed amendment was designed to prevent an NRSRO from manipulating the performance statistics by not including defaults when generating statistics for a category of credit ratings (e.g., AA) because the defaults occur after the rating is downgraded to a lower category (e.g., CC) or withdrawn.

Commenters raised a number of concerns about how this proposal would operate in practice.²⁸ Several commenters expressed concern that the requirement to include defaults occurring after a rating is withdrawn could obligate an NRSRO to monitor ratings for an indefinite period of time after the NRSRO stops rating such instruments, and that an NRSRO may not be able to provide such statistics after a rating is withdrawn.²⁹ Two NRSROs noted that the ability to monitor ratings depends on the ability of the NRSRO to obtain information that an event of default has occurred and that this may be impractical given limited access to information once a rating is withdrawn.³⁰ Another NRSRO believed that the proposal was overbroad and outside the scope of the Commission’s authority, asserting that it intrudes upon the substance of the NRSRO’s rating procedures.³¹ The Commission agrees that, given the limited information available to NRSROs following the withdrawal of a rating, requiring the inclusion in these statistics of defaults occurring after a rating is withdrawn may be problematic. Therefore, the Commission is not adopting this provision at this time. While the instructions to Exhibit 1 will continue to require default statistics that are relative to initial rating on a class-by-class basis, for the reasons discussed

²³ 15 U.S.C. 78o-7(a)(1)(B)(i).

²⁴ See LIUNA Letter; JCR Letter; Council Letter; S&P Letter; Second SIFMA Letter; Fitch Letter; Multiple-Markets Letter; AFP Letter; Colorado PERA Letter; ABA Business Law Committees Letter; NCRC Letter; Raingard Letter.

²⁵ 15 U.S.C. 78o-7(a)(1)(B)(i).

²⁶ See LIUNA Letter; AFP Letter.

²⁷ See JCR Letter; S&P Letter.

²⁸ See DBRS Letter; S&P Letter; Fitch Letter; Moody’s Letter.

²⁹ See DBRS Letter; S&P Letter.

³⁰ See S&P Letter; Fitch Letter.

³¹ See Moody’s Letter.

¹⁹ See Fitch Letter.

²⁰ *Id.*

²¹ 15 U.S.C. 78c(a)(62)(B)(iv).

²² See *id.*

above, the amendment as adopted does not require the inclusion of defaults that occur after a credit rating is withdrawn in those statistics. As an alternative means of achieving the Commission's goals in proposing this amendment, the Commission notes that, as discussed below, ratings withdrawals must be included among the ratings actions to be disclosed under the Commission's amendment to Rule 17g-3,³² which requires an annual report of all ratings actions taken during the year within a class of credit ratings. This information will be useful in determining whether the number of ratings actions in a given class is unusually large and, if so, the need for a review of the causes of any significant changes to that number—including, potentially, a disproportionate amount of ratings withdrawals.

2. Enhanced Disclosure of Ratings Methodologies

Exhibit 2 to Form NRSRO elicits the information required by Section 15E(a)(1)(B)(ii) of the Exchange Act: information regarding the procedures and methodologies used by the credit rating agency to determine credit ratings.³³ The instructions for the Exhibit require a description of the procedures and methodologies (not the submission and disclosure of each actual procedure and methodology). The instructions further provide that the description must be sufficiently detailed to provide users of credit ratings with an understanding of the processes the applicant or NRSRO employs to determine credit ratings. The instructions also identify a number of areas that must be addressed in the description to the extent they are applicable.³⁴

³² 17 CFR 240.17g-3.

³³ 15 U.S.C. 78o-7(a)(1)(B)(ii).

³⁴ Specifically, the instructions require an NRSRO to provide descriptions of the following areas (as applicable): "policies for determining whether to initiate a credit rating; a description of the public and non-public sources of information used in determining credit ratings, including information and analysis provided by third-party vendors; the quantitative and qualitative models and metrics used to determine credit ratings; the methodologies by which credit ratings of other credit rating agencies are treated to determine credit ratings for securities or money market instruments issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction; the procedures for interacting with the management of a rated obligor or issuer of rated securities or money market instruments; the structure and voting process of committees that review or approve credit ratings; procedures for informing rated obligors or issuers of rated securities or money market instruments about credit rating decisions and for appeals of final or pending credit rating decisions; procedures for monitoring, reviewing, and updating credit ratings; and procedures to withdraw, or

The Commission proposed amending the instructions to Exhibit 2 to add three additional areas that an applicant and a registered NRSRO would need to address in the descriptions of its procedures and methodologies in Exhibit 2 to the extent they are applicable. The three proposed areas that would need to be addressed by an applicant and NRSRO were:

- Whether and, if so, how information about verification performed on assets underlying or referenced by a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction is relied on in determining credit ratings;
- Whether and, if so, how assessments of the quality of originators of assets underlying or referenced by a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction play a part in the determination of credit ratings; and
- How frequently credit ratings are reviewed, whether different models or criteria are used for ratings surveillance than for determining initial ratings, whether changes made to models and criteria for determining initial ratings are applied retroactively to existing ratings, and whether changes made to models and criteria for performing ratings surveillance are incorporated into the models and criteria for determining initial ratings.

The comments submitted on the first proposed amendment to the instructions to Exhibit 2 were supportive of the proposal.³⁵ Commenters generally supported the second proposed amendment as well.³⁶ Likewise, commenters were supportive of the third proposed amendment. They stated that it would be particularly helpful to retail investors and that all investors would benefit from knowing what ratings have undergone surveillance by the NRSRO.³⁷

The Commission is adopting the first amendment to the instructions to Exhibit 2 as proposed. This amendment requires an NRSRO to disclose whether and, if so, how information about verification performed on the assets is relied on in determining credit ratings for structured finance products. The Commission believes this disclosure will benefit users of credit ratings by

suspend the maintenance of, a credit rating." See Form NRSRO Instructions for Exhibit 2.

³⁵ See NCRC Letter; Second SIFMA Letter; MICA Letter; ASF Letter.

³⁶ See Second SIFMA Letter; ASF Letter.

³⁷ See ASF Letter; Multiple-Markets Letter; NCRC Letter.

providing information about the potential accuracy of an NRSRO's credit ratings. NRSROs determine credit ratings for structured finance products based on assumptions in their models as to how the assets underlying the instruments will perform under varying levels of stress. These assumptions are based on the characteristics of the assets (e.g., value of the property, income of the borrower) as reported by the arranger of the structured finance product. If this information is inaccurate, the capacity of the model to predict the potential future performance of the assets may be significantly impaired. Consequently, information about whether an NRSRO requires that some level of verification be performed or takes other steps to account for the lack of verification or a low level of verification will be useful to users of credit ratings in assessing the potential for an NRSRO's credit ratings to be adversely impacted by inaccurate information about the assets underlying a rated structured finance product.

The Commission is adopting the second amendment to the instructions to Exhibit 2 as proposed. This amendment requires an NRSRO to disclose whether it considers qualitative assessments of the originator of assets underlying a structured finance product in the rating process for such products. The Commission believes that certain qualities of an asset originator, such as its experience and underwriting standards, may impact the quality of the loans it originates and the accuracy of the associated loan documentation. This, in turn, could influence how the assets ultimately perform and the ability of the NRSRO's models to predict their performance. Consequently, the failure to perform any assessment of the loan originators could increase the risk that an NRSRO's credit ratings may not be accurate. Therefore, disclosures as to whether the NRSRO performs any qualitative assessments of the originators would be useful in comparing the efficacy of the NRSROs' procedures and methodologies.

The Commission is adopting the third amendment to the instructions to Exhibit 2 as proposed. This amendment requires an NRSRO to disclose the frequency of its surveillance efforts and how changes to its quantitative and qualitative ratings models are incorporated into the surveillance process. The Commission believes that users of credit ratings will find information about these matters useful in comparing the ratings methodologies of different NRSROs. For example, how often and with what models an NRSRO monitors its credit ratings would be

relevant to assessing the accuracy of the ratings inasmuch as ratings based on stale information and outdated models may not be as accurate as ratings of like products using newer data and models. Moreover, with respect to new types of rated obligors and debt securities, the NRSROs refine their models as more information about the performance of these obligors and debt securities is observed and incorporated into their assumptions. Consequently, as the models evolve based on more robust performance data, credit ratings of obligors or debt securities determined using older models may be at greater risk for being inaccurate than the newer ratings. Therefore, whether the NRSRO verifies the older ratings using the newer methodologies would be useful to users of credit ratings in assessing the accuracy of the credit ratings.

The Commission notes that, unlike the prior two changes, this new instruction applies to all classes of credit ratings for which the NRSRO determines credit ratings (not solely to structured products). For the reasons noted above, the Commission is adopting this amendment as proposed.

The Commission is adopting these amendments to the instructions to Exhibit 2 to Form NRSRO, in part, under authority to require such additional information in the application as it finds necessary or appropriate in the public interest or for the protection of investors.³⁸ The Commission believes the new disclosure requirements are necessary and appropriate and in the public interest or for the protection of investors. Specifically, they are designed to provide greater clarity around three areas of the NRSROs' rating processes where questions have been raised, particularly for structured finance products, in the context of the credit market turmoil: Namely, the verification performed on information provided in loan documents; the quality of loan originators; and the surveillance of existing ratings and how changes to models are applied to existing ratings. The amendments are designed to enhance the disclosures NRSROs make in these areas and, thereby, allow users of credit ratings to better evaluate the quality of their ratings processes.

B. Amendments to Rule 17g-2

Rule 17g-2 requires an NRSRO to make and retain certain records relating to its business and to retain certain other business records made in the

normal course of business operations.³⁹ The rule also prescribes the time periods and manner in which these records are required to be retained. The Commission is adopting amendments to Rule 17g-2 to require NRSROs to make and retain certain additional records and to require that a portion of these new records be made publicly available.

1. A Record of Rating Actions and the Requirement That They Be Made Publicly Available

The Commission proposed an amendment that would require an NRSRO to make and retain a record of the ratings history of each outstanding credit rating as well as an amendment that would require the NRSRO to make the ratings histories contained in the record publicly available on its corporate Web site in eXtensible Business Reporting Language ("XBRL") electronic format, with each new ratings action to be made public no later than six months after the date of the rating action. The Commission is adopting the amendment with substantial changes in part to address concerns raised by commenters.

As adopted, paragraph (a)(8) to Rule 17g-2 requires an NRSRO to make and retain a record for each outstanding credit rating it maintains showing all rating actions (initial rating, upgrades, downgrades, placements on watch for upgrade or downgrade, and withdrawals) and the date of such actions identified by the name of the security or obligor rated and, if applicable, the CUSIP for the rated security or the Central Index Key (CIK) number for the rated obligor. This full record of credit rating histories will be maintained by the NRSRO as part of its internal records that are available to Commission staff.

In addition, paragraph (d) to Rule 17g-2, as amended, requires that an NRSRO make publicly available, on a six-month delayed basis, a random sample of 10% of the issuer-paid credit ratings and their histories documented pursuant to paragraph (a)(8) for each class of credit rating for which the NRSRO is registered and has issued 500 or more ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated. Consequently, the final rule only requires the disclosure of ratings histories for a limited number of outstanding credit ratings and only if they are issuer-paid credit ratings. Generally, NRSROs make their issuer-paid credit ratings publicly available for free.

NRSROs also obtain revenues by selling subscriptions to their credit ratings. Certain NRSROs derive their credit rating revenues solely or predominantly from selling subscriptions to their credit ratings. These NRSROs determine credit ratings that are not paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated ("subscriber-paid credit ratings"). Generally, NRSROs do not make their subscriber-paid credit ratings publicly available for free.

The Commission believes it is appropriate at this time to adopt a rule that will accomplish much of what the Commission sought to achieve in the proposal, mindful of the many comments about the proposal's potential impact. In addition, in a companion release,⁴⁰ the Commission is proposing additional means of accomplishing even more of the Commission's objective of providing information to the marketplace in order to gauge the accuracy of ratings over time. Both the rule adopted today and the re-proposal are designed to foster accountability and comparability—and hence, competition—among NRSROs.

As noted above, NRSROs generally make their issuer-paid credit ratings publicly available for free. Currently, while these rating actions are made public free of charge, it may be difficult to compile the actions and compare them across NRSROs. Therefore, the Commission expects that making this information more accessible will advance the Commission's goal of fostering accountability and comparability among NRSROs with respect to their issuer-paid credit ratings. Furthermore, the Commission notes that issuer-paid credit ratings account for over 98% of the outstanding credit ratings issued by NRSROs, according to information furnished by NRSROs in Form NRSRO. Moreover, seven of the ten registered NRSROs currently maintain 500 or more issuer-paid credit ratings in at least one class of credit ratings for which they are registered. Consequently, applying this rule to issuer-paid ratings should result in a substantial amount of new information for users of credit ratings. It also will allow market observers to begin analyzing the information and developing performance metrics based on it.

The Commission is mindful of the potential impact on NRSROs that

³⁸ See Section 15E(a)(1)(B)(x) of the Exchange Act (15 U.S.C. 78o-7(a)(1)(B)(x)).

³⁹ See 17 CFR 240.17g-2.

⁴⁰ See *Re-proposed Rules for Nationally Recognized Statistical Rating Organizations*, Exchange Act Release No. 59343 (February 2, 2009) ("*Companion Proposing Release*").

determine issuer-paid credit ratings. Therefore, the Commission has taken a number of steps to minimize the impact on NRSROs and enable them to be able to continue to sell downloads and data feeds of their current credit ratings. For example, an NRSRO subject to the disclosure requirement would not be required to disclose a rating action taken with respect to an outstanding credit rating until six months after the action occurs.

In addition, by requiring NRSROs to publicly disclose ratings action histories for a limited percentage of their outstanding issuer-paid credit ratings, market participants, academics and others should still be able to use the information to perform analysis comparing how the NRSROs subject to the disclosure rule perform in the classes of credit ratings for which they are registered. This process will be facilitated by the requirement that the ratings actions data be provided in XBRL format, which will provide a uniform standard format for presenting the information and allow users to dynamically search and analyze the information. This should facilitate the processing of the information and enhance the ability of users to compare information across different NRSROs subject to the disclosure by ratings classes. The Commission believes the random 10% of ratings histories and 500 ratings per class thresholds will result in the disclosure of a sample suitable for performing statistical analyses of NRSRO performance generally with respect to issuer-paid credit ratings.

NRSROs that sell subscriber-paid credit ratings have suggested that requiring all the histories of these ratings to be publicly disclosed could reduce competition by putting them out of business or adversely impacting their business.⁴¹ They stated that this would be the case even with a substantial time lag between the date a rating action is taken and the date the action must be publicly disclosed. An NRSRO that determines issuer-paid credit ratings stated that ratings history data has substantial commercial value even after 6 months.⁴² The Commission wants further input on this issue before deciding on whether the rule should also apply to subscriber-paid credit ratings. As noted above, the Commission, in a separate release, is seeking comment on whether to impose additional means of increasing the amount of information publicly available with respect to the ratings histories of subscriber-paid credit

ratings. The Commission wants to carefully balance the commercial and competitive concerns expressed by NRSROs that determine subscriber-paid credit ratings with the Commission's objective of fostering accountability and comparability among all NRSROs. Therefore, in that release, the Commission asks detailed questions about the potential impact of applying the rule to subscriber-paid credit ratings. The responses to those questions will inform the Commission's deliberations as to whether this rule ultimately should be expanded to cover subscriber-paid credit ratings.

The amended rule further provides that the information must be made public on the NRSRO's corporate Internet Web site in XBRL format. The rule provides that in preparing the XBRL disclosure, an NRSRO must use the List of XBRL Tags for NRSROs as specified on the Commission's Web site. In order to allow NRSROs subject to this requirement sufficient time to implement this new disclosure requirement and the Commission time to develop the List of XBRL Tags for NRSROs, the compliance date of the amendment to paragraph (d) is delayed until 180 days after publication in the **Federal Register**.⁴³

The Commission is adopting these amendments, in part, under authority to require NRSROs to make and keep for specified periods such records as the Commission prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.⁴⁴ The Commission believes the new recordkeeping and disclosure requirements are necessary and appropriate in the public interest and for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act. The internal record of the complete ratings histories of each outstanding credit rating required under new paragraph (a)(8) of Rule 17g-2 will be useful to the Commission in performing its examination and oversight functions. The data could be analyzed to determine if NRSROs are following their own methodologies in their ratings actions and whether additional disclosure is necessary. This could provide valuable information that could be indicative of problems in the

⁴³ The Commission notes that the ability of NRSROs to comply with the amended rule depends on the availability of the List of XBRL Tags for NRSROs on the Commission's Web page. If the publication of those materials is delayed, the Commission will consider delaying compliance with the rule.

⁴⁴ See Section 17(a)(1) of the Exchange Act (15 U.S.C. 78q(a)(1)).

ratings process unrelated to the analytical process, such as conflicts of interest. The Commission notes that this recordkeeping requirement applies to all credit ratings regardless of whether they are issuer-paid or subscriber-paid. The disclosure requirements will assist users of credit ratings to compare the relative performance of NRSROs that determine issuer-paid credit ratings. This could enhance competition by making it easier for smaller NRSROs to develop proven track records of determining accurate credit ratings.

The Commission received numerous comments on the proposed amendments to paragraphs (a)(8) and (d) to Rule 17g-2 as proposed.⁴⁵ Many commenters expressed support for the proposal, stating that the proposed rule would be a meaningful step in furthering competition in the credit rating industry and could benefit the investor community.⁴⁶ One commenter suggested that the proposed rule should require the sorting of records by classes of credit ratings and that the six month time lag should be reduced.⁴⁷ Other commenters suggested either reducing⁴⁸ or lengthening⁴⁹ the proposed six month time lag.

One NRSRO supported the proposal but believed the record of ratings histories should be limited to 10 years.⁵⁰ The Commission notes that in order to make the information more meaningful, users seeking to analyze NRSRO performance should be able to review the entire history of a given rating. Imposing a time limit—and therefore eliminating the ability to compare a current rating against the initial rating—would curtail the usefulness of this information.

A number of commenters raised substantial concerns with the proposal.⁵¹ For example, NRSROs and others noted that NRSROs that determine subscriber-paid credit ratings

⁴⁵ See Nappier Letter; ICI Letter; RBDA Letter; R&I Letter; Moody's Letter; ABA Business Law Committee Letter; Realpoint Letter; CMSA Letter; DBRS Letter; ABA Letter; Council Letter; S&P Letter; Second SIFMA Letter; Pollock Letter; IBFED Letter; Egan Jones Letter; Fitch Letter; ASF Letter; Multiple-Markets Letter; CFA Institute Letter; Rapid Ratings Letter; AFP Letter; Colorado PERA Letter; R&I Letter; DBA Letter; NCRC Letter; Citi Letter; Raingard Letter.

⁴⁶ See, e.g., AFP Letter; Colorado PERA Letter.

⁴⁷ See Second SIFMA Letter.

⁴⁸ See Multiple-Markets Letter; CFA Institute Letter; ICI Letter; RBDA Letter; NCRC Letter.

⁴⁹ See Realpoint Letter; S&P Letter; Pollock Letter; Multiple-Markets Letter.

⁵⁰ See DBRS Letter.

⁵¹ See R&I Letter; ABA Business Law Committee Letter; DBRS Letter; S&P Letter; Fitch Letter; ASF Letter; Multiple-Markets Letter; AFP Letter; Moody's Letter.

⁴¹ See Realpoint Letter; Rapid Ratings Letter.

⁴² See S&P Letter.

make the ratings available for a fee.⁵² These commenters argued that requiring them to make all the ratings publicly available for free—even with a six month time lag—could cause them to lose subscribers.

Commenters also raised concerns that requiring an NRSRO that determines issuer-paid credit ratings to make all ratings actions available free of charge in a machine readable format would cause them to lose revenues they derive from selling downloadable packages of their credit ratings.⁵³ These commenters also questioned whether the requirement would be permitted under the U.S. Constitution, arguing that it could be considered a taking of private property without compensation.⁵⁴

The Commission is adopting paragraph (a)(8) to Rule 17g-2, the recordkeeping provision, substantially as proposed, but, as noted above, has made substantial changes to paragraph (d), the public disclosure provision. Specifically, rather than disclose the ratings history for each outstanding credit rating, an NRSRO must disclose, in XBRL format and on a six-month delay, ratings action histories for a randomly selected sample of 10% of the outstanding credit ratings for each rating class for which the NRSRO has issued 500 or more ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated.

The Commission believes that by limiting the ratings actions histories that need to be disclosed to a random selection of 10% of outstanding credit ratings, applying the requirement to issuer-paid credit ratings only, and allowing for a six-month delay before a ratings action is required to be disclosed, the amendment as adopted addresses the concerns among commenters that the rule would cause them to lose revenue. With respect to NRSROs that earn revenues from issuer-paid credit ratings but sell access to packages of the ratings as well, the Commission believes that customers that are willing to pay for full and immediate access to downloadable information for all of an NRSRO's ratings actions are unlikely to reconsider their purchase of that product due to the ability to access ratings histories for 10% of the NRSRO's outstanding issuer-paid credit ratings selected on a random basis and

disclosed with a six-month time lag. The 500 ratings threshold and random selection are designed to provide a sufficient sample of data upon which to draw reasonable inferences about the quality of ratings generally issued by NRSROs. The random 10% sample of issuer-paid credit ratings and six month time lag are designed to make it less likely that current purchasers of data about issuer-paid credit ratings could reliably find the information they want, and so NRSROs could continue to sell downloads and data feeds of the credit ratings. As such, the Commission believes that the changes made to the amendment address the commenters' concerns while still facilitating greater accountability for issuer-paid NRSROs, enhanced third-party development of performance measurement statistics for issuer-paid credit ratings, and increased competition among all NRSROs.

The Commission has decided not to impose the same disclosure obligation on subscriber-paid credit ratings at this time out of competitive concerns raised, but is still considering how to make more information publicly available and accessible about the performance of these ratings. The Commission believes that the rule as adopted will address the concerns expressed by commenters and at the same time foster greater accountability of NRSROs with respect to their issuer-paid credit ratings as well as increase competition among NRSROs by making it easier for persons to analyze the actual performance of their credit ratings.

The amendment as adopted also will require that the data be made available in XBRL format, using the List of XBRL Tags for NRSROs as specified on the Commission's Web site. Several NRSROs provided information arguing that an XBRL format could be particularly costly and that the burden on smaller NRSROs could be particularly acute.⁵⁵ They suggested that if the Commission adopted the rule as proposed, that the Commission allow NRSROs sufficient time to develop the necessary systems to implement the XBRL format or, in the alternative, to implement this required disclosure as a pilot program.⁵⁶

The Commission believes, however, that the XBRL format will benefit market participants seeking to develop their own performance statistics using the ratings history data to be made public by the NRSROs. Requiring NRSROs to make histories of ratings

actions for issuer-paid credit ratings publicly available using the interactive data format rather than using other machine readable format will enable market participants, academics and others to analyze this information more quickly, more accurately, and at a lower cost. The Commission believes that this will enhance the ability of end-users to compare the rating performance of different NRSROs, which will foster NRSRO competition.

For purposes of the internal records required by new paragraph (a)(8), the NRSRO will be required to keep its records up to date to reflect the complete ratings history of each outstanding credit rating (including the current rating). However, for purposes of the requirement to make publicly available ratings action histories for a random sample of 10% of outstanding issuer-paid credit ratings in each class of credit rating for which the NRSRO is registered and has 500 or more such credit ratings outstanding, the NRSRO will be permitted to delay disclosure of a rating action for six months. As noted above, this limited disclosure and the six month time lag is expected to mitigate the concerns regarding the loss of revenues that NRSROs derive from selling data feeds and downloadable packages of their current outstanding issuer-paid credit ratings and histories of the ratings.

Because NRSROs withdraw ratings and rated instruments mature, the number of ratings made public in a particular class may fall below the 10% threshold. In order to continue to make a large sample of information publicly available, the Commission is requiring NRSROs to replenish the sample when it falls below 10%. Consequently, paragraph (d) of Rule 17g-2 provides that the NRSRO must replace a rating that rolls off for these reasons with a new randomly selected rating from the impacted class of credit ratings. In order to protect against the possibility of "cherry picking" ratings that may make the performance of the NRSRO more favorable, the Commission believes it is important that both the initial selection and any replenishment of ratings be randomly selected. The Commission is not specifying how the NRSROs must randomly select the initial ratings disclosed under paragraph (d) of Rule 17g-2 or how they must randomly select ratings going forward to maintain the 10% sample. The Commission believes the NRSROs should develop a selection process that they can demonstrate to be random.

Finally, the Commission is adopting amendments to the instructions to Exhibit 1 of Form NRSRO to require that

⁵² See ABA Business Law Committee Letter; Realpoint Letter; Pollock Letter; Egan-Jones Letter; Multiple-Markets Letter; Rapid Ratings Letter; AFP Letter; R&I Letter; Moody's Letter.

⁵³ See S&P Letter; Moody's Letter.

⁵⁴ See S&P Letter; Egan-Jones Letter; Fitch Letter; R&I Letter;

⁵⁵ See, e.g., DBRS Letter; Moody's Letter.

⁵⁶ See Fitch Letter; DBRS Letter; Multiple-Markets Letter; CFA Institute Letter; ICI Letter; R&I Letter; Moody's Letter.

NRSROs subject to the new requirements of Rule 17g-2(d) as amended disclose the Web address where the XBRL Interactive Data File with the required information can be accessed. The Commission did not receive any comments on this aspect of the proposal and is adopting the requirement with modifications to reflect the modifications to the final rule discussed above. This rule amendment is designed to inform persons who use credit ratings where the sample of ratings histories for each class of issuer-paid credit ratings for which the NRSRO is registered can be obtained.

2. A Record of Material Deviation From Model Output

The Commission proposed amending paragraph (a)(2) of Rule 17g-2 to require NRSROs to make a record documenting the rationale when a final credit rating materially deviates from the rating implied by a quantitative model used in the rating process if the model was a substantial component of the rating process. Under this paragraph, as amended, if a quantitative model was a substantial component in the process of determining the credit rating of a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction, the NRSRO is required to make a record of the rationale for any material difference between the credit rating implied by the model and the final credit rating issued. The purpose of this rule is to enhance the recordkeeping process in order to enable Commission staff, as well as an NRSRO's internal auditors, to understand the methodologies through which analysts developed the credit rating issued by the NRSRO.

The Commission is adopting this amendment, in part, under authority to require NRSROs to make and keep for prescribed periods such records as the Commission prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.⁵⁷ The Commission believes this new recordkeeping requirement is necessary and appropriate in the public interest and for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.

Specifically, the Commission believes that maintaining records identifying the rationale for material divergences from the ratings implied by qualitative models used as a substantial component

in the ratings process will assist the Commission in evaluating whether an NRSRO is adhering to its disclosed procedures for determining ratings. As the Commission has noted, "books and records rules have proven integral to the Commission's investor protection function because the preserved records are the primary means of monitoring compliance with applicable securities laws."⁵⁸ In the absence of such a recordkeeping requirement, there may be no way to determine whether an NRSRO adhered to its stated methodologies for obtaining a certain category of credit rating (e.g. AAA) as indicated by the model results, that is, whether adjustments to the result implied by the model were made by applying appropriate qualitative factors permitted under the NRSRO's documented procedures or because of undue influence from the person seeking the credit rating or other inappropriate reasons such as those prohibited by Rule 17g-6, including the prohibition on issuing or modifying credit ratings for unfair, abusive or coercive reasons. The new recordkeeping requirement will allow Commission staff to review whether an NRSRO is adhering to its disclosed procedures for determining structured finance ratings and complying with Rule 17g-6.⁵⁹

The Commission received 18 comments addressing this proposal.⁶⁰ Many commenters strongly supported the proposal.⁶¹ NRSROs and others, however, expressed concern over the possibility that the rule could lead to the regulation of the substance of ratings and the overemphasis of quantitative models at the expense of applying qualitative factors.⁶² These commenters argued that the model is just one tool in the rating process and that the proposal may lead to generalizations of models in order to avoid material differences.⁶³

⁵⁸ June 5, 2007 Adopting Release, 72 FR at 33582.

⁵⁹ 17 CFR 240.17g-6. Rule 17g-6 prohibits an NRSRO from engaging in certain unfair, abusive or coercive practices such as issuing a credit rating that is not determined in accordance with the NRSRO's established procedures and methodologies for determining credit ratings based on whether the rated person will purchase the credit rating. See 17 CFR 240.17g-6(a)(2).

⁶⁰ See CMSA Letter; DBRS Letter; Council Letter; S&P Letter; Second SIFMA Letter; Fitch Letter; Lockyer Letter; ASF Letter; Multiple-Markets Letter; CFA Institute Letter; Rapid Ratings Letter; AFP Letter; Colorado PERA Letter; R&I Letter; Moody's Letter; ABA Business Law Committee Letter; DBA Letter; NCRC Letter.

⁶¹ See Council Letter; Second SIFMA Letter; CFA Institute Letter; AFP Letter; Colorado PERA Letter; DBA Letter NCRC Letter.

⁶² See DBRS Letter; S&P Letter; Rapid Ratings Letter; R&I Letter; Moody's Letter; ABA Business Law Committee Letter.

⁶³ See, e.g., DBRS Letter.

One commenter noted that this record may cause examiners to ignore the role qualitative factors play in developing ratings.⁶⁴ Another commenter noted that models are not as integral to the process of rating commercial mortgage-backed securities.⁶⁵

In part in response to these comments, the Commission has narrowed the application of the rule to ratings of structured finance products. This will lessen the recordkeeping burden on an NRSRO and address commenters' concerns that the requirement could have negative effects on the ratings process for other classes of credit ratings where qualitative analysis is predominant and models have a more marginal role.

Further, the Commission does not believe that the requirement will cause NRSROs to abandon qualitative analysis when determining credit ratings for structured finance products. The Commission does not believe that the record-making required by the amendment will be extensive. For example, if the NRSRO's methodologies permit an analyst to adjust required credit enhancement levels up or down for the various tranches of a structured finance issuer based on certain qualitative factors, the NRSRO could document the rationale for any material difference between the credit rating implied by the model and the final rating by describing the qualitative factor or factors that were relied on. In addition to benefiting the Commission's regulatory and oversight functions, this requirement may serve to assist analysts in ensuring that their use of qualitative factors follows the procedures documented in the NRSRO's methodologies.

The Commission also notes that the NRSROs will be responsible for making the determination of when a model constitutes a "substantial component" of the rating process as well as when a difference between the rating issued and the rating implied by the model is "material." NRSROs should document in their ratings methodologies the models they deem to be substantial components of a ratings process for structured finance products and the magnitude of deviation from the rating implied by the model and rating issued that they deem material.⁶⁶

For the foregoing reasons, the Commission is adopting the rule with the modification discussed above.

⁶⁴ See Moody's Letter.

⁶⁵ See CMSA Letter.

⁶⁶ For example, the Commission believes the expected loss and cash flow models used by the NRSROs to rate RMBS and CDOs are substantial components of the rating process.

⁵⁷ See Section 17(a)(1) of the Exchange Act (15 U.S.C. 78q(a)(1)).

3. Records Concerning Third-Party Analyst Complaints

The Commission proposed adding a new paragraph (b)(8) to Rule 17g-2 requiring NRSROs to retain records of any complaints about the performance of a credit analyst. The Commission is adopting this amendment with the modifications discussed below. Under this paragraph, an NRSRO is required to retain any written communications received from persons not associated with the NRSRO that contain complaints about the performance of a credit analyst in initiating, determining, maintaining, monitoring, changing, or withdrawing a credit rating. The purpose of this rule is to allow Commission examiners the opportunity to review external complaints and how the NRSRO addressed them.

The Commission is adopting this amendment, in part, under authority to require NRSROs to make and keep for prescribed periods such records as the Commission prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in the furtherance of the Exchange Act.⁶⁷ The Commission believes this requirement is necessary and appropriate in the public interest and for the protection of investors, or otherwise in furtherance of the Exchange Act, because it will assist Commission examiners in reviewing how NRSROs handle the conflicts inherent in the issuer-pay and subscriber-pay models: Namely, that clients have an economic interest in the ratings issued by the NRSRO and may seek to influence the rating process by complaining about an analyst who does not issue ratings favorable to that interest. Commission examiners will be able to review the complaint file and follow-up with the relevant persons within the NRSRO as to how a particular complaint was handled. The potential for such a review by Commission examiners could reduce the willingness of an NRSRO to re-assign or terminate a credit analyst to placate a client that desires a different rating.

Commenters generally supported the proposal.⁶⁸ Some commenters requested clarification that rule does not require the retention of oral communications.⁶⁹ The Commission did not intend the rule to apply to oral communications.

⁶⁷ See Section 17(a)(1) of the Exchange Act (15 U.S.C. 78q(a)(1)).

⁶⁸ See Council Letter; S&P Letter; MBA Letter; Fitch Letter; CFA Institute Letter; Rapid Ratings Letter; AFP Letter; Colorado PERA Letter; Moody's Letter.

⁶⁹ See Moody's Letter; S&P Letter.

Consequently, the rule text has been modified to clarify that it only applies to "written" communications. One NRSRO expressed concern that privacy and labor laws in some non-U.S. jurisdictions would prevent monitoring of an employee's electronic communications.⁷⁰ The Commission intended the rule to apply to communications received by the NRSRO from outside parties such as subscribers or persons who pay to obtain credit ratings. The amendment was not intended to require the retention of complaints sent internally between, for example, employees of the NRSRO. The Commission has clarified the rule's scope in this regard by specifying that it only applies to complaints from persons not associated with the NRSRO.

For the foregoing reasons, the Commission is adopting the proposed rule with the modifications discussed above.

4. Clarifying Amendment to Rule 17g-2(b)(7)

Paragraph (b)(7) of Rule 17g-2 currently requires an NRSRO to retain all internal and external communications that relate to "initiating, determining, maintaining, changing, or withdrawing a credit rating."⁷¹ The Commission proposed to add the word "monitoring" to this list. The intent was to clarify that NRSRO recordkeeping rules extend to all aspects of the credit rating surveillance process as well as the initial rating process. This was the intent when the Commission originally adopted the rule as indicated by the use of the term "maintaining." The Commission believes that adding the term "monitoring"—a term of art in the credit rating industry—will better clarify this requirement. The Commission received 5 comments on this proposed amendment, all of which were supportive of the change.⁷² The Commission is adopting this amendment as proposed.

C. Amendment to Rule 17g-3 (*Report of Credit Rating Actions*)

Rule 17g-3 requires an NRSRO to furnish the Commission on an annual basis the following reports: Audited financial statements; unaudited consolidated financial statements of the parent of the NRSRO, if applicable; an unaudited report concerning revenue categories of the NRSRO; an unaudited

⁷⁰ See S&P Letter.

⁷¹ 17 CFR 240.17g-2(b)(7).

⁷² See S&P Letter; Multiple-Markets Letter; CFA Institute Letter; Rapid Ratings Letter; Moody's Letter.

report concerning compensation of the NRSRO's credit analysts; and an unaudited report listing the largest customers of the NRSRO. The rule further requires an NRSRO to furnish the Commission these reports within 90 days of the end of its fiscal year. The Commission proposed amending the rule to require a report showing the number of rating actions taken by the NRSRO during the fiscal year in each class of credit rating for which the NRSRO is registered. In the *June 16, 2008 Proposing Release*, the Commission indicated that a "credit rating action" includes upgrades, downgrades, or placements of the rating on watch for an upgrade or downgrade.⁷³

The Commission received 10 comments on this proposal.⁷⁴ Commenters were generally supportive of the proposal. One commenter recommended that the final rule should make clear what is meant by "class of credit rating" and establish a measurement period.⁷⁵ The Commission notes that the rule requires the report to cover each of the classes of credit rating identified in Section 3(a)(62)(B)(iv) of the Rating Agency Act⁷⁶ for which the NRSRO is applying for registration or is registered. Further, as discussed below, the note to the paragraph clarifies that for the purposes of this requirement, the asset-backed securities class must include all structured finance products. The Commission further notes that the measurement period is on a fiscal year basis.

One commenter believed that the proposal is unclear or overbroad regarding the scope of a report on "credit rating actions." This commenter also noted its belief that the proposed rule was inappropriate because ratings changes are not financial statements, and stated that the proposed requirement should be relocated to Rule 17g-2.⁷⁷ In response, the Commission notes that it is adopting this requirement, in part, under authority to require an NRSRO to "make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors,

⁷³ *June 16, 2008 Proposing Release*, 73 FR at 36234.

⁷⁴ See S&P Letter; Fitch Letter; Multiple-Markets Letter; ICI Letter; Rapid Ratings Letter; AFP Letter; Moody's Letter; ABA Business Law Committee Letter; NCRC Letter; Raingard Letter.

⁷⁵ See Fitch Letter.

⁷⁶ 15 U.S.C. 78c(a)(62)(B)(iv).

⁷⁷ See Moody's Letter.

or otherwise in furtherance of the purposes of [the Exchange Act].”⁷⁸

The Commission is adopting this amendment by adding paragraph (a)(6) to Rule 17g-3. Paragraph (a)(6) requires an NRSRO to provide the Commission with an unaudited report of the number of credit rating actions (upgrades, downgrades, placements on credit watch, and withdrawals) during the fiscal year in each class of credit rating for which the NRSRO is registered with the Commission. As proposed, the Commission did not identify the types of credit rating actions that should be used to generate the report. Instead, it identified them in the preamble as being upgrades of credit ratings, downgrades of credit ratings, placements of credit ratings on watch for an upgrade or downgrade. The final rule text identifies the types of ratings actions that should be included in order to provide greater clarity. In addition, the Commission is adding “withdrawals” to the types of credit rating actions that must be included in the “credit ratings actions” reported by the NRSRO. The Commission views a withdrawal as a “credit rating action” since ceasing to monitor a credit rating is a significant change to the rating and, as such, is comparable to a downgrade, upgrade and placement on watch in terms of the potential impact on the rated obligor or security. Moreover, the inclusion of withdrawals in the report addresses the concerns that led the Commission to propose requiring that withdrawals be included in the default statistics generated for Exhibit 1 to Form NRSRO. As discussed above, NRSROs raised substantial compliance concerns with the proposal to require withdrawals in the performance statistics. This change is intended to address their concerns regarding that proposed amendment while at the same time ensuring that any disproportionate amount of ratings withdrawals in a class of ratings will be captured in the ratings action information provided to the Commission for examination and oversight purposes.

The new rule includes a note to paragraph (a)(6) clarifying that for the purposes of reporting credit rating actions in the asset-backed security class of credit ratings described in Section 3(a)(62)(B)(iv) of the Rating Agency Act⁷⁹ an NRSRO must include credit rating actions on any security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities

transaction. As discussed in the *June 16, 2008 Proposing Release*, this note is designed to ensure the inclusion of information about ratings actions for credit ratings of structured finance products that do not meet the narrower statutory definition of “issuers of asset-backed securities (as that term is defined in section 1101(c) of part 229 of title 17, Code of Federal Regulations).”⁸⁰ The Commission also notes that the report required under paragraph (a)(6) to Rule 17g-3 will be furnished to the Commission on a confidential basis, to the extent permitted by law, consistent with the other reports furnished to the Commission under Rule 17g-3.⁸¹

The Commission believes this amendment is necessary and appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act because it will assist the Commission in its examination function of NRSROs. Large spikes in ratings actions within a class of credit ratings could indicate the processes for determining the ratings may be compromised by inappropriate factors. For example, a substantial increase in the number of downgrades in a particular class of credit rating may be indicative of the fact that the initial ratings were higher than the NRSRO’s procedures and methodologies would have implied because the NRSRO sought to gain favor with issuers and underwriters by issuing higher ratings. A substantial increase in upgrades also could be the result of the NRSRO attempting to gain favor with issuers and underwriters.

As discussed in the *June 16, 2008 Proposing Release*, the Commission recognizes that an increase in the number of ratings actions in a particular class of credit rating may be the result of macroeconomic factors broadly impacting the rated obligors or securities.⁸² In this case, the ratings actions are presumably the result of appropriate credit analysis and not inappropriate extraneous factors. On the other hand, large numbers of actions could be a signal that the process for rating and monitoring ratings in the impacted class has been compromised by improper practices such as failing to adhere to disclosed and internally documented ratings procedures and methodologies, having prohibited conflicts, failing to establish reasonable

procedures to manage conflicts, or engaging in unfair, coercive, or abusive conduct. Consequently, the Commission expects that the report will be a valuable tool to improve the focus of examination resources. For these reasons, the Commission is adopting the amendment with the modifications described above.

D. Amendments to Rule 17g-5

Rule 17g-5 identifies a series of conflicts arising from the business of determining credit ratings. Under the rule, some of these conflicts must be disclosed and managed, while others are prohibited outright. In the *June 16, 2008 Proposing Release*, the Commission identified three additional conflicts that would be prohibited under paragraph (c) of the rule.⁸³ The Commission received a number of comments on the proposed amendments.⁸⁴ As discussed below, the Commission is adopting the amendments but with revisions designed in part to address concerns raised by commenters.

1. Rule 17g-5 Prohibition on Conflict of Interest Related to Rating an Obligor or Debt Security Where the Obligor or Issuer Received Ratings Recommendations From the NRSRO or Person Associated With the NRSRO

The Commission proposed adding a new paragraph (c)(5) to Rule 17g-5 prohibiting the conflict that arises when an NRSRO or its affiliate makes recommendations on how to achieve a desired rating and then rates the obligor or debt instrument that was the subject of the recommendations. The final rule being adopted adds this new paragraph to Rule 17g-5. Under this paragraph, an NRSRO is prohibited from issuing or maintaining a credit rating with respect

⁸³ *Id.*, 73 FR at 36226–36228. The Commission also proposed amendments to paragraphs (a) and (b) of Rule 17g-5 that would require an NRSRO to manage the conflict of being repeatedly paid by arrangers of structured finance products by prohibiting the NRSRO from rating such a product unless, among other things, information about the underlying assets was disseminated to persons not involved in the rating process. *Id.*, 73 FR at 36219–36226. The Commission received many thoughtful comments on the proposal that identified substantial issues as to how the proposed amendments would operate in practice. The Commission is re-proposing the amendments in a separate release. See *Companion Proposing Release*.

⁸⁴ See MICA Letter; ICI Letter; Rapid Ratings Letter; ABA Business Law Committees Letter; NCRC Letter; Nappier Letter; Egan-Jones Letter; Lockyer Letter; RBDA Letter; Moody’s Letter; A.M. Best Letter; Euler Letter; Realpoint Letter; CMSA Letter; LIUNA Letter; DBRS Letter; Council Letter; DPW Letter; S&P Letter; Second SIFMA Letter; IBFED Letter; MBA Letter; Fitch Letter; ASF Letter; Trepp Letter; CFA Institute Letter; Roundtable Letter; Colorado PERA Letter; CGSH Letter; SPA Letter; R&I Letter; CreditSights Letter; DBA Letter; Citi Letter; Lehman Letter; Raingard Letter; JCR Letter; Second Realpoint Letter.

⁸⁰ See *June 16, 2008 Proposing Release*, 73 FR at 36234.

⁸¹ 17 CFR 240.17g-3; see also, *June 5, 2007 Adopting Release*, 72 FR at 33592.

⁸² See *June 16, 2008 Proposing Release*, 73 FR at 36235.

⁷⁸ See Section 17(a)(1) of the Exchange Act (15 U.S.C. 78q(a)(1)).

⁷⁹ 15 U.S.C. 78c(a)(62)(B)(iv).

to an obligor or security where the NRSRO or a person associated with the NRSRO made recommendations to the obligor or the issuer, underwriter, or sponsor of the security about the corporate or legal structure, assets, liabilities, or activities of the obligor or issuer of the security. The purpose of this rule is to address the potential lack of impartiality that could arise when an NRSRO determines a credit rating based on a corporate structure that was developed after consultations with the NRSRO or its affiliate on how to achieve a desired credit rating. In simple terms, the rule prohibits an NRSRO from rating its own work or the work of an affiliate.

The Commission is adopting this amendment to Rule 17g-5, in part, pursuant to the authority in Section 15E(h)(2) of the Exchange Act.⁸⁵ This section of the statute provides the Commission with authority to prohibit, or require the management and disclosure of, any potential conflict of interest relating to the issuance of credit ratings by an NRSRO.⁸⁶ The Commission believes this amendment is necessary and appropriate in the public interest and for the protection of investors because it addresses a practice that could impair the objectivity, and, correspondingly, the quality, of a credit rating. It has been suggested that during the process of rating structured finance products the NRSROs have recommended to arrangers how to structure a trust or complete an asset pool to receive a desired credit rating and then rated the securities issued by the trust—in effect, rating their own work.⁸⁷ This amendment will prohibit this conduct based on the Commission's belief that it creates a conflict that cannot be effectively managed inasmuch as it would be very difficult for an NRSRO to remain objective when assessing the creditworthiness of an obligor or debt security where the NRSRO or person associated with the NRSRO made recommendations about steps the obligor or issuer of the security could take to obtain a desired credit rating.

The Commission received 33 comments addressing this proposal.⁸⁸

Most of the comments supported the proposal, although some commenters expressed concern that the provision may limit appropriate dialogue between an NRSRO and a person seeking a credit rating or subject to an existing rating.⁸⁹ Several commenters asked that the Commission clarify the type of communications that would be acceptable feedback during the ratings process. As stated in the *June 16, 2008 Proposing Release*, it is not the Commission's intent to prohibit the flow of information between an NRSRO and the obligor, issuer, underwriter, or sponsor during the rating process.⁹⁰ For example, the Commission does not view an explanation by an NRSRO of the assumptions and rationales it uses to arrive at ratings decisions and how they apply to a given rating transaction as a recommendation. Consequently, in the case of a residential mortgage-backed security, an NRSRO, after putting the underlying assets through an expected loss model run, may communicate the results to the sponsor and discuss how loan characteristics such as FICO scores, geographic concentrations, or loan-to-value ratios may have driven the results.

The Commission recognizes that providing this type of information during the rating process allows the person seeking the rating to make adjustments in response to the information provided by the NRSRO. However, the free flow of information between the NRSRO and the person increases the transparency of the rating process. Moreover, NRSROs generally make their models available to persons seeking ratings. Sponsors of structured finance securities can run potential asset pools through the models before bringing the transactions to the NRSRO to be rated. This gives them an understanding of the rating that the NRSRO likely will determine, particularly with respect to more standardized structured finance products. The Commission believes this level of transparency before and during the rating process benefits the credit markets by allowing participants to gain an understanding and, ultimately, to assess the methodologies used by the NRSROs. The alternative—restricting the flow of information—would make the rating process more opaque.

The Commission notes, however, that if the feedback process turns into recommendations by the NRSRO about changes to the structure, assets, liabilities or activities of the obligor or security that the person seeking the rating potentially could make to obtain a desired credit rating, the NRSRO would be in violation of the new rule. For example, in the case of a residential mortgage-backed security, the NRSRO would not be prohibited from informing the sponsor that the expected loss model indicated that the underlying loan pool was too concentrated in a certain geographic region to receive the desired rating given the level of credit enhancement proposed. On the other hand, if an analyst recommends how to change the composition of the loans in the pool to achieve the desired rating, the NRSRO would be making a recommendation about the assets of the issuer and, consequently violate the rule. The sponsor must take the model results from the NRSRO and decide independently how to adjust the asset pool to achieve the desired rating. If changes are made, the NRSRO will run the new pool through the model as if it were a new transaction and report the results to the sponsor.

Some argue that even this process of providing sponsors with information they can use to make adjustments during the rating process should be prohibited. The Commission disagrees because locking down the structure prior to the rating process could have serious adverse consequences. Investors seek securities with specific credit ratings. If sponsors cannot make adjustments to obtain those ratings, then the securities ultimately issued and rated may not be marketable.

The Commission understands that NRSROs are concerned about how to draw the line between permissible and unlawful communication of information.⁹¹ In response, the Commission notes that NRSROs who provide the greatest clarity to the marketplace about their ratings methodologies will need to provide less explanation during the ratings process. Thus, NRSROs can mitigate the risk that communications during the rating process will violate the rule by enhancing their disclosures about their ratings methodologies, including about the qualitative factors they consider and the quantitative models and the assumptions underlying those models they employ. For these reasons, the Commission believes the new prohibition creates a strong incentive for NRSROs to improve their disclosures,

⁸⁵ 15 U.S.C. 78o-7(h)(2).

⁸⁶ *Id.*

⁸⁷ See e.g., Testimony of Professor John C. Coffee, Jr., Adolf A. Berle Professor of Law, Columbia University Law School, before the U.S. Senate Committee on Banking, Housing, and Urban Affairs (September 26, 2007), pp. 2-3.

⁸⁸ See Realpoint Letter; CMSA Letter; LIUNA Letter; DBRS Letter; JCR Letter; Council Letter; DPW Letter; S&P Letter; Second SIFMA Letter; IBFED Letter; Nappier Letter; MBA Letter; Fitch Letter; Lockyer Letter; ASF Letter; Multiple-Markets Letter; CFA Institute Letter; ICI Letter; RBDA Letter; Roundtable Letter; Rapid Ratings Letter; AFP Letter;

Colorado PERA Letter; CGSH Letter; SPA Letter; R&I Letter; Moody's Letter; ABA Business Law Committees Letter; DBA Letter; NCRC Letter; Raingard Letter; A.M. Best Letter.

⁸⁹ See, e.g., CMSA Letter; LIUNA Letter; DBRS Letter; JCR Letter; Second SIFMA Letter; IBFED Letter; MBA Letter; Fitch Letter; Roundtable Letter; AFP Letter.

⁹⁰ *June 16, 2008 Proposing Release*, 73 FR at 36226.

⁹¹ See, e.g., Fitch Letter, JCR Letter.

which, in turn, will benefit the users of credit ratings and, by extension, the credit markets.

Some commenters stated that this conflict should not be prohibited but, instead, included among the conflicts that must be disclosed and managed.⁹² Several commenters also suggested that the conflict should not be prohibited when the affiliate (as opposed to the NRSRO) makes the recommendation. The commenters suggested that measures such as information barriers could address the conflict adequately without the need to prohibit it outright.⁹³ The Commission believes that an NRSRO cannot remain objective when rating its own work or that of an affiliate. As stated in the *June 16, 2008 Proposing Release*, the Commission believes it would be difficult for the NRSRO to remain objective if an affiliate were providing advice to obligors, issuers and sponsors about how to obtain desired credit ratings because the financial success of the affiliate would depend on issuers getting the ratings they sought after taking steps recommended by the affiliate.⁹⁴ This may create undue pressure on the NRSRO's credit analysts to determine credit ratings that favored the affiliate. The Commission believes this pressure may undermine protective measures such as information barriers between the NRSRO and the affiliate as they both would be under the common control of a group that benefited from the affiliate's financial success.

Finally, several commenters requested that the Commission clarify whether this conflict applies only to structured finance ratings or whether it applies to all ratings classes.⁹⁵ The Commission intends that this prohibited conflict would apply across all ratings classes.

For the reasons discussed above, the Commission is adopting the amendment as proposed.

2. Rule 17g-5 Prohibition on Conflict of Interest Related to the Participation of Certain Personnel in Fee Discussions

The Commission proposed prohibiting the conflict that arises when persons within an NRSRO responsible for determining credit ratings or developing methodologies for determining credit ratings participate in fee discussions. The final rule being adopted adds a new paragraph (c)(6) to

Rule 17g-5.⁹⁶ Under this paragraph, an NRSRO is prohibited from issuing or maintaining a credit rating where the fee paid for the rating was negotiated, discussed, or arranged by a person within the NRSRO who has responsibility for participating in determining or approving credit ratings or for developing or approving procedures or methodologies used for determining credit ratings, including qualitative and quantitative models. The purpose of this rule is to remove the persons most directly involved in making the judgments that credit ratings are based on from fee negotiations and, thereby, insulate them from a process that could make them more or less favorably disposed toward a client or class of clients.

As proposed, the rule did not explicitly mention persons involved in approving credit ratings, although it implicitly included them by including persons involved in "determining" credit ratings.⁹⁷ The Commission notes that both determiners and approvers engage in analysis that results in a final rating, and the Commission intends them both to be covered by prohibitions aimed at protecting the integrity of this process. Therefore, the Commission is clarifying today that for the purposes of Rule 17g-5, the terms "determine," "determined," and "determining" include both persons who develop credit ratings and persons who approve credit ratings. This clarification reflects the Commission's intent when it proposed the rule and is designed to remove any potential ambiguity that could arise if some of the Rule 17g-5 prohibitions cover persons who determine and approve credit ratings and others only cover persons who determine credit ratings.

The Commission is adopting this amendment to Rule 17g-5, in part, pursuant to the authority in Section 15E(h)(2) of the Exchange Act.⁹⁸ This section of the statute provides the Commission with authority to prohibit, or require the management and disclosure of, any potential conflict of interest relating to the issuance of credit ratings by an NRSRO.⁹⁹ The Commission believes this amendment is necessary and appropriate in the public interest or for the protection of investors because it addresses a potential practice that could impair the objectivity, and, correspondingly, the quality, of a credit rating. This amendment is designed to

effectuate the separation within the NRSRO of persons involved in fee discussions from persons involved in the credit rating analytical process. While the incentives of the persons discussing fees could be based primarily on generating revenues for the NRSRO; the incentives of the persons involved in the analytical process should be based on determining accurate credit ratings. There is a significant potential for these distinct incentive structures to conflict with one another when persons within the NRSRO are engaged in both activities.

The potential consequences are that a credit analyst or person responsible for approving credit ratings or credit rating methodologies could, in the context of negotiating fees, let business considerations undermine the objectivity of rating process. For example, an individual involved in a fee negotiation with an issuer might not be impartial when it comes to rating the issuer's securities. In addition, persons involved in approving the methodologies and processes used to determine credit ratings could be reluctant to adjust a model to make it more conservative if doing so would make it more difficult to negotiate fees with issuers. For these reasons, the Commission believes that this conflict should be prohibited.

The Commission received 19 comments addressing this proposal, most of which supported its goal.¹⁰⁰ NRSROs, while agreeing in principle with the rule, raised a number of questions. First, several NRSROs suggested that the Commission revise the language of the amendment to conform to the International Organization of Securities Commissions' "Code of Conduct Fundamentals for Credit Rating Agencies" (the "IOSCO Code").¹⁰¹ The IOSCO Code provides that credit rating agencies "should not have employees who are directly involved in the rating process initiate, or participate in, discussions regarding fees or payments with any entity they rate." The Commission believes, however, that the IOSCO Code provision would be insufficient to accomplish the goal of fully effectuating the separation within NRSROs of persons involved in fee discussions

⁹² See, e.g., Realpoint Letter; DPW Letter; S&P Letter; ICI Letter; Colorado PERA Letter; R&I Letter; Moody's Letter.

⁹³ See, e.g., Fitch Letter; Moody's Letter.

⁹⁴ See *June 16, 2008 Proposing Release*, 73 FR at 36226.

⁹⁵ See, e.g., Lockyer Letter, RBDA Letter, A.M. Best Letter.

⁹⁶ 17 CFR 240.17g-5.

⁹⁷ *June 16, 2008 Proposing Release*, 73 FR at 36226-36228.

⁹⁸ 15 U.S.C. 78o-7(h)(2).

⁹⁹ *Id.*

¹⁰⁰ See Realpoint Letter; CMSA Letter; LIUNA Letter; DBRS Letter; S&P Letter; Nappier Letter; Fitch Letter; ASF Letter; Multiple-Markets Letter; CFA Institute Letter; ICI Letter; Rapid Ratings Letter; AFP Letter; Colorado PERA Letter; Moody's Letter; ABA Business Law Committees Letter; NCRC Letter; Raingard Letter; A.M. Best Letter.

¹⁰¹ See, e.g., S&P Letter; Fitch Letter; A.M. Best Letter. A copy of the IOSCO code is available at <http://www.iosco.org>.

from persons involved in the credit rating analytical process. In particular, the IOSCO Code's language would allow persons involved in approving the methodologies and processes used to determine credit ratings to negotiate ratings fees, which could make them reluctant to adjust a model to make it more conservative if doing so would make it more difficult to negotiate fees with issuers.

In addition, other commenters, including the NRSROs, asked that the Commission clarify that the prohibition does not apply to internal communications.¹⁰² They stated that senior managers (some of whom may be covered by the prohibition) participate in internal discussions relating to fees to ensure that a fee charged is in proportion to the work performed by the NRSRO. The Commission recognizes that credit analysts may need to provide information on expected staffing and resource requirements to the persons involved in fee discussions so the latter can factor such information into the fees charged.

Some commenters stated that this conflict should be subject to the requirement to disclose and manage, as opposed to being prohibited.¹⁰³ The Commission disagrees for several reasons. There does not appear to be a compelling reason for credit analysts and model developers to participate in fee discussions. Furthermore, their involvement in that process creates greater risk that they will develop a favorable or negative view of the client or a class of clients based on how the negotiations proceed. This could influence the judgment they exercise in determining credit ratings or developing credit rating methodologies.

Several commenters noted that small NRSROs may need to have some analysts or model developers participate in fee discussions given their staffing levels.¹⁰⁴ These commenters suggested that the rule should include an exemption for such NRSROs.¹⁰⁵ The Commission agrees that the rule could potentially raise difficulties in certain circumstances for an NRSRO with a small staff. Consequently, the Commission will review requests by small NRSROs for exemptions from the rule under Section 36 of the Exchange Act based on their specific

¹⁰² See, e.g., S&P Letter; Fitch Letter; A.M. Best Letter.

¹⁰³ See, e.g., DBRS Letter; ASF Letter; Multiple-Markets Letter; Moody's Letter.

¹⁰⁴ See, e.g., DBRS Letter; Multiple-Markets Letter; CFA Institute Letter; Colorado PERA Letter; ABA Business Law Committees Letter.

¹⁰⁵ See, e.g., Fitch Letter; Rapid Ratings Letter; Moody's Letter.

circumstances. The Commission notes that it has provided two small NRSROs with temporary exemptive relief from the prohibition in Rule 17g-5 against receiving 10% or more of their net revenues from a single client.¹⁰⁶

For the reasons discussed, the Commission is adopting the amendment as proposed and clarifies, as noted above, that persons responsible for "approving" credit ratings are covered by the prohibition as well as the provisions of Rule 17g-5 as a whole.

3. Rule 17g-5 Prohibition of Conflict of Interest Related to Receipt of Gifts

The Commission proposed adding a new paragraph (c)(7) to Rule 17g-5¹⁰⁷ prohibiting the conflict that arises when persons responsible for determining or approving credit ratings receive gifts from the persons being rated or the sponsors of the persons being rated.¹⁰⁸ The final rule being adopted includes this new paragraph. Under this paragraph, an NRSRO is prohibited from issuing or maintaining a credit rating where a credit analyst who participated in determining or monitoring the credit rating, or a person responsible for approving the credit rating received gifts, including entertainment, from the obligor being rated, or from the issuer, underwriter, or sponsor of the securities being rated, other than items provided in the context of normal business activities such as meetings that have an aggregate value of no more than \$25. The purpose of this rule is to eliminate the potential undue influence that gifts can have on those responsible for determining credit ratings.

The Commission is adopting this amendment to Rule 17g-5, in part, pursuant to the authority in Section 15E(h)(2) of the Exchange Act.¹⁰⁹ This section of the statute provides the Commission with authority to prohibit, or require the management and disclosure of, any potential conflict of interest relating to the issuance of credit ratings by an NRSRO as the Commission deems necessary or appropriate in the public interest or for the protection of investors.¹¹⁰ The Commission believes the amendment is necessary and

¹⁰⁶ See *Order Granting Temporary Exemption of LACE Financial Corp. from the Conflict of Interest Prohibition in Rule 17a-5(c)(1) of the Securities Exchange Act of 1934*, Exchange Act Release No. 57301 (February 11, 2008); *Order Granting Temporary Exemption of Realpoint LLC from the Conflict of Interest Prohibition in Rule 17a-5(c)(1) under the Securities Exchange Act of 1934*, Exchange Act Release No. 58001 (June 23, 2008).

¹⁰⁷ 17 CFR 240.17g-5.

¹⁰⁸ See June 16, 2008 *Proposing Release*, 73 FR at 36227-36228.

¹⁰⁹ 15 U.S.C. 78o-7(h)(2).

¹¹⁰ *Id.*

appropriate in the public interest or for the protection of investors because it addresses a potential practice that could impair the objectivity, and, correspondingly, the quality, of a credit rating.

The Commission received 18 comments on the proposed amendment, most of which agreed in principle with the proposal.¹¹¹ One commenter suggested that this conflict should be disclosed and managed instead of prohibited.¹¹² The Commission disagrees because other than in the most obvious cases it would be very difficult to determine whether an analyst was swayed by gifts to adjust a rating. Persons seeking credit ratings for an obligor or debt security could use gifts in an attempt to gain favor with the analyst. In the case of a substantial gift, the potential to impact the analyst's objectivity could be immediate. With smaller gifts, the danger is that over time the cumulative effect of repeated gifts can impact the analyst's objectivity. In either case, there is little ability to "manage" the analyst's motivations. Therefore, the Commission believes that an absolute prohibition on gifts, with the exception of minor incidentals such as those provided in business meetings, is appropriate.

Several NRSROs noted the potential for cultural misunderstandings over the proposed gift limit, noting that issuers from other countries may be embarrassed or offended by the prohibition. One NRSRO suggested in response that the Commission include an exemption or higher dollar threshold for gifts from foreign issuers, while another cited such potential misunderstandings in support of its suggestion that the conflict be disclosed and managed instead of prohibited.¹¹³ The Commission recognizes that a prohibition may pose initial difficulties with certain foreign issuers but believes that over time, and given the uniformity of the rule across NRSROs, such issuers will come to understand and accept the prohibition.

Several commenters asked that the Commission clarify how the \$25 limit would operate¹¹⁴ and some suggested a

¹¹¹ See S&P Letter; Nappier Letter; Lockyer Letter; ASF Letter; Multiple-Markets Letter; CFA Institute Letter; ICI Letter; Roundtable Letter; Rapid Ratings Letter; AFP Letter; R&I Letter; Moody's Letter; ABA Business Law Committees Letter; Foutch Letter; DBA Letter; NCRC Letter; Raingard Letter; A.M. Best Letter.

¹¹² See Moody's Letter.

¹¹³ See, e.g., S&P Letter, Moody's Letter.

¹¹⁴ See, e.g., S&P Letter; Roundtable Letter; R&I Letter; Moody's Letter.

higher limit such as \$50 or \$100.¹¹⁵ The \$25 limit is not designed to be an exception to the prohibition on giving gifts. Rather, it is intended to permit the exchange of items that are incidental to routine business interactions such as meetings. For example, if an analyst meets with an issuer to discuss a credit rating, the issuer could provide the analyst with note pads, pens and light refreshments, provided they did not have an aggregate value exceeding \$25. The Commission notes that the rule is not intended to allow an analyst to accept a gift, regardless of its value, that has no use in conducting the meeting. In addition, the Commission wishes to clarify that the \$25 limit is per analyst and per interaction and not a one-time or annual limit.

The Commission also intends that the rule be prospective. Therefore, the fact that an analyst received a gift from a person seeking a credit rating prior to the rule's effective date will not preclude the NRSRO from issuing a credit rating determined by the analyst.

Finally, a few commenters asked the Commission to clarify whether this amendment applied only to structured finance ratings or whether it applied to all ratings classes.¹¹⁶ The Commission believes that there is no reason to limit this prohibition to structured finance ratings: any person seeking a credit rating could attempt to gain favor with an analyst responsible for determining the credit rating by using gifts. Therefore, this prohibition applies across all classes of credit ratings.

For the reasons discussed, the Commission is adopting the amendment as proposed.

III. Paperwork Reduction Act

Certain provisions of the rule amendments contain a "collection of information" within the meaning of the Paperwork Reduction Act of 1995 ("PRA").¹¹⁷ The Commission published a notice requesting comment on the collection of information requirements in the *June 16, 2008 Proposing Release* and submitted the proposed amendments to the Office of Management and Budget ("OMB") for review in accordance with the PRA.¹¹⁸ An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid control

number. The titles for the collections of information are:

(1) Rule 17g-1, Application for registration as a nationally recognized statistical rating agency; Form NRSRO and the Instructions for Form NRSRO (OMB Control Number 3235-0625);

(2) Rule 17g-2, Records to be made and retained by national recognized statistical rating organizations (OMB Control Number 3235-0628); and

(3) Rule 17g-3, Annual reports to be furnished by nationally recognized statistical rating organizations (OMB Control Number 3235-0626).

A. Collections of Information Under the Amended Rules

The Commission is adopting rule amendments to prescribe additional requirements for NRSROs to address concerns that have arisen with respect to their role in the credit market turmoil. These amendments modify rules the Commission adopted in 2007 to implement registration, recordkeeping, financial reporting, and oversight rules under the Rating Agency Act. Certain of the amendments contain recordkeeping and disclosure requirements that will be subject to the PRA. The collection of information obligations imposed by the amendments is mandatory. The amendments, however, will apply only to credit rating agencies that are registered with the Commission as NRSROs. Such registration is voluntary.¹¹⁹

In summary, the rule amendments require: (1) An NRSRO to provide enhanced disclosure of performance measurements statistics and the procedures and methodologies used by the NRSRO in determining credit ratings for structured finance products and other debt securities on Form NRSRO;¹²⁰ (2) an NRSRO to make, keep and preserve additional records under Rule 17g-2;¹²¹ (3) an NRSRO to make publicly available on its Internet Web site in XBRL format a random sample of 10% of the ratings histories in each ratings class for which it is registered and has issued 500 or more ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated, with each new ratings action to be reflected in such histories no later than six months after they are taken;¹²² and (4) an NRSRO to furnish the Commission with an additional annual report.¹²³

B. Proposed Use of Information

The amendments enhance the framework for Commission oversight of NRSROs, in part in response to the recent credit market turmoil.¹²⁴ The collections of information in the rule amendments are designed to further assist the Commission in effectively monitoring, through its examination function, whether an NRSRO is conducting its activities in accordance with Section 15E of the Exchange Act¹²⁵ and the rules thereunder. In addition, these rule amendments are designed to further assist users of credit ratings by requiring the disclosure of additional information with respect to an NRSRO that could be used to compare the credit ratings quality of different NRSROs, particularly with respect to structured finance products. The Commission believes that the information that NRSROs will be required to make public as a result of the amendments will advance one of the primary objectives of the Rating Agency Act, as noted in the accompanying Senate Report, to "facilitate informed decisions by giving investors the opportunity to compare ratings quality of different firms."¹²⁶

C. Respondents

In adopting the final rules under the Rating Agency Act, the Commission estimated that approximately 30 credit rating agencies would be registered as NRSROs.¹²⁷ The Commission believes that this estimate continues to be appropriate for identifying the number of respondents for purposes of the amendments. Since the initial set of rules under the Rating Agency Act became effective in June 2007, ten credit rating agencies have registered with the Commission as NRSROs.¹²⁸ The registration program has been in effect for over a year; consequently, the Commission expects additional entities will register. While 20 more entities may not ultimately register, the Commission believes the estimate is within reasonable bounds and appropriate given that it adds an element of conservatism to its paperwork burden estimates as well as cost estimates.

¹²⁴ See 17 CFR 17g-1 through 17g-6, and Form NRSRO.

¹²⁵ 15 U.S.C. 78o-7.

¹²⁶ See *Senate Report*, p. 8.

¹²⁷ See *June 5, 2007 Adopting Release*, 72 FR at 33607.

¹²⁸ A.M. Best Company, Inc.; DBRS Ltd.; Fitch.; Japan Credit Rating Agency, Ltd.; Moody's; Rating and Investment Information, Inc.; S&P; LACE Financial Corp.; Egan-Jones Rating Company; and Realpoint LLC.

¹¹⁵ See, e.g., S&P Letter; CFA Institute Letter; Roundtable Letter; ABA Business Law Committees Letter; A.M. Best Letter.

¹¹⁶ See, e.g., Lockyer Letter.

¹¹⁷ 44 U.S.C. 3501 *et seq.*; 5 CFR 1320.11.

¹¹⁸ See *June 16, 2008 Proposing Release*, 73 FR at 36236-36241.

¹¹⁹ See Section 15E of the Exchange Act (15 U.S.C. 78o-7).

¹²⁰ See amendments to Form NRSRO.

¹²¹ 17 CFR 240.17g-2.

¹²² See Rule 17g-2(a)(8) and (d).

¹²³ See Rule 17g-3(a)(6).

The Commission requested comment on all aspects of the proposed estimate for the number of respondents. The Commission did not receive any comments in response to the proposed estimate. As discussed above, the Commission continues to estimate, for purposes of this PRA, that approximately 30 credit rating agencies will be registered as NRSROs and thus will be required to comply.

D. Total Annual Recordkeeping and Reporting Burden

As discussed in further detail below, the Commission estimates the total recordkeeping burden resulting from the amendments will be approximately 820 hours on an annual basis¹²⁹ and 4,560 hours on a one-time basis.¹³⁰

The total annual and one-time hour burden estimates described below are averages across all types of NRSROs expected to be impacted by the rule amendments. The size and complexity of NRSROs range from small entities to entities that are part of complex global organizations employing thousands of credit analysts. Consequently, the burden hour estimates represent the average time across all NRSROs. The Commission further notes that, given the significant variance in size between the largest NRSROs and the smallest NRSROs, the burden estimates, as averages across all NRSROs, are skewed higher because the largest firms currently predominate in the industry.

1. Amendments to Form NRSRO

The amendments to Form NRSRO change the instructions for the Form to require that NRSROs provide more detailed credit ratings performance statistics in Exhibit 1 and disclose with greater specificity information about the procedures and methodologies used to determine structured finance and other credit ratings in Exhibit 2.¹³¹ The total annual burden hours currently approved by OMB is 2,100, and the total one-time burden hours is 10,000. In the *June 16, 2008 Proposing Release*, the Commission stated that it expected that the proposed amendments would not have a material effect on the respondents' hour burden because the additional disclosures would be included within the overall preparation of the initial Form NRSRO for new

¹²⁹ This total is derived from the total annual hours set forth in the order that the totals appear in the text: 750 + 70 + 1000 = 1,820.

¹³⁰ This total is derived from the total one-time hours set forth in the order that the totals appear in the text: 3,000 + 1,350 + 210 = 4,560.

¹³¹ 17 CFR 240.17g-1 and Form NRSRO.

applicants.¹³² Additionally, in that release, the Commission stated it believed that the NRSROs currently registered would be required to prepare and furnish an amended Form NRSRO to update their registration applications as a result of the adoption of the proposed amendments (*i.e.*, as of today that would be ten amended Form NRSROs).¹³³ However, the Commission stated that it believed these potential furnishings of Form NRSRO were accounted for in the currently approved PRA collection for Rule 17g-1, which includes an estimate that each NRSRO would file two amendments to Form NRSRO per year.

The Commission requested comment on all aspects of the burden estimates for Rule 17g-1 and Form NRSRO, as amended.¹³⁴ One commenter disagreed with the Commission that there would be no additional one-time or ongoing collection of information burdens for NRSROs to provide the additional information required in Exhibit 2 to Form NRSRO.¹³⁵ The commenter stated that it would need to conduct a survey of its practices, synthesize and summarize the results of the survey, and incorporate the results into Exhibit 2 of Form NRSRO.¹³⁶ The commenter estimated that it would take at least 100 hours to complete a global survey, involving compliance personnel, as well as senior analysts and their supervisors. In addition, the commenter estimated that it would take at least 24 hours per year on average to collect information and another 12 hours per year to incorporate descriptions of changes into Form NRSRO, as well as an additional 24 hours per year conducting compliance assessments.¹³⁷ The commenter noted, however, that it did not consider such one-time and ongoing compliance burdens to be excessive.¹³⁸

As adopted, the amendments to the instructions to Exhibit 2 to Form NRSRO add three additional areas that an applicant and a registered NRSRO must address in the descriptions of its procedures and methodologies in Exhibit 2 to the extent they are applicable.¹³⁹ Because the additional

¹³² *June 16, 2008 Proposing Release*, 73 FR at 36237-36238.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ See Moody's Letter.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ These additional areas are: Whether and, if so, how information about verification performed on assets underlying or referenced by a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction is relied on in determining credit ratings; whether and, if so, how assessments

requirements, as adopted, require only a description of the procedures and methodologies, the Commission believes that there may have been some misinterpretation with respect to the actual requirements regarding the amendments to Exhibit 2. As stated above, the Commission notes that the instructions for Exhibit 2 to Form NRSRO require only a description of the procedures and methodologies that the NRSRO actually employs and it does not require an NRSRO to adopt specific procedures. In addition, it only requires a description of the NRSRO's general ratings procedures and methodologies as opposed to the submission and disclosure of the actual procedures and methodologies used to determine credit ratings.¹⁴⁰

Based on clarifications discussed above, the Commission believes that the actual time expenditures of NRSROs in complying with the rules will be less than the commenter's estimates. Nonetheless, the Commission is revising the one-time hourly burden estimate upward in response to the comment. The Commission, based on the comment received and staff experience, estimates that the average time necessary for an applicant or NRSRO to gather the information on a one-time basis in order to complete the additional disclosures required by the amendments to Exhibit 2 to Form NRSRO will be 100 hours per NRSRO, which would be a one-time hour burden to the industry of 3,000 hours.¹⁴¹ The Commission is not revising its annual burden because it believes that once an NRSRO has updated Exhibit 2 to Form NRSRO to include descriptions of these aspects of its methodologies, any further updates would be incremental and the time burdens associated with completing the updates are reflected in the current annual burdens discussed above.

2. Amendments to Rule 17g-2

Rule 17g-2 requires an NRSRO to make and keep current certain records

of the quality of originators of assets underlying or referenced by a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction play a part in the determination of credit ratings; and how frequently credit ratings are reviewed, whether different models or criteria are used for ratings surveillance than for determining initial ratings, whether changes made to models and criteria for determining initial ratings are applied retroactively to existing ratings, and whether changes made to models and criteria for performing ratings surveillance are incorporated into the models and criteria for determining initial ratings.

¹⁴⁰ The instructions further provide that the description must be sufficiently detailed to provide users of credit ratings with an understanding of the processes the applicant or NRSRO employs to determine credit ratings.

¹⁴¹ 100 hours × 30 NRSROs = 3,000 hours.

relating to its business and requires an NRSRO to preserve those and other records for certain prescribed time periods.¹⁴² The amendments to Rule 17g-2 require an NRSRO to make and retain two additional records and to retain a third type of record. The records to be made and retained are: (1) A record of the rationale for any material difference between the credit rating implied by the model and the final credit rating issued, if a quantitative model is a substantial component in the process of determining a credit rating of a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction;¹⁴³ and (2) a record showing the history and dates of all previous rating actions with respect to each outstanding credit rating.¹⁴⁴ The amendments to Rule 17g-2 also require an NRSRO to make public, in XBRL format and with a six-month grace period, the ratings action information required under new paragraph (a)(8) for a random sample of 10% of the issuer paid credit ratings for each ratings class for which it has issued 500 or more issuer-paid credit ratings.¹⁴⁵ In addition, the amendments require an NRSRO to retain communications from persons not associated with the NRSRO that contain any complaints by an obligor, issuer, underwriter, or sponsor about the performance of a credit analyst.¹⁴⁶

The Commission requested comment in the *June 16, 2008 Proposing Release* on the burdens that would result from the proposed amendments to Rule 17g-2.¹⁴⁷ The Commission received one comment regarding the PRA estimate for Rule 17g-2.¹⁴⁸ This commenter, a large NRSRO, stated that the Commission has significantly underestimated the initial and ongoing recordkeeping burdens associated with its proposed changes to NRSROs' recordkeeping requirements.¹⁴⁹

The same large NRSRO submitted comments specific to the proposed amendment to Rule 17g-2(d) which would have required disclosure of the histories of rating actions for outstanding credit ratings in an XBRL format. The commenter stated that developing and agreeing upon the taxonomy and tags for an XBRL data file would take at least several hundred hours over several months or even

longer and that ongoing maintenance of the database could easily exceed two months per year.¹⁵⁰ The Commission notes that the amendment as adopted specifies that in making the required information available on its Web site, an NRSRO will use the List of XBRL Tags for NRSROs as specified on the Commission's Web site, thus eliminating the need for an NRSRO to develop its own taxonomy and tags. In addition, as adopted, the amendment to Rule 17g-2(d) limits the requirement to the disclosure of a random sample of 10% of the issuer-paid credit rating histories for each ratings class for which an NRSRO has issued 500 or more issuer-paid credit ratings. This is a substantial reduction from the amount of information that would have been required by the amendment as proposed. Consequently, the amount of time required to comply with the amendment to Rule 17g-2(d), as adopted, will be significantly reduced for what would have been required under the proposal. Finally, the Commission notes that, in order to allow NRSROs sufficient time to implement the new disclosure requirement of Rule 17g-2(d), as amended, the compliance date for that amendment will be 180 days after publication in the **Federal Register**.

In addition to its comments on the XBRL portion of the proposed amendments to Rule 17g-2, the same large NRSRO submitted comments on the proposed amendment to Rule 17g-2 regarding records of material deviation from model output and the recording of complaints relating to analysts. With respect to the record of material deviation from model output, the commenter stated it would take analysts, supervisors, and senior management more than 150 hours to determine which quantitative models were a "substantial component" in determining ratings; 200 hours for compliance, legal and IT staff to develop policies, amend schedules and modify systems to comply with the rule; and 1,500 hours to develop compliance procedures and training materials. On an ongoing basis, the commenter estimated that it would take approximately 60-90 minutes to create, approve and file each record related to this amendment. Finally, the commenter estimated that, on an annual basis, it would spend 40 to 80 hours per year on compliance reviews and 200 hours per year on training.¹⁵¹ In response to comments on the proposed rule language, the Commission

narrowed the application of Rule 17g-2(a)(2)(iii) to ratings of structured finance products only. This will lessen the recordkeeping burden on an NRSRO and be responsive to commenters' concerns that the requirement could have negative effects on the ratings process for other classes of credit ratings where qualitative analysis is predominant and models have a more marginal role.

Finally, the same NRSRO commenter estimated that with respect to the records of complaints about analysts under Rule 17g-2(b)(8), it would take approximately 100 hours to implement the proposed rule, draft a policy, and change its systems to capture the required records, as well as 1,500 hours to develop compliance procedures and a training module. On an ongoing basis, the commenter estimated it would take approximately 10 to 100 hours to follow-up and document each complaint. Finally, on an annual basis, the commenter estimated it would spend approximately 40 to 80 hours per year on compliance reviews and 150 hours per year on training.¹⁵² With respect to this requirement, the Commission notes that it intends the rule to apply only to communications received by the NRSRO from outside parties such as subscribers or entities that pay to obtain credit ratings. The amendment was not intended to require the retention of complaints sent internally between, for example, employees of the NRSRO. Further, the Commission has clarified that the rule does not apply to oral communications.

Based on the modifications and clarifications discussed above, the Commission believes that the actual time expenditures of NRSROs in complying with the rules will be less than the commenter's estimates. Nonetheless, the Commission is revising its hourly burden estimates upward in response to the comment.

With respect to the amendments to Rule 17g-2, the Commission estimates, based on staff information gained from the NRSRO examination process and in response to comments received, that the total one-time and annual recordkeeping burdens will increase approximately 15% and 10%, respectively. The Commission believes that the one-time burden to set up and/or modify a recordkeeping system to comply with the amendments would be greater than the ongoing annual burden. Once an NRSRO has set up or modified its recordkeeping system to comply with the amendments, its annual hour burden would be increased only to the

¹⁴² 17 CFR 240.17g-2.

¹⁴³ Paragraph (a)(2)(iii) of Rule 17g-2.

¹⁴⁴ Paragraph (a)(8) of Rule 17g-2.

¹⁴⁵ Amendment to Rule 17g-2(d).

¹⁴⁶ Paragraph (b)(8) of Rule 17g-2.

¹⁴⁷ See *June 16, 2008 Proposing Release*, 73 FR at 36238-36239.

¹⁴⁸ See Moody's Letter.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

extent it would be required to make and retain additional records. In the *June 16, 2008 Proposing Release*, the Commission estimated that the total one-time and annual recordkeeping burdens would increase approximately 10% and 5%, respectively.¹⁵³ Thus, the Commission estimates that the one-time burden that each NRSRO will spend implementing a recordkeeping system to comply with Rule 17g-2, as amended, will be approximately 345 hours,¹⁵⁴ for a total one-time burden of 10,350 hours for 30 NRSROs,¹⁵⁵ which represents an increase in the currently approved PRA burden under Rule 17g-2 of 1,350 total one-time burden hours.¹⁵⁶ The Commission estimates that an NRSRO would spend an average of 279 hours per year¹⁵⁷ to make and retain records under Rule 17g-2 as amended, for a total annual hour burden under Rule 17g-2 of 8,370 hours.¹⁵⁸ This estimate will result in an increase in the currently approved PRA burden under Rule 17g-2 of 750 annual burden hours.¹⁵⁹ As discussed above, the increase in annual burden hours will result from the increase in the number of records an NRSRO will be required to make and retain under the amendments to Rule 17g-2. The Commission notes that the PRA estimates for Rule 17g-2 are averages across all types of NRSROs expected to be affected by the rule amendments. The size and complexity of NRSROs range from small entities to entities that are part of complex global organizations employing thousands of credit analysts. Consequently, the burden hour estimates for Rule 17g-2 represent the average time across all NRSROs.

In addition, the amendments to Rule 17g-2 require an NRSRO to make publicly available on its Web site in XBRL format ratings action histories for a random sample of 10% of its outstanding issuer-paid credit ratings in each class of credit rating for which it is registered and has determined 500 or more issuer-paid credit ratings.¹⁶⁰ Based on information furnished on Form NRSRO, seven of the ten currently registered NRSROs issue 500 or more issuer-paid credit ratings in at least one

of the classes of credit ratings for which they are registered. The Commission believes that even as the number of registered NRSROs expands to the 30 ultimately expected to register, this number will remain relatively constant, as new entrants are likely to predominantly determine subscriber-paid credit ratings, at least in the near future. In addition, the Commission believes that each of the NRSROs affected by this new requirement already has, or will have, an Internet Web site. As noted above, the amendment as adopted specifies that in making the required information available on its Web site, an NRSRO will use the List of XBRL Tags for NRSROs as specified on the Commission's Web site, thus eliminating the need for an NRSRO to develop its own taxonomy and tags and significantly reducing the amount of time required to comply with the amendment.

Therefore, based on staff experience, the Commission estimates that, on average, an NRSRO subject to the requirement will spend approximately 30 hours to publicly disclose the required information in an XBRL format and, thereafter, 10 hours per year to update this information.¹⁶¹ Accordingly, the total aggregate one-time burden to the industry to make the history of rating actions publicly available in an XBRL format will be 210 hours,¹⁶² and the total aggregate annual burden hours will be 70 hours.¹⁶³

Under the currently approved PRA collection for Rule 17g-2, the Commission estimated that an NRSRO may need to purchase recordkeeping system software to establish a recordkeeping system in conformance with Rule 17g-2.¹⁶⁴ The Commission estimated that the cost of the software would vary based on the size and complexity of the NRSRO. Also, the Commission estimated that some NRSROs would not need such software because they already have adequate recordkeeping systems or, given their small size, such software would not be necessary. Based on these estimates, the Commission estimated that the average cost for recordkeeping software across all NRSROs would be approximately \$1,000 per firm, with an aggregate one-

time cost to the industry of \$30,000.¹⁶⁵ In response to comments discussed above, the Commission estimates that the amendments to Rule 17g-2 would alter this per firm estimate upward by approximately \$800.¹⁶⁶ For example, in the PRA for the proposed rules requiring the submission of risk/return summary information using interactive data, the Commission estimated that software and consulting services would be used by mutual funds for an increase of approximately \$803 per mutual fund.¹⁶⁷ The Commission believes that the requirement to publicly disclose certain ratings action histories in an XBRL format would result in a similar cost.

3. Amendment to Rule 17g-3

Rule 17g-3 requires an NRSRO to furnish certain financial reports to the Commission on an annual basis, including audited financial statements as well as other financial reports.¹⁶⁸ The Commission is amending Rule 17g-3 to require an NRSRO to furnish the Commission with an additional report: An unaudited report of the number of credit ratings actions (upgrades, downgrades, placements on credit watch, and withdrawals) taken during the fiscal year in each class of credit ratings identified in section 3(a)(62)(B) of the Act (15 U.S.C. 78c(a)(62)(B)) for which the NRSRO is registered with the Commission.¹⁶⁹

The total annual burden currently approved by OMB for Rule 17g-3 is 6,000 hours, based on the fact that it will take an NRSRO, on average, approximately 200 hours to prepare for and file the annual reports.¹⁷⁰ In addition, the total annual cost burden currently approved by OMB is \$450,000 to engage the services of an independent public accountant to conduct the annual audit as part of the preparation of the first report required by Rule 17g-3.¹⁷¹ This estimate is based on 30 NRSROs hiring an independent public accountant on an annual basis for an average of \$15,000.¹⁷²

The Commission requested comment in the *June 16, 2008 Proposing Release* on the burdens that would result from the proposed amendments to Rule 17g-

¹⁵³ See *June 16, 2008 Proposing Release*, 73 FR at 36238-36239.

¹⁵⁴ 300 hours × 1.15 = 345 hours. This will result in an increase of approximately 45 hours per NRSRO for the one-time hour burden.

¹⁵⁵ 345 hours × 30 respondents = 10,350 hours.

¹⁵⁶ 10,350 hours - 9,000 hours = 1,350 hours.

¹⁵⁷ 254 hours × 1.10 = 279 hours. The amendments would result in an increase of approximately 25 annual burden hours per NRSRO for Rule 17g-2.

¹⁵⁸ 279 hours × 30 respondents = 8,370 hours.

¹⁵⁹ 8,370 hours - 7,620 hours = 750 hours.

¹⁶⁰ See amendment to Rule 17g-2(d).

¹⁶¹ The Commission also bases this estimate on the current one-time and annual burden hours for an NRSRO to publicly disclose its Form NRSRO. No alternatives to these estimates as proposed were suggested by commenters. See *June 5, 2007 Adopting Release*, 72 FR at 33609.

¹⁶² 30 hours × 7 NRSROs = 210 hours.

¹⁶³ 10 hours × 7 NRSROs = 70 hours.

¹⁶⁴ See *June 5, 2007 Adopting Release*, 72 FR at 33609, 33610.

¹⁶⁵ *Id.*

¹⁶⁶ See *Interactive Data for Mutual Fund Risk/Return Summary*, Securities Act Release No. 8929 (June 10, 2008), 73 FR 35442 (June 23, 2008).

¹⁶⁷ *Id.*

¹⁶⁸ 17 CFR 240.17g-3.

¹⁶⁹ See Rule 17g-3(a)(6).

¹⁷⁰ 200 hours × 30 NRSROs = 6,000 hours. See *June 5, 2007 Adopting Release*, 72 FR at 33610.

¹⁷¹ Rule 17g-3 currently requires six reports. Only the first report—financial statements—need be audited.

¹⁷² \$15,000 × 30 NRSROs = \$450,000. See *June 5, 2007 Adopting Release*, 72 FR at 33610.

3.¹⁷³ One commenter, a large NRSRO, estimated that it would cost \$300,000 to build and test a system to comply with this amendment and that its ongoing costs would be \$70,000 per year.¹⁷⁴ The commenter did not provide specific data and analysis to support the estimates.¹⁷⁵ The Commission believes that most NRSROs already will have the information that it needs in order to comply with the amendment to Rule 17g-3 with respect to each class of credit ratings for which it is registered. In addition, the Commission emphasizes that this amendment does not prescribe a specific format for the report. Consequently, the Commission believes that the actual time expenditures of NRSROs in complying with the rule amendment will be less than the commenter's estimates. Nonetheless, the Commission is revising its PRA estimate for Rule 17g-3 upward in response to the comment.

The Commission, based on the comment received and staff experience, estimates that the average time necessary for an applicant or NRSRO to establish an internal process to conform its systems to generate a report in compliance with the amendment will be 100 hours per NRSRO, for a total one-time hour burden to the industry of 3,000 hours.¹⁷⁶ The Commission believes that once an NRSRO complies with the amendment to Rule 17g-3 in the first year, that preparation of the new annual report will become routine. To account for this one-time burden of 3,000 hours and the possibility that new credit rating agencies will register as NRSROs, the Commission is averaging this burden estimate over the three year approval period. Consequently, the Commission is increasing the annual burden estimate by 1,000 hours for a total annual burden estimate for Rule 17g-3 of 7,000 hours.

E. Collection of Information Is Mandatory

The recordkeeping requirements for the rule amendments are mandatory.

F. Confidentiality

The disclosures required under the amendments to Rule 17g-1 and Form NRSRO will be made publicly available on Form NRSRO. The books and records information to be collected under the amendments to Rule 17g-2 will be stored by the NRSRO and made available to the Commission and its

representatives as required in connection with examinations, investigations, and enforcement proceedings. However, an NRSRO will be required to make public, in XBRL format and with a six-month grace period, the ratings action histories for a random sample of 10% of the issuer-paid credit ratings for each ratings class for which it has issued 500 or more issuer-paid credit ratings.¹⁷⁷ The information collected under the amendment to Rule 17g-3 will be generated from the internal records of the NRSRO and will be furnished to the Commission on a confidential basis, to the extent permitted by law.¹⁷⁸

IV. Costs and Benefits of the Amended Rules

The Commission is sensitive to the costs and benefits that result from its rules. The Commission identified certain costs and benefits arising from these amendments and requested comment on all aspects of the cost-benefit analysis contained therein, including identification and assessment of any costs and benefits not discussed in the analysis.¹⁷⁹ The Commission sought comment and data on the value of the benefits identified. The Commission also requested comment on the accuracy of the cost estimates in each section of the cost-benefit analysis, and requested those commenters to provide data so the Commission could improve the cost estimates, including identification of statistics relied on by commenters to reach conclusions on cost estimates. Finally, the Commission requested estimates and views regarding the costs and benefits for particular types of market participants, as well as any other costs or benefits that might

result from the adoption of the rule amendments.

A. Benefits

The purposes of the Rating Agency Act, as stated in the accompanying Senate Report, are to improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating industry.¹⁸⁰ As the *Senate Report* states, the Rating Agency Act establishes "fundamental reform and improvement of the designation process" to further the belief that "eliminating the artificial barrier to entry will enhance competition and provide investors with more choices, higher quality ratings, and lower costs."¹⁸¹

The Commission requested comment on all aspects of the benefits of the amendments as proposed.¹⁸² In addition, the Commission requested specific comment on available metrics to quantify these benefits and any other benefits the commenter may identify, including the identification of sources of empirical data that could be used for such metrics.¹⁸³ The Commission did not receive any comments in response to this request.

The amendments are designed to further the goals of the Rating Agency Act, including fostering transparency in the credit rating agency industry. Since the adoption of the final rules implementing the Rating Agency Act in 2007,¹⁸⁴ the Commission has identified a number of areas where it is appropriate to enhance the current regulatory program for NRSROs.

Consequently, the Commission is adopting amendments that enhance the disclosure of credit ratings performance measurement statistics; increase the disclosure of information about the assets underlying structured finance products; require more information about the procedures and methodologies used to determine structured finance ratings; and address conflicts of interest arising from the structured finance rating process. As discussed below, the Commission believes that these amendments will further the purpose of the Rating Agency Act to improve the quality of credit ratings by fostering accountability, transparency, and competition in the credit rating industry, particularly with respect to

¹⁷⁷ Amendment to Rule 17g-2(d).

¹⁷⁸ 15 U.S.C. 78o-7(k).

¹⁷⁹ For the purposes of this cost/benefit analysis, the Commission is using salary data from the Securities Industry and Financial Markets Association ("SIFMA") Report on Management and Professional Earnings in the Securities Industry 2007, which provides base salary and bonus information for middle-management and professional positions within the securities industry. The Commission believes that the salaries for these securities industry positions would be comparable to the salaries of similar positions in the credit rating industry. Finally, the salary costs derived from the report and referenced in this cost benefit section, are modified to account for an 1800-hour work year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. The Commission used comparable assumptions in adopting the final rules implementing the Rating Agency Act in 2007, requested comments on such assumptions, and received no comments in response to its request. See June 5, 2007 Adopting Release, 72 FR at 33611, note 576. Hereinafter, references to data derived from the report as modified in the manner described above will be cited as "SIFMA 2007 Report as Modified."

¹⁸⁰ *Senate Report*, p. 2.

¹⁸¹ *Id.*, p. 7.

¹⁸² See June 16, 2008 Proposing Release, 73 FR at 36241-36243.

¹⁸³ *Id.*

¹⁸⁴ See June 5, 2007 Adopting Release.

¹⁷³ See June 16, 2008 Proposing Release, 73 FR at 36239.

¹⁷⁴ See S&P Letter.

¹⁷⁵ *Id.*

¹⁷⁶ 100 hours × 30 NRSROs = 3,000 hours.

credit ratings for structured finance products.¹⁸⁵

Rule 17g-1 prescribes a process for a credit rating agency to register with the Commission as an NRSRO using Form NRSRO,¹⁸⁶ and requires that a credit rating agency provide information required under Section 15E(a)(1)(B) of the Exchange Act and certain additional information.¹⁸⁷ Form NRSRO is also the means by which NRSROs update the information they must publicly disclose. The amendments to the instructions to Exhibit 1 to Form NRSRO will require NRSROs to provide more detailed performance statistics and, thereby, make it easier for users of credit ratings to compare the ratings performance of the NRSROs.¹⁸⁸ In addition, these amendments will make it easier for an NRSRO to demonstrate that it has a superior ratings methodology or competence and, thereby, attract clients.

The amendments to the instructions to Exhibit 2 of Form NRSRO are designed to provide greater clarity around three areas of the NRSROs' rating processes that have raised concerns in the context of the recent credit market turmoil: The level of verification performed on information provided in loan documents; the quality of loan originators; and the on-going surveillance of existing ratings and how changes made to a model used for initial ratings are applied to existing ratings. The additional information provided by the amendments will assist users of credit ratings in making more informed decisions about the quality of an NRSRO's ratings processes, particularly with regard to structured finance products.

The Commission believes that these enhanced disclosures in the Exhibits to Form NRSRO will make it easier for market participants to select the NRSROs that are performing well and have the highest quality processes for determining credit ratings. The Commission expects that providing market participants with enhanced disclosures will lead to increased competition and the promotion of capital formation through a restoration of confidence in credit ratings.

The amendments to Rule 17g-2 are designed to provide greater documentation of the ratings process to assist Commission staff in its examination function as well as to provide greater information to users of issuer-paid credit ratings about the

performance of an NRSRO's issuer-paid credit ratings. The additional records will be: (1) A record of the rationale for any material difference between the credit rating implied by the model and the final credit rating issued, if a quantitative model is a substantial component in the process of determining a credit rating for a structured finance product;¹⁸⁹ (2) a record showing the history and dates of all previous rating actions with respect to each outstanding credit rating; (3) a record, to be made publicly available, showing the history and dates of a 10% random sample of issuer-paid credit ratings, for each ratings class for which an NRSRO is registered and has issued 500 or more issuer-paid credit ratings, of all previous rating actions with respect to each outstanding credit rating;¹⁹⁰ and (4) any written complaints regarding the performance of a credit analyst in determining credit ratings.¹⁹¹ These records will assist the Commission in monitoring whether an NRSRO is complying with provisions of Section 15E of the Exchange Act and the rules thereunder. The Commission will be better able to monitor whether an NRSRO is operating consistently with the methodologies and procedures it establishes (and discloses) to determine credit ratings and its policies and procedures designed to ensure the impartiality of its credit ratings, including its ratings of structured finance products.

In addition, the amendment to Rule 17g-2(d) will require an NRSRO to make publicly available a random sample of 10% of the issuer-paid credit ratings actions histories, in an XBRL format and with a six-month grace period, for each ratings class for which it has issued 500 or more issuer-paid credit ratings. This XBRL disclosure requirement will allow the marketplace to better compare the performance of different NRSROs that determine issuer-paid credit ratings, since it will shift the source of data formatting from end-users to NRSROs submitting interactive data, thus eliminating the need for end-users to make interpretive decisions on how to compare data fields across NRSROs' reported rating histories. This additional disclosure also may make NRSROs more accountable for their issuer-paid credit ratings by enhancing the transparency of their ratings performance. The Commission believes the XBRL format will benefit market participants seeking to develop their own performance statistics using the ratings history data

to be made public by the NRSROs because it will require them to present the information in a standard format. Making the information available in an XBRL format will facilitate the process of creating better and more useful means to analyze how a given NRSRO performed in a certain class of issuer-paid credit ratings and compare that broader performance across NRSROs subject to the public disclosure rule, increasing the transparency of the results of their rating processes and encouraging competition within the industry by making it easier for users of issuer-paid credit ratings to judge the output of such NRSROs. As noted above, the Commission believes that the XBRL format will increase access to information in the financial marketplace and transform the manner in which individual investors, financial intermediaries, analysts, the financial media, and others access, use, and ultimately understand the wealth of available data. Requiring NRSROs to provide this disclosure in a single industry standard format will offer market participants the benefits of simplification, increased transparency, and ease of comparisons.

The amendment to Rule 17g-3 will require an NRSRO to furnish an additional annual report to the Commission: an unaudited report of the number of credit ratings actions (upgrades, downgrades, placements on credit watch, and withdrawals) taken during the fiscal year in each class of credit ratings identified in section 3(a)(62)(B) of the Act (15 U.S.C. 78c(a)(62)(B)) for which the NRSRO is registered with the Commission.¹⁹² The new report is designed to enhance the Commission's oversight of NRSROs by providing the Commission with additional information to assist in the monitoring of NRSROs for compliance with their stated policies and procedures. For example, the proposed new report will allow examiners to target potential problem areas in an NRSRO's rating processes by highlighting spikes in rating actions within a particular class of credit rating.

The amendments to Rule 17g-5 will prohibit an NRSRO from issuing or maintaining a credit rating where the NRSRO or an affiliate provided recommendations on the structure of the transaction being rated; a credit analyst or person involved in the ratings process participated in fee negotiations; or a credit analyst or a person responsible for approving a credit rating received gifts from the obligor being rated, or from the issuer, underwriter, or

¹⁸⁵ See *Senate Report*, p. 2.

¹⁸⁶ See Rule 17g-1.

¹⁸⁷ See Section 15E(a)(1)(B) of the Exchange Act, 15 U.S.C. 78o-7(a)(1)(B).

¹⁸⁸ 17 CFR 240.17g-1 and Form NRSRO.

¹⁸⁹ Paragraph (a)(2)(iii) of Rule 17g-2.

¹⁹⁰ Paragraph (a)(8) of Rule 17g-2.

¹⁹¹ Paragraph (b)(8) of Rule 17g-2.

¹⁹² See Rule 17g-3(a)(6).

sponsor of the securities being rated, other than items provided in the context of normal business activities such as meetings that have an aggregate value of no more than \$25.¹⁹³ The Commission believes that the amendments to Rule 17g-5 will promote the disclosure and management of conflicts of interest and mitigate potential undue influences on an NRSRO's credit rating process, particularly with respect to credit ratings for structured finance products.¹⁹⁴ These amendments will, in turn, increase confidence in the integrity of NRSRO ratings and, thereby, promote capital formation.

B. Costs

The cost of compliance to a given NRSRO will depend on its size and the complexity of its business activities. The size and complexity of the ten NRSROs vary significantly. For example, the three largest NRSROs account for approximately 98% of all outstanding credit ratings as reported on their most recent Form NRSROs. In addition, these three NRSROs also employ approximately 92% of the credit analysts among the ten registered NRSROs. In the *June 16, 2008 Proposing Release*, the Commission provided estimates of the average cost per NRSRO as a result of the proposed amendments, taking into consideration the range in size and complexity of NRSROs and the fact that many already may have established policies, procedures and recordkeeping systems and processes that would comply substantially with the amendments.¹⁹⁵

The Commission also sought comment on its cost estimates and the assumptions behind the estimates. One of the largest NRSROs provided cost data for the proposed rules but, significantly, only in summary form.¹⁹⁶ That is, the NRSRO provided estimates for the total one-time and on-going costs to comply with each proposed rule but did not identify the particular components of each total cost estimate. For example, the NRSRO did not identify the amount of each cost estimate that would be due to internal costs such as employee salaries and internal systems developments; nor the amount of each cost that would be due to external costs such as the need to purchase software to comply with a recordkeeping requirement in a rule. Nonetheless, the Commission believes that the summary form cost estimates

provided by the NRSRO do provide some basis for revising the Commission's earlier cost estimates because they reflect the experience of a large highly complex NRSRO that has been subject to existing Commission rules. However, the Commission does note that, because the cost estimates were provided in summary form, the Commission cannot identify specific components of the cost estimates that are linked to a recordkeeping requirement and, therefore, subject to the PRA. Consequently, the Commission continued to analyze the PRA burden estimates separately from these summary cost estimates.

For the reasons discussed above, the cost estimates below are calculated for two categories of NRSROs. The first category is comprised of the three largest NRSROs in terms of the number of credit ratings outstanding. As noted above, these three firms account for 98% of the credit ratings outstanding. The second category is comprised of the seven smaller NRSROs currently registered with the Commission. These NRSROs account for the remaining 2% of credit ratings outstanding. The theory behind this analysis is that the total cost to the NRSRO industry resulting from an amendment will be incurred by each NRSRO in approximate proportion to the percentage of the total credit ratings it issues. As discussed below, the Commission is determining a total cost to the industry using the summary cost figures provided by the large NRSRO by estimating that, since this firm accounts for 47% of the credit ratings outstanding, its summary cost estimate is 47% of the total cost to the industry. Having derived a total cost to the industry using this NRSRO's summary cost estimates, the Commission allocates a percentage of that total cost to the two different categories of NRSROs: 98% for the first category and 2% for the second category. Further, the Commission estimates an average cost per NRSRO by dividing the amount of the total cost allocated to the first category by the three NRSROs in that category and the amount of the total cost allocated to the second category of NRSROs by the seven NRSROs in that category.

The Commission continues to estimate that 30 NRSROs ultimately may register. However, because the Commission assumes the total number of ratings extant would remain stable, the total cost to the industry likely would remain stable and be reallocated among new entrants. Therefore, for the purposes of cost estimates derived using this analysis, the Commission is not including the potential 20 new entrants in either the first or second categories of

NRSROs for the purposes of determining the cost per NRSRO.

Additionally, the Commission notes that ten credit rating agencies are currently registered with the Commission as NRSROs and subject to the statutory and regulatory requirements for NRSROs. The cost of compliance to these firms will vary depending on which classes of credit ratings an NRSRO issues. For example, NRSROs that issue credit ratings for structured finance products—the focus of many of these new requirements—will incur higher compliance costs than NRSROs that do not issue credit ratings or that issue relatively few credit ratings in that class. The Commission notes that the bulk of the structured finance credit ratings outstanding are issued by NRSROs in the first category.

This method of calculating costs also differs from the one used in the *June 16, 2008 Proposing Release* in that it is not derived by multiplying the number of burden hours estimated for purposes of the PRA by hourly costs of personnel expected to undertake the responsibilities for complying with the amendment. As noted above, the Commission received summary cost data from the NRSRO in its comments that did not separate internal costs from external costs or paperwork burdens from other economic impacts. Nonetheless, the Commission believes that using the summary cost information provided by the NRSRO allows for a more robust method of estimating the total economic impact of the amendments. The Commission believes that for purposes of the cost-benefit analysis this methodology provides a more conservative method for estimating costs because it is based on the experience of an NRSRO that has been subject to existing Commission rules and it accounts for the substantial variance in size and complexity of the 10 registered NRSROs. For example, the methodology provides a basis for assessing the different cost impacts the rules will have on the largest NRSROs, which skew the total costs to the industry.

1. Amendments to Form NRSRO

The Commission is amending the instructions to Exhibit 1 to Form NRSRO to require the disclosure of more detailed performance statistics. Currently, the instructions require the disclosure of performance measurement statistics of the credit ratings of the “Applicant/NRSRO over the short-term, mid-term and long-term periods (as applicable) through the most recent calendar year end.” The new amendments refine these instructions to

¹⁹³ See Rule 17 CFR 240.17g-5(c)(5)-(7).

¹⁹⁴ See 15 U.S.C. 78o-7(a)(1)(B)(vi) and (h).

¹⁹⁵ See *June 16, 2008 Proposing Release*, 73 FR at 36243-36247.

¹⁹⁶ See S&P Letter.

require the disclosure of separate sets of default and transition statistics for each class of credit ratings. In addition, the class-by-class disclosures need to be broken out over 1, 3 and 10 year periods.¹⁹⁷

The Commission also is amending the instructions to Exhibit 2 to Form NRSRO to require enhanced disclosures about the procedures and methodologies an NRSRO uses to determine credit ratings, including whether and, if so, how information about verification performed on assets underlying a structured finance transaction is relied on in determining credit ratings; whether and, if so, how assessments of the quality of originators of assets underlying a structured finance transaction factor into the determination of credit ratings; and how frequently credit ratings are reviewed, whether different models are used for ratings surveillance than for determining credit ratings, and whether changes made to models and criteria for determining initial ratings are applied retroactively to existing ratings.

In the *June 16, 2008 Proposing Release*, the Commission preliminarily stated that it believed NRSROs may incur a cost of compliance in updating their performance metric statistics to conform to the new requirements set forth in the proposed rule amendments.¹⁹⁸ Specifically, the Commission estimated that it would take each NRSRO currently registered with the Commission approximately 50 hours to review its performance measurement statistics and to develop and implement any changes necessary to comply with the proposed amendment.¹⁹⁹ For these reasons, the Commission originally estimated that the average one-time cost to an NRSRO would be \$12,740²⁰⁰ and the total aggregate cost to the currently registered NRSROs would be \$114,660.²⁰¹

The Commission received one comment on these proposed costs. The commenter, a large NRSRO, estimated that it would have to build systems to comply with each new amendment to Form NRSRO, resulting in a one-time

cost to the NRSRO of \$6,710,000.²⁰² The commenter further estimated that its costs on an annual basis would be \$1,860,000.²⁰³ The commenter did not break down these cost estimates or provide supporting data. Although the Commission believes existing systems could be adjusted instead of rebuilt to comply with the new Exhibit instructions, the Commission is taking into account the comment received regarding the cost and, therefore, is revising its cost estimates.

The Commission believes the costs incurred by the NRSROs will be in approximate proportion to the number of credit ratings they issue. The commenter that provided cost estimates for this rule amendment is the largest NRSRO in terms of credit ratings outstanding. As such, it accounts for approximately 47% of the total outstanding credit ratings reported by all registered NRSROs on their most recent Form NRSROs. The Commission estimates that this NRSRO will incur 47% of the total costs to the NRSROs from this amendment. Consequently, the total one time cost to the industry will be approximately \$14,276,600²⁰⁴ and the total annual cost to the industry will be \$3,957,400.²⁰⁵ Furthermore, the three largest NRSROs constituting the first category account for approximately 98% of the total credit ratings outstanding among all NRSROs and, therefore, the Commission estimates they will incur approximately \$13,991,100²⁰⁶ of the total one-time cost to the industry and approximately \$3,878,300²⁰⁷ of the total annual cost to the industry. Consequently, the Commission estimates that they will incur approximately \$4,663,700²⁰⁸ per firm in one time costs and approximately \$1,292,800²⁰⁹ per firm in annual costs. The seven remaining NRSROs account for 2% of the credit ratings outstanding among all NRSROs and, therefore, the Commission estimates they will incur approximately \$285,500²¹⁰ of the total one time costs to the industry and approximately \$79,100²¹¹ of the total annual costs to the industry. Consequently, the Commission estimates that they will

incur approximately \$40,790²¹² per firm in one time costs and \$11,300²¹³ per firm in annual costs. The Commission further estimates that the cost per NRSRO within each category will vary based on their relative sizes.

Finally, the Commission has made changes to the final amendments to Form NRSRO that will minimize the burdens. Therefore, the Commission anticipates that the costs could be lower than those estimated here for NRSROs in both the first and second categories.

2. Amendments to Rule 17g-2

Rule 17g-2 requires an NRSRO to make and preserve specified records related to its credit rating business as well as to make a portion of those records available publicly.²¹⁴ The amendments to Rule 17g-2 will require an NRSRO to make and retain two additional records and retain a third type of record. The records to be made and retained are: (1) a record of the rationale for any material difference between the credit rating implied by the model and the final credit rating issued, if a quantitative model is a substantial component in the process of determining a credit rating;²¹⁵ and (2) a record showing the history and dates of all previous rating actions with respect to each outstanding credit rating.²¹⁶ In addition, the amendments will require an NRSRO to make publicly available a random sample of 10% of the issuer-paid credit ratings actions histories, in an XBRL format and with a six-month grace period, for each ratings class for which it has issued 500 or more ratings under the issuer-pay model.²¹⁷ Finally, the amendments will require an NRSRO to retain written communications that contain any complaints by an obligor, issuer, underwriter, or sponsor about the performance of a credit analyst.²¹⁸

The Commission requested comment in the *June 16, 2008 Proposing Release* on the costs that would result from the proposed amendments to Rule 17g-2.²¹⁹ In addition, the Commission requested specific comment on whether the proposals imposed costs on other market participants, including persons who use credit ratings to make investment decisions or for regulatory purposes, and persons who purchase services and products from NRSROs.²²⁰

²¹² \$285,500/7 = \$40,790.

²¹³ \$79,100/7 = \$11,300.

²¹⁴ 17 CFR 240.17g-2.

²¹⁵ Paragraph (a)(2)(iii) of Rule 17g-2.

²¹⁶ Paragraph (a)(8) of Rule 17g-2.

²¹⁷ Paragraph (d) of Rule 17g-2.

²¹⁸ Paragraph (b)(8) of Rule 17g-2.

²¹⁹ See *June 16, 2008 Proposing Release*, 73 FR at 36244-36245.

²²⁰ *Id.*

¹⁹⁷ See instructions to Exhibit 1, Form NRSRO.

¹⁹⁸ See *June 16, 2008 Proposing Release*, 73 FR at 36244.

¹⁹⁹ *Id.*

²⁰⁰ The Commission estimated that a Compliance Attorney (40 hours) and a Programmer Analyst (10 hours) would perform these responsibilities. The SIFMA 2007 Report as Modified indicates that the average hourly rates for a Compliance Attorney and a Programmer Analyst are \$270 and \$194 per hour, respectively. Therefore, the average one-time cost to an NRSRO would be \$12,740 [(40 hours × \$270) + (10 hours × \$194)].

²⁰¹ \$12,740 × 9 NRSROs = \$114,660.

²⁰² See S&P Letter.

²⁰³ *Id.*

²⁰⁴ \$6,710,000 × 100 = \$671,000,000; \$671,000,000/47 = \$14,276,600.

²⁰⁵ \$1,860,000 × 100 = \$186,000,000; \$186,000,000/47 = \$3,957,400.

²⁰⁶ \$14,276,600 × .98 = \$13,991,100.

²⁰⁷ \$3,957,400 × .98 = \$3,878,300.

²⁰⁸ \$13,991,100/3 = \$4,663,700.

²⁰⁹ \$3,878,300/3 = \$1,292,800.

²¹⁰ \$14,276,600 × .02 = \$285,500.

²¹¹ \$3,957,400 × .02 = \$79,100.

The Commission asked that commenters provide specific data and analysis to support any comments they submit with respect to the burden estimates.²²¹ The Commission received two comments on the proposed amendments.²²² The first commenter, a large NRSRO, stated that the comment period did not provide time to fully assess the costs and benefits of the proposed rule.²²³ The second commenter, also a large NRSRO, stated that its one-time cost would be \$10,660,000 and its annual cost would be \$3,260,000.²²⁴ The commenter did not provide any data or analysis to support this view.

The Commission is sensitive to the costs of the new amendments to NRSROs. The Commission is therefore revising its cost estimates based on the comments received.²²⁵ The Commission believes the costs incurred by the NRSROs will be in approximate proportion to the number of credit ratings they issue. The commenter that provided cost estimates for this rule amendment is the largest NRSRO in terms of credit ratings outstanding, accounting for approximately 47% of the total outstanding credit ratings reported by all registered NRSROs on their most recent Form NRSROs. The Commission estimates that this NRSRO will incur 47% of the total costs to the NRSROs from this amendment. Consequently, the total one time cost to the industry will be approximately \$22,680,900²²⁶ and the total annual cost to the industry will be \$6,936,200.²²⁷ Furthermore, the three largest NRSROs constituting the first category account for approximately 98% of the total credit ratings outstanding among all NRSROs and, therefore, the Commission estimates they will incur approximately \$22,227,300²²⁸ of the total one-time cost to the industry and approximately \$6,797,500²²⁹ of the total annual cost to the industry. Consequently, the Commission estimates that they will incur approximately \$7,409,100²³⁰ per

firm in one time costs and \$2,265,800²³¹ per firm in annual costs.

The seven remaining NRSROs account for 2% of the credit ratings outstanding among all NRSROs and, therefore, the Commission estimates they will incur approximately \$453,600²³² of the total one time costs to the industry and approximately \$138,700²³³ of the total annual costs to the industry. Consequently, the Commission estimates that they will incur approximately \$64,800²³⁴ per firm in one time costs and \$19,810²³⁵ per firm in annual costs. The Commission further estimates that the cost per NRSRO within each category will vary based on their relative sizes.

New paragraph (a)(8) to Rule 17g-2 requires an NRSRO to create and maintain a record showing all rating actions and the date of such actions from the initial rating to the current rating identified by the name or rated security or obligor, and, if applicable, the CUSIP of the rated security or the Central Index Key (CIK) number of the rated obligor.²³⁶ In the June 16, 2008 Proposing Release, the Commission estimated that an NRSRO may choose to purchase a license from the CUSIP Service Bureau in order to access CUSIP numbers for the securities it rates.²³⁷ The CUSIP Service Bureau's operations are covered by fees paid by issuers and licensees of the CUSIP Service Bureau's data. Issuers pay a one-time fee for each new CUSIP assigned, and licensees pay a renewable subscription or a license fee for access and use of the CUSIP Service Bureau's various database services. The CUSIP Service Bureau's license fees vary based on usage, *i.e.*, how many securities or by type of security or

business line.²³⁸ In the *June 16, 2008 Proposing Release*, the Commission estimated that the license fees incurred by an NRSRO that chose to purchase a license would vary depending on the size of the NRSRO and the number of credit ratings it issues.²³⁹ For purposes of this cost estimate, the Commission estimates that an NRSRO opting to purchase a license would incur a fee of \$100,000 to obtain access to the CUSIP numbers for the securities it rates. Consequently, the estimated total one-time cost to the industry would be \$3,000,000.²⁴⁰ The Commission believes that this estimate continues to be valid for the purposes of new paragraph (a)(8) to Rule 17g-2.

Under paragraph (d) of Rule 17g-2, as amended, NRSROs are required to publicly provide the histories of 10% of their issuer-paid credit ratings, in each class of ratings for which they have issued 500 or more such ratings, in XBRL format and with a six month grace period. The main cost of mandated use of the XBRL format likely will be the incremental cost of developing the systems to make the information available on the NRSROs' Web sites in interactive format rather than machine readable format. The Commission recognizes that new systems will have to be developed regardless of the reporting format. The Commission expects that the incremental cost of reporting credit rating information in XBRL format relative to other machine readable format will not be large. The Commission bases this assessment on the responses collected through voluntary program questionnaires on the direct costs of submitting interactive data-formatted risk/return summary information by mutual funds and interactive data-formatted financial statements by reporting companies. Participating mutual funds indicated that the estimated direct costs of Web posting of their risk/return summary in interactive data are \$23,450 for the first submission and \$3,350 for each subsequent submission.²⁴¹ Reporting companies, which participated in the voluntary program questionnaire, estimated their direct reporting costs at \$40,509 for the first submission and \$13,452 for each subsequent

²³¹ \$6,797,500/3 = \$2,265,800.

²³² \$22,680,900 × .02 = \$453,600.

²³³ \$6,936,200 × .02 = \$138,700.

²³⁴ \$453,600/7 = \$64,800.

²³⁵ \$138,700/7 = \$19,810.

²³⁶ See Rule 17g-2(a)(8). The Central Index Key (CIK) is used on the Commission's computer systems to identify corporations and individual people who have filed disclosure with the Commission. Anyone may search <http://www.edgarcompany.sec.gov> for a company, fund, or individual CIK. There is no fee for this service. CUSIP stands for Committee on Uniform Securities Identification Procedures. A CUSIP number identifies most securities, including: Stocks of all registered U.S. and Canadian companies, U.S. government and municipal bonds, as well as structured finance issuances. The CUSIP system-owned by the American Bankers Association and operated by Standard & Poor's-facilitates the clearing and settlement process of securities. The CUSIP number consists of nine characters (including letters and numbers) that uniquely identify a company or issuer and the type of security.

²³⁷ See *June 16, 2008 Proposing Release*, 73 FR at 36245.

²³⁸ See https://www.cusip.com/static/html/webpage/service_fees.html#lic_fees.

²³⁹ See *June 16, 2008 Proposing Release*, 73 FR at 36245.

²⁴⁰ \$100,000 × 30 NRSROs = \$3,000,000.

²⁴¹ Interactive Data for Mutual Fund Risk/Return Summary, Securities Act Release No. 8929 (June 10, 2008), 73 FR 35442 (June 23, 2008).

²²¹ *Id.*

²²² See Moody's Letter; S&P Letter.

²²³ See Moody's Letter.

²²⁴ See S&P Letter.

²²⁵ To address commenter concerns, the Commission has employed a different methodology for these cost estimates than that used in the *June 16, 2008 Proposing Release*. For a discussion of the Commission's original cost estimates, see *June 16, 2008 Proposing Release*, 73 FR at 36244-36245.

²²⁶ \$10,660,000 × 100 = \$1,066,000,000;
\$1,066,000,000/47 = \$22,680,900.

²²⁷ \$3,260,000 × 100 = \$326,000,000;
\$326,000,000/47 = \$6,936,200.

²²⁸ \$22,680,900 × .98 = \$22,227,300.

²²⁹ \$6,936,200 × .98 = \$6,797,500.

²³⁰ \$22,227,300/3 = \$7,409,100.

submission.²⁴² The Commission expects that the costs to NRSROs will be closer to those for mutual funds' risk/return summary reporting, since the reporting complexity (and therefore tagging) of credit rating actions is closer to that of risk/return summaries than to quarterly financial reports. The Commission believes the incremental costs allocable to the XBRL requirement are accounted for in the per-firm one-time and annual costs described above for the two categories of NRSROs.

The Commission anticipates that the changes made to the final amendments to Rule 17g-2 will result, for NRSROs in both the first and second categories, in lower costs overall than those estimated in the *June 16, 2008 Proposing Release*. For example, the Commission is instead requiring that NRSROs provide a 10% sample of their issuer-paid credit ratings histories for each ratings class for which they have issued 500 or more ratings under the issuer-pay model instead of the history for all outstanding credit ratings. In addition, the Commission is specifying that this data be provided in XBRL format using the List of XBRL Tags for NRSROs as specified on the Commission's Web site, thus eliminating the need for an NRSRO to develop its own taxonomy and tags for the data. Finally, the Commission is only requiring that the record of the rationale for any material difference between the credit rating implied by the model and the final credit rating be kept for structured finance products only, rather than for all classes of ratings. These changes to the amendments to Rule 17g-2 were designed in part to reduce the costs associated with implementing the new amendments.

Finally, one commenter, an NRSRO, suggested that the requirement to post their ratings histories would destroy a revenue stream at the company.²⁴³ Currently, the company charges subscribers a fee to access historical data and information on ratings actions. The Commission believes that the changes to the amendments to Rule 17g-2(d) from those that were proposed address this concern. The amendment now requires NRSROs provide a random 10% sample of their issuer-paid credit ratings histories for each ratings class for which they have issued 500 or more ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated with a six-month grace period for posting new ratings actions. The Commission

believes the disclosure of 10% of the issuer-paid credit ratings, selected randomly and disclosed with a six-month time lag, will not cause persons who pay for ratings downloads to cease purchasing this service, as customers that are willing to pay for full and immediate access to all of an NRSRO's ratings actions are unlikely to reconsider their purchase of that product due to the ability to access 10% of the ratings on a six-month delayed basis free of charge. In addition, the Commission has decided not to impose the same disclosure obligation on subscriber-paid credit ratings at this time out of competitive concerns raised, but is still considering how to make more information publicly available and accessible about the performance of these ratings. The Commission believes that the rule as adopted will address the concerns expressed by commenters and at the same time foster greater accountability of NRSROs with respect to their issuer-paid credit ratings as well as increase competition among NRSROs by making it easier for persons to analyze the actual performance of their credit ratings.

3. Amendment to Rule 17g-3

Rule 17g-3 requires an NRSRO to furnish audited annual financial statements to the Commission, including certain specified schedules.²⁴⁴ The amendment to Rule 17g-3 will require an NRSRO to furnish the Commission with an additional annual report: An unaudited report of the number of credit ratings that were changed during the fiscal year in each class of credit ratings for which the NRSRO is registered with the Commission. As stated in the *June 16, 2008 Proposing Release*, the Commission believed that the annual costs to NRSROs to comply with the proposed amendment to Rule 17g-3 would be *de minimis*.²⁴⁵ The Commission preliminarily believed that an NRSRO already would have this information with respect to each class of credit ratings for which it is registered.²⁴⁶ In addition, the amendment does not prescribe a format for the report. Consequently, the Commission estimated that proposed Rule 17g-3(a)(6) would not have a significant effect on the total average annual cost burden currently estimated for Rule 17g-3.²⁴⁷

The Commission requested comment in the *June 16, 2008 Proposing Release* on the costs that would result from the proposed amendments to Rule 17g-3.²⁴⁸ In addition, the Commission requested specific comment on whether this proposal imposed costs on other market participants, including persons who use credit ratings to make investment decisions or for regulatory purposes, and persons who purchase services and products from NRSROs.²⁴⁹ The Commission asked that commenters provide specific data and analysis to support any comments they submit with respect to these burden estimates. The Commission received one comment on this cost estimate.²⁵⁰ The commenter, a large NRSRO, estimated that it would cost \$300,000 to build and test a system to comply with this amendment and that its ongoing costs would be \$70,000 per year.²⁵¹ The commenter did not provide specific data and analysis to support the estimates.²⁵²

The Commission is revising its cost estimates based on the specific costs included in the comments received. The commenter that provided cost estimates for this rule amendment is the largest NRSRO in terms of credit ratings outstanding. As such, it accounts for approximately 47% of the total outstanding credit ratings reported by all registered NRSROs on their most recent Form NRSROs. The Commission estimates that this NRSRO will incur 47% of the total costs to the NRSROs from this amendment. Consequently, the total one time cost to the industry will be approximately \$638,300²⁵³ and the total annual cost to the industry will be \$148,900.²⁵⁴ Furthermore, the three largest NRSROs in the first category account for approximately 98% of the total credit ratings issued by the NRSROs and, therefore, the Commission estimates they will incur approximately \$625,500²⁵⁵ of the total one-time cost to the industry and approximately \$145,900²⁵⁶ of the total annual cost to the industry. Consequently, the Commission estimates that they will incur approximately \$208,500²⁵⁷ per firm in one time costs and \$48,600²⁵⁸ per firm in annual costs.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ See S&P Letter.

²⁵² *Id.*

²⁵³ $\$300,000 \times 100 = \$30,000,000$; $\$30,000,000/47 = \$638,300$.

²⁵⁴ $\$70,000 \times 100 = \$7,000,000$; $\$7,000,000/47 = \$148,900$.

²⁵⁵ $\$638,300 \times 0.98 = \$625,500$.

²⁵⁶ $\$148,900 \times 0.98 = \$145,900$.

²⁵⁷ $\$625,500/3 = \$208,500$.

²⁵⁸ $\$145,900/3 = \$48,600$.

²⁴⁴ 17 CFR 240.17g-3.

²⁴⁵ See *June 16, 2008 Proposing Release*, 73 FR at 36245-36246.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴² *Interactive Data to Improve Financial Reporting*, Securities Act Release No. 8924 (May 30, 2008), 73 FR 35442 (June 10, 2008).

²⁴³ See S&P Letter.

The seven remaining NRSROs account for 2% of the credit ratings outstanding and, therefore, the Commission estimates they will incur approximately \$12,800²⁵⁹ of the total one time costs to the industry and approximately \$3,000²⁶⁰ of the total annual costs to the industry. Consequently, the Commission estimates that they will incur approximately \$1,830²⁶¹ per firm in one time costs and \$430²⁶² per firm in annual costs. The Commission further estimates that the cost per NRSRO within each category will vary based on their relative sizes.

4. Amendments to Rule 17g-5

Rule 17g-5 requires an NRSRO to manage and disclose certain conflicts of interest and prohibits other conflicts outright.²⁶³ The Commission is amending paragraph (c) to Rule 17g-5 to add three additional prohibited conflicts of interest.²⁶⁴ In the *June 16, 2008 Proposing Release*, the Commission estimated that the amendments to paragraph (c) to Rule 17g-5 generally would impose *de minimis* costs on an NRSRO.²⁶⁵ However, the Commission recognized that an NRSRO may incur costs related to training employees about the new requirements.²⁶⁶ The Commission also recognized that it was possible that the proposed amendments could require some NRSROs to restructure their business models or activities, in particular with respect to their consulting services.²⁶⁷

The Commission requested comment in the *June 16, 2008 Proposing Release* on the costs that would result from the proposed amendments to Rule 17g-5.²⁶⁸ In addition, the Commission requested specific comment on whether the proposed amendments to paragraph (c) of Rule 17g-5 would impose training and restructuring costs, would impose personnel costs, or would impose any additional costs on an NRSRO that is part of a large conglomerate related to monitoring the business activities of persons associated with the NRSRO, such as affiliates located in other countries.²⁶⁹ The Commission asked that commenters provide specific data and analysis to support any comments

they submit with respect to these cost estimates.²⁷⁰ The Commission received two comments on the proposed amendment, both from large NRSROs.²⁷¹

One commenter said that paragraph (c)(6) would cause the NRSRO to create a number of new positions for senior chief credit officers so that drafting, approving and implementing methodologies could be handled exclusively by individuals with no involvement in the business of running an NRSRO.²⁷² The commenter also stated that it would be necessary for the NRSRO to create additional, senior positions in its issuer and intermediary relations team for individuals, such as former analysts, who were deeply familiar with the NRSRO's methodologies and procedures and could assist with fee negotiations.²⁷³ The NRSRO further stated that it would have to transfer former credit analysts to this team regularly and on an ongoing basis so that this team retained sufficient and current technical knowledge to handle fees.²⁷⁴ The NRSRO did not provide specific cost estimates. Another commenter stated that it would cost \$7,830,000 for personnel time, system modifications, and training to implement the new amendments.²⁷⁵ In addition, the NRSRO estimated that its annual, ongoing costs would be \$2,250,000.²⁷⁶ The NRSRO did not provide a breakdown of costs with its estimate.

The Commission is revising its cost estimates based on the specific comments received. The Commission believes the costs incurred by the NRSROs will be in approximate proportion to the number of credit ratings they issue. The commenter that provided cost estimates for this rule amendment is the largest NRSRO in terms of credit ratings outstanding. As such, it accounts for approximately 47% of the total outstanding credit ratings reported by all registered NRSROs on their most recent Form NRSROs. The Commission estimates that this NRSRO will incur 47% of the total costs to the NRSROs from this amendment. Consequently, the total one time cost to the industry will be approximately \$16,659,600²⁷⁷ and the total annual cost

to the industry will be \$4,787,200.²⁷⁸ Furthermore, the three largest NRSROs in the first category account for approximately 98% of the total credit ratings issued by the NRSROs and, therefore, the Commission estimates they will incur approximately \$16,326,400²⁷⁹ of the total one-time cost to the industry and approximately \$4,691,500²⁸⁰ of the total annual cost to the industry. Consequently, the Commission estimates that they will incur approximately \$5,442,100²⁸¹ per firm in one time costs and \$1,563,800²⁸² per firm in annual costs.

The seven remaining NRSROs account for 2% of the credit ratings outstanding and, therefore, the Commission estimates they will incur approximately \$333,200²⁸³ of the total one time costs to the industry and approximately \$95,700²⁸⁴ of the total annual costs to the industry. Consequently, the Commission estimates that they will incur approximately \$47,600²⁸⁵ per firm in one time costs and \$13,760²⁸⁶ per firm in annual costs. The Commission further estimates that the cost per NRSRO within each category will vary based on their relative sizes.

C. Total Estimated Costs of This Rulemaking

Based on the figures discussed above, the Commission estimates that the first year quantifiable costs related to this proposed rulemaking will be approximately \$73,085,100.²⁸⁷

V. Consideration of Burden on Competition and Promotion of Efficiency, Competition, and Capital Formation

Under Section 3(f) of the Exchange Act,²⁸⁸ the Commission shall, when engaging in rulemaking that requires the Commission to consider or determine if an action is necessary or appropriate in the public interest, consider whether the action will promote efficiency, competition, and capital formation. Section 23(a)(2) of the Exchange Act²⁸⁹ requires the Commission to consider the anticompetitive effects of any rules the

²⁷⁸ $\$2,250,000 \times 100 = \$225,000,000$;
 $\$225,000,000/47 = \$4,787,200$.

²⁷⁹ $\$16,659,600 \times 0.98 = \$16,326,400$.

²⁸⁰ $\$4,787,200 \times 0.98 = \$4,691,500$.

²⁸¹ $\$16,326,400/3 = \$5,442,100$.

²⁸² $\$4,691,500/3 = \$1,563,800$.

²⁸³ $\$16,659,600 \times .02 = \$333,200$.

²⁸⁴ $\$4,787,200 \times .02 = \$95,700$.

²⁸⁵ $\$333,200/7 = \$47,600$.

²⁸⁶ $\$95,700/7 = \$13,671 = \$13,670$.

²⁸⁷ $\$57,255,400$ (total one-time costs) +
 $\$15,829,700$ (total annual costs) = \$73,085,100.

²⁸⁸ 15 U.S.C. 78c(f).

²⁸⁹ 15 U.S.C. 78w(a)(2).

²⁵⁹ $\$638,300 \times .02 = \$12,800$.

²⁶⁰ $\$148,900 \times .02 = \$3,000$.

²⁶¹ $\$12,800/7 = \$1,830$.

²⁶² $\$3,000/7 = \430 .

²⁶³ 17 CFR 240.17g-5.

²⁶⁴ See Rule 17g-5(c)(5)-(7).

²⁶⁵ See *June 16, 2008 Proposing Release*, 73 FR at 36246-36247.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ See Moody's Letter; S&P Letter.

²⁷² See Moody's Letter.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ See S&P Letter.

²⁷⁶ See *id.*

²⁷⁷ $\$7,830,000 \times 100 = \$783,000,000$;
 $\$783,000,000/47 = \$16,659,600$.

Commission adopts under the Exchange Act. Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. As discussed below, the Commission believes that the amendments will promote efficiency, competition, and capital formation.

The amendments to the Instructions to Exhibit 1 to Form NRSRO will require NRSROs to make more comparable disclosures about the performance of their credit ratings. These disclosures will provide more information to users of credit ratings about the relative performance of the NRSROs and, thereby, promote competition. In addition, the amendments to the instructions to Exhibit 2 are designed to enhance the disclosures NRSROs make with respect to their methodologies for determining credit ratings. The Commission believes these enhanced disclosures will make it easier for users of credit ratings to compare the quality of the NRSRO's procedures and methodologies for determining credit ratings. The greater transparency that will result from all these enhanced disclosures will make it easier for market participants to select the NRSROs that have the highest quality processes for determining credit ratings. This transparency is designed to increase competition and promote capital formation by restoring confidence in the credit ratings, which are an integral part of the capital formation process.

The amendments to Rule 17g-2 are designed to enhance the Commission's oversight of NRSROs and, with respect to the public disclosure of a percentage of the histories of their issuer-paid credit ratings, provide the marketplace with information for comparing the ratings performance of NRSROs subject to the requirement. Enhancing the Commission's oversight will help enhance confidence in credit ratings and, thereby, promote capital formation. Increased disclosure of the histories of issuer-paid credit ratings could make the ratings performance of the NRSROs subject to this requirement more transparent to the marketplace and, thereby, highlight those firms that analyze credit risk better. The Commission believes that this enhanced disclosure will benefit smaller NRSROs to the extent they have performed better in determining issuer-paid credit ratings than other NRSROs by alerting the market to their superior performance.

The amendment to Rule 17g-3 is designed to enhance the Commission's oversight of NRSROs. Enhancing the

Commission's oversight will help enhance confidence in credit ratings and, thereby, promote capital formation.

The amendments to Rule 17g-5 will prohibit NRSROs from determining credit ratings where they or their affiliate provided recommendations about the corporate or legal structure, assets, liabilities, or activities of the obligor being rated or the issuer of the security being rated, prohibit analysts from participating in fee negotiations, and prohibit credit analysts or persons responsible for approving a credit rating from receiving gifts from the obligor being rated, or from the issuer, underwriter, or sponsor of the securities being rated, other than items provided in the context of normal business activities such as meetings that have an aggregate value of no more than \$25. These proposals are designed to increase confidence in the integrity of NRSROs and the credit ratings they issue and, thereby, enhance confidence in credit ratings and, by extension, promote capital formation.

The Commission received one comment specifically on the Commission's analysis of the whether the amendments would promote efficiency, competition, and capital formation.²⁹⁰ The commenter argued that the requirement to publish all ratings histories free of charge would be a "new barrier to entry" and would create "a significant disincentive to apply for the NRSRO designation" thereby reducing competition among NRSROs.²⁹¹ The commenter stated that if these amendments were passed, the estimate that there would be 30 NRSROs would need to be revised.

As discussed more fully in section II.B.1, in response to this comment and similar concerns raised by other commenters, the Commission has balanced the many competitive concerns expressed by commenters. The rule is designed to foster competition, by making ratings histories more accessible. However, the Commission has taken a number of steps to minimize the potential competitive effects. First, the amendments do not apply to subscriber-paid credit ratings. Second, with respect to issuer-paid credit ratings, the Commission notes that NRSROs generally make these ratings public. This publicly available, historical information currently is difficult to access and compare. The Commission expects that making this information more accessible will advance the Commission's goal of fostering accountability and

comparability among NRSROs. The Commission does not, however, expect that requiring NRSROs to make publicly available ratings action histories for a random sample of 10% of their outstanding issuer-paid credit ratings in a more accessible form six months after the rating action has been taken will have a material effect on their business. Because the Commission is requiring only a small portion of the ratings histories to be made available in a more accessible format, the Commission expects NRSROs will still be able to realize economic value from the information.

The Commission has decided not to impose the same disclosure obligation on subscriber-paid credit ratings at this time out of competitive concerns raised, but is still considering how to make more information publicly available and accessible about the performance of these ratings. The Commission believes that the rule as adopted will address the concerns expressed by commenters and at the same time foster greater accountability of NRSROs with respect to their issuer-paid credit ratings as well as increase competition among NRSROs by making it easier for persons to analyze the actual performance of their credit ratings.

VI. Final Regulatory Flexibility Analysis

The Commission proposed amendments to Form NRSRO, Rule 17g-2, Rule 17g-3, and Rule 17g-5 under the Exchange Act. An Initial Regulatory Flexibility Analysis ("IRFA") was published in the *June 16, 2008 Proposing Release*.²⁹² The Commission has prepared the following Final Regulatory Flexibility Analysis ("FRFA"), in accordance with the provisions of the Regulatory Flexibility Act,²⁹³ regarding amendments to Form NRSRO, Rule 17g-2, Rule 17g-3, and Rule 17g-5 under the Exchange Act.

A. Need for and Objective of the Amendments

The amendments will prescribe additional requirements for NRSROs to address concerns raised about the role of credit rating agencies in the recent credit market turmoil. The amendments are designed to enhance and strengthen the rules the Commission adopted in 2007 to implement specific provisions of the Rating Agency Act.²⁹⁴ The objectives of the Rating Agency Act are "to improve ratings quality for the

²⁹² See *June 16, 2008 Proposing Release*, 73 FR at 36248-36250.

²⁹³ 5 U.S.C. 603.

²⁹⁴ Public Law No. 109-291 (2006); see also *June 5, 2007 Adopting Release*.

²⁹⁰ See Rapid Ratings Letter.

²⁹¹ *Id.*

protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating industry.”²⁹⁵ The amendments are designed to further achieve these objectives and further assist the Commission in monitoring whether an NRSRO complies with the statutes and regulations applicable to NRSROs.

B. Significant Issues Raised by Commenters

The Commission sought comment with respect to every aspect of the IRFA, including comments with respect to the number of small entities that may be affected by the proposed amendments.²⁹⁶ Commenters were asked to specify the costs of compliance with the proposed rules and suggest alternatives that would accomplish the goals of the rules.²⁹⁷ The Commission did not receive any comments on the IRFA. The Commission did, however, receive a limited number of comments that discussed the effect the rules might have on smaller credit rating agencies, although these commenters did not address whether their comments pertained to entities that would be small businesses for purposes of Regulatory Flexibility Act analysis. For example, a commenter stated that the proposed amendments, if adopted, would create a barrier to entry for new NRSROs.²⁹⁸ In addition, several commenters suggested that small NRSROs would not be able to comply with Rule 17g-5(c)(6), which prohibits persons within an NRSRO that are responsible for determining or approving credit ratings or developing the methodologies for determining credit ratings from participating in fee discussions.²⁹⁹ In response to these comments, the Commission will review requests by small NRSROs for exemptions from the rule under Section 36 of the Exchange Act based on their specific circumstances.

C. Small Entities Subject to the Rule

Paragraph (a) of Rule 0-10 provides that for purposes of the Regulatory Flexibility Act, a small entity “[w]hen used with reference to an ‘issuer’ or a ‘person’ other than an investment company” means “an ‘issuer’ or ‘person’ that, on the last day of its most recent fiscal year, had total assets of \$5 million

or less.”³⁰⁰ The Commission believes that an NRSRO with total assets of \$5 million or less would qualify as a “small” entity for purposes of the Regulatory Flexibility Act.

As noted in the *June 5, 2007 Adopting Release*, the Commission believes that approximately 30 credit rating agencies ultimately may register as an NRSRO.³⁰¹ Of the approximately 30 credit rating agencies that may register with the Commission, the Commission estimates that approximately 20 may be “small” entities for purposes of the Regulatory Flexibility Act.³⁰²

D. Reporting, Recordkeeping, and Other Compliance Requirements

The amendments will revise Form NRSRO to elicit certain additional information regarding the performance data for the credit ratings and the methods used by an NRSRO for issuing credit ratings.³⁰³

The amendments will revise Rule 17g-2 to establish additional recordkeeping requirements for NRSROs.³⁰⁴ The amendments will require an NRSRO to make and retain two additional records and retain a third type of record. The records would be: (1) A record of the rationale for any material difference between the credit rating implied by the model and the final credit rating issued, if a quantitative model is a substantial component in the process of determining a credit rating;³⁰⁵ and (2) a record showing the history and dates of all previous rating actions with respect to each outstanding credit rating. An NRSRO also will be required to publicly disclose, in XBRL format and on a six month delay, a record showing the history and dates of all previous rating actions with respect to a random sample of 10% of the issuer-paid credit ratings for each ratings class for which an NRSRO is registered and has issued 500 or more ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated.³⁰⁶ In addition, the NRSRO will be required to retain any complaints about the performance of a credit analyst.³⁰⁷ These records will assist the Commission, through its examination process, in monitoring whether the NRSRO continues to maintain adequate financial and

managerial resources to consistently produce credit ratings with integrity (as required under the Rating Agency Act) and whether the NRSRO was complying with the provisions of the Exchange Act including the provisions of the Rating Agency Act, the rules adopted thereunder, and the NRSRO’s disclosed policies and procedures.

The amendments will revise Rule 17g-3 to require an NRSRO to furnish the Commission with an additional annual report: The number of ratings actions in each class of credit rating for which it is registered.³⁰⁸ This requirement is designed to further assist the Commission in its examination function.

The amendments will revise Rule 17g-5 to prohibit NRSROs and their affiliates from providing consulting or advisory services, prohibit analysts from participating in fee negotiations, and prohibit credit analysts or persons responsible for approving a credit rating from receiving gifts from the obligor being rated, or from the issuer, underwriter, or sponsor of the securities being rated, other than items provided in the context of normal business activities such as meetings that have an aggregate value of no more than \$25.³⁰⁹

E. Significant Alternatives

Pursuant to Section 3(a) of the RFA,³¹⁰ the Commission must consider certain types of alternatives, including: (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part of the rule, for small entities.

The Commission is not establishing different compliance or reporting requirements or timetables. The Commission believes that obtaining comparable information from NRSROs regardless of size is important. Moreover, because the rules are relatively straightforward, the Commission does not believe it necessary to clarify, consolidate, or simplify compliance and reporting requirements under the rule for small entities at this time. Because the amendments are designed to improve the overall quality of ratings and enhance the Commission’s oversight,

²⁹⁵ See *Senate Report*.

²⁹⁶ See *June 16, 2008 Proposing Release*, 73 FR 36250.

²⁹⁷ *Id.*

²⁹⁸ See Rapid Ratings Letter.

²⁹⁹ See, e.g., DBRS Letter; Multiple-Markets Letter; CFA Institute Letter; Colorado PERA Letter; ABA Business Law Committees Letter.

³⁰⁰ 17 CFR 240.0-10(a).

³⁰¹ *June 5, 2007 Adopting Release*, 72 FR at 33618.

³⁰² See 17 CFR 240.0-10(a).

³⁰³ See amendments to Form NRSRO.

³⁰⁴ See amendments to Form NRSRO.

³⁰⁵ See amendments to Rule 17g-2.

³⁰⁶ Paragraph (a)(2)(iii) of Rule 17g-2.

³⁰⁷ Paragraph (a)(8) of Rule 17g-2.

³⁰⁸ See amendments to Rule 17g-3.

³⁰⁹ See amendments to Rule 17g-5.

³¹⁰ 5 U.S.C. 603(c).

the Commission is not proposing to exempt any specific small entities from coverage of the rule, or any part of the rule. However, the Commission would be willing to consider requests for exemptive relief from smaller NRSROs for which the prohibition on participating in fee discussions may be more difficult to comply with than for larger NRSROs. The other prohibited conflicts do not appear to impose any disproportionate impact on smaller NRSROs. The amendments are designed to allow NRSROs the flexibility to develop procedures tailored to their specific organizational structure and business models.

VII. Statutory Authority

The Commission is adopting amendments to Form NRSRO and Rules 17g-2, 17g-3, and 17g-5 pursuant to the authority conferred by the Exchange Act, including Sections 3(b), 15E, 17, 23(a) and 36.³¹¹

Text of the Amendments

List of Subjects in 17 CFR Parts 240 and 249b

Brokers, Reporting and recordkeeping requirements, Securities.

■ In accordance with the foregoing, the Commission amends Title 17, Chapter II of the Code of Federal Regulations as follows.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The authority citation for part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

- * * * *
- 2. Section 240.17g-2 is amended by:
 - a. Removing paragraph (a)(2)(iv);
 - b. Redesignating paragraph (a)(2)(iii) as paragraph (a)(2)(iv);
 - c. In newly redesignated paragraph (a)(2)(iv), removing “; and” and in its place adding a period;
 - d. Adding new paragraph (a)(2)(iii);
 - e. Adding paragraph (a)(8);
 - f. In paragraph (b)(7), removing the phrase “maintaining, changing,” and in its place adding “maintaining, monitoring, changing.”;
 - g. Redesignating paragraphs (b)(8), (b)(9), and (b)(10) as paragraphs (b)(9), (b)(10), and (b)(11), respectively;

- h. Adding new paragraph (b)(8); and
- i. In paragraph (d), adding four sentences to the end of the paragraph.

§ 240.17g-2 Records to be made and retained by nationally recognized statistical rating organizations.

- (a) * * *
- (2) * * *
- (iii) If a quantitative model was a substantial component in the process of determining the credit rating of a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction, a record of the rationale for any material difference between the credit rating implied by the model and the final credit rating issued; and

* * * * *

(8) For each outstanding credit rating, a record showing all rating actions and the date of such actions from the initial credit rating to the current credit rating identified by the name of the rated security or obligor and, if applicable, the CUSIP of the rated security or the Central Index Key (CIK) number of the rated obligor.

(b) * * *

(8) Any written communications received from persons not associated with the nationally recognized statistical rating organization that contain complaints about the performance of a credit analyst in initiating, determining, maintaining, monitoring, changing, or withdrawing a credit rating.

* * * *

(d) * * * In addition, a nationally recognized statistical rating organization must make and keep publicly available on its corporate Internet Web site in an XBRL (eXtensible Business Reporting Language) format the ratings action information for ten percent of the outstanding credit ratings required to be retained pursuant to paragraph (a)(8) of this section and which were paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated, selected on a random basis, for each class of credit rating for which it is registered and for which it has issued 500 or more outstanding credit ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated. Any ratings action required to be disclosed pursuant to this paragraph (d) need not be made public less than six months from the date such ratings action is taken. If a credit rating made public pursuant to this paragraph (d) is withdrawn or the instrument rated matures, the nationally recognized

statistical rating organization must randomly select a new outstanding credit rating from that class of credit ratings in order to maintain the 10 percent disclosure threshold. In making the information available on its corporate Internet Web site, the nationally recognized statistical rating organization shall use the List of XBRL Tags for NRSROs as specified on the Commission’s Internet Web site.

* * * * *

- 3. Section 240.17g-3 is amended by:
 - a. Adding paragraph (a)(6); and
 - b. Revising paragraph (b).

The addition and revision read as follows:

§ 240.17g-3 Annual financial reports to be furnished by nationally recognized statistical rating organizations.

- (a) * * *
- (6) An unaudited report of the number of credit ratings actions (upgrades, downgrades, placements on credit watch, and withdrawals) taken during the fiscal year in each class of credit ratings identified in section 3(a)(62)(B) of the Act (15 U.S.C. 78c(a)(62)(B)) for which the nationally recognized statistical rating organization is registered with the Commission.

Note to paragraph (a)(6): A nationally recognized statistical rating organization registered in the class of credit ratings described in section 3(a)(62)(B)(iv) of the Act (15 U.S.C. 78c(a)(62)(B)(iv)) must include credit ratings actions taken on credit ratings of any security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction for purposes of reporting the number of credit ratings actions in this class.

(b) The nationally recognized statistical rating organization must attach to the financial reports furnished pursuant to paragraphs (a)(1) through (a)(6) of this section a signed statement by a duly authorized person associated with the nationally recognized statistical rating organization stating that the person has responsibility for the financial reports and, to the best knowledge of the person, the financial reports fairly present, in all material respects, the financial condition, results of operations, cash flows, revenues, analyst compensation, and credit rating actions of the nationally recognized statistical rating organization for the period presented.

* * * * *

- 4. Section 240.17g-5 is amended by:
 - a. Removing the word “or” at the end of paragraph (c)(3);
 - b. Removing the period at the end of paragraph (c)(4) and in its place adding a semi-colon; and

³¹¹ 15 U.S.C. 78c(b), 78o-7, 78q, 78w, and 78mm.

■ c. Adding paragraphs (c)(5), (c)(6), and (c)(7).

The additions read as follows:

§ 240.17g-5 Conflicts of interest.

* * * * *

(c) * * *

(5) The nationally recognized statistical rating organization issues or maintains a credit rating with respect to an obligor or security where the nationally recognized statistical rating organization or a person associated with the nationally recognized statistical rating organization made recommendations to the obligor or the issuer, underwriter, or sponsor of the security about the corporate or legal structure, assets, liabilities, or activities of the obligor or issuer of the security;

(6) The nationally recognized statistical rating organization issues or maintains a credit rating where the fee paid for the rating was negotiated, discussed, or arranged by a person within the nationally recognized statistical rating organization who has responsibility for participating in determining credit ratings or for developing or approving procedures or methodologies used for determining credit ratings, including qualitative and quantitative models; or

(7) The nationally recognized statistical rating organization issues or maintains a credit rating where a credit analyst who participated in determining or monitoring the credit rating, or a person responsible for approving the credit rating received gifts, including entertainment, from the obligor being rated, or from the issuer, underwriter, or sponsor of the securities being rated, other than items provided in the context of normal business activities such as meetings that have an aggregate value of no more than \$25.

* * * * *

PART 249b—FURTHER FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 6. The authority citation for part 249b continues to read in part as follows:

Authority: 15 U.S.C. 78a *et seq.*, unless otherwise noted;

* * * * *

■ 7. Form NRSRO (referenced in § 249b.300) is amended by revising Exhibits 1 and 2 in section H, Item 9 of the Form NRSRO Instructions to read as follows:

Note: The text of Form NRSRO and this amendment does not appear in the Code of Federal Regulations.

Form NRSRO

* * * * *

Form NRSRO Instructions

* * * * *

H. INSTRUCTIONS FOR SPECIFIC LINE ITEMS

* * * * *

Item 9. Exhibits. * * *

Exhibit 1. Provide in this Exhibit performance measurement statistics of the credit ratings of the Applicant/NRSRO, including performance measurement statistics of the credit ratings separately for each class of credit rating for which the Applicant/NRSRO is seeking registration or is registered (as indicated in Item 6 and/or 7 of Form NRSRO). For the purposes of this Exhibit, an Applicant/NRSRO registered in the class of credit ratings described in Section 3(a)(62)(B)(iv) of the Act (15 U.S.C. 78c(a)(62)(B)(iv)) must include credit ratings of any security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction for purposes of reporting the performance measurement statistics for this class. In addition, the class of government securities should be separated into three additional classes: Sovereigns, United States public finance, and international public finance. The performance measurement statistics must at a minimum show the performance of credit ratings in each class over 1 year, 3 year, and 10 year periods (as applicable) through the most recent calendar year-end, including, as applicable: Historical ratings transition and default rates within each of the credit rating categories, notches, grades, or rankings used by the Applicant/NRSRO as an indicator of the assessment of the creditworthiness of an obligor, security, or money market instrument in each class of credit rating. The default statistics must include defaults relative to the initial rating. As part of this Exhibit, define the credit rating categories, notches, grades, and rankings used by the Applicant/NRSRO and explain the performance measurement statistics, including the inputs, time horizons, and metrics used to determine the statistics. If the Applicant/NRSRO is required to make and keep publicly available on its corporate Internet Web site in an XBRL (eXtensible Business Reporting Language) format a sample of ratings action information pursuant to the requirements of 17 CFR 240.17g-2(d), provide in this Exhibit the Web site address where this information is, or will be, made publicly available.

Exhibit 2. Provide in this Exhibit a general description of the procedures and methodologies used by the

Applicant/NRSRO to determine credit ratings, including unsolicited credit ratings within the classes of credit ratings for which the Applicant/NRSRO is seeking registration or is registered. The description must be sufficiently detailed to provide users of credit ratings with an understanding of the processes employed by the Applicant/NRSRO in determining credit ratings, including, as applicable, descriptions of: Policies for determining whether to initiate a credit rating; a description of the public and non-public sources of information used in determining credit ratings, including information and analysis provided by third-party vendors; whether and, if so, how information about verification performed on assets underlying or referenced by a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction is relied on in determining credit ratings; the quantitative and qualitative models and metrics used to determine credit ratings, including whether and, if so, how assessments of the quality of originators of assets underlying or referenced by a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction factor into the determination of credit ratings; the methodologies by which credit ratings of other credit rating agencies are treated to determine credit ratings for securities or money market instruments issued by an asset pool or as part of any asset-backed or mortgaged-backed securities transaction; the procedures for interacting with the management of a rated obligor or issuer of rated securities or money market instruments; the structure and voting process of committees that review or approve credit ratings; procedures for informing rated obligors or issuers of rated securities or money market instruments about credit rating decisions and for appeals of final or pending credit rating decisions; procedures for monitoring, reviewing, and updating credit ratings, including how frequently credit ratings are reviewed, whether different models or criteria are used for ratings surveillance than for determining initial ratings, whether changes made to models and criteria for determining initial ratings are applied retroactively to existing ratings, and whether changes made to models and criteria for performing ratings surveillance are incorporated into the models and criteria for determining initial ratings; and procedures to withdraw, or suspend the

maintenance of, a credit rating. An Applicant/NRSRO may provide in Exhibit 2 the location on its Web site where additional information about the

procedures and methodologies is located.

* * * * *

Dated: February 2, 2009.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9-2513 Filed 2-6-09; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 243

[Release No. 34–59343; File No. S7–04–09]

RIN 3235–AK14

Re-Proposed Rules for Nationally Recognized Statistical Rating Organizations

AGENCY: Securities and Exchange Commission (“Commission”).

ACTION: Proposed rules.

SUMMARY: In conjunction with the publication today, in a separate release, of the Commission’s final rule amendments to its existing rules governing the conduct of nationally recognized statistical rating organizations (“NRSROs”), the Commission is proposing amendments which would require the public disclosure of credit rating histories for all outstanding credit ratings issued by an NRSRO on or after June 26, 2007 paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated. The Commission also is soliciting detailed information about the issues surrounding the application of a disclosure requirement on subscriber-paid credit ratings. The Commission is re-proposing for comment an amendment to its conflict or interest rule that would prohibit an NRSRO from issuing a rating for a structured finance product paid for by the product’s issuer, sponsor, or underwriter unless the information about the product provided to the NRSRO to determine the rating and, thereafter, to monitor the rating is made available to other persons. The Commission is proposing these rules to address concerns about the integrity of the credit rating procedures and methodologies at NRSROs.

DATES: Comments should be received on or before March 26, 2009.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission’s Internet comment form (<http://www.sec.gov/rules/proposed.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7–04–09 on the subject line; or
- Use the Federal eRulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–04–09. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission’s Internet Web site (<http://www.sec.gov/rules/proposed.shtml>). Comments are also available for public inspection and copying in the Commission’s Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Michael A. Macchiaroli, Associate Director, at (202) 551–5525; Thomas K. McGowan, Assistant Director, at (202) 551–5521; Randall W. Roy, Branch Chief, at (202) 551–5522; Joseph I. Levinson, Special Counsel, at (202) 551–5598; Carrie A. O’Brien, Special Counsel, at (202) 551–5640; Sheila D. Swartz, Special Counsel, at (202) 551–5545; Rose Russo Wells, Special Counsel, at (202) 551–5527; Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–6628.

SUPPLEMENTARY INFORMATION:

I. Background

On June 16, 2008, the Commission, in the first of three related actions, proposed a series of amendments to its existing rules governing the conduct of NRSROs under the Credit Rating Agency Reform Act of 2006 (“Rating Agency Act”).¹ The proposed

¹ Exchange Act Release No. 57967 (June 16, 2008), 73 FR 36212 (June 25, 2008) (“June 16, 2008 Proposing Release”). The Commission adopted the existing NRSRO rules in June 2007. See *Oversight of Credit Rating Agencies Registered as Nationally Recognized Statistical Rating Organizations*, Exchange Act Release No. 55857 (June 5, 2007), 72 FR 33564 (June 18, 2007) (“June 5, 2007 Adopting Release”). The second action taken by the Commission (also on June 16, 2008) was to propose a new rule that would require NRSROs to distinguish their ratings for structured finance products from other classes of credit ratings by publishing a report with the rating or using a different rating symbol. See *June 16, 2008 Proposing Release*. The third action taken by the Commission was to propose a series of amendments to rules under the Exchange Act, Securities Act of 1933 (“Securities Act”), and Investment Company

amendments were designed to address concerns about the integrity of the process by which NRSROs rate structured finance products, particularly mortgage related securities. Today, in a separate release, the Commission is adopting, with revisions, a majority of the proposed rule amendments.² In addition, in this release, the Commission is proposing additional amendments to paragraph (d) of Rule 17g–2 and re-proposing with substantial modifications amendments to paragraphs (a) and (b) of Rule 17g–5.

The proposed amendments to paragraph (d) of Rule 17g–2 would add public disclosure requirements to those that are being adopted today. Specifically, the amendments being adopted require an NRSRO to disclose, in eXtensible Business Reporting Language (“XBRL”) format and on a six-month delay, ratings action histories for a randomly selected 10% of the ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor being rated (“issuer-paid credit ratings”) for each rating class for which it has issued 500 or more issuer-paid credit ratings.³ In this release, the Commission is proposing to further amend paragraph (d) of Rule 17g–2 to require NRSROs to disclose ratings actions histories for all credit ratings issued on or after June 26, 2007 at the request of the obligor being rated or of the issuer, underwriter, or sponsor of the security being rated. The proposed amendment would allow an NRSRO to delay for up to 12 months publicly disclosing a rating action.

The amendments to paragraphs (a) and (b) of Rule 17g–5 would substantially modify the previous proposal. As originally proposed, the amendments would have prohibited an NRSRO from issuing or maintaining a credit rating for a structured finance product paid for by the product’s issuer, sponsor or underwriter unless the information provided to the NRSRO by the issuer, sponsor, or underwriter to determine the rating is disseminated to other persons. The intent behind the proposal was to provide the opportunity

Act of 1940 (“Investment Company Act”) that would end the use of NRSRO credit ratings in the rules. See *References to Ratings of Nationally Recognized Statistical Rating Organizations*, Exchange Act Release No. 58070 (July 1, 2008), 73 FR 40088 (July 11, 2008); *Securities Ratings*, Securities Act Release No. 8940 (July 1, 2008), 73 FR 40106 (July 11, 2008); *References to Ratings of Nationally Recognized Statistical Rating Organizations*, Investment Company Act Release No. 28327 (July 1, 2008), 73 FR 40124 (July 11, 2008).

² See *Amendments to Rules for Nationally Recognized Statistical Rating Organizations*, Exchange Act Release No. 59342 (February 2, 2009) (“Companion Adopting Release”).

³ See *Companion Adopting Release*.

for other persons such as credit rating agencies and academics to perform independent analysis on the securities or money market instruments at the same time the hired NRSRO determines its rating. The goal was to increase competition among NRSROs for rating structured finance products by providing new entrants access to the information necessary to determine credit ratings for these products.

The Commission received 38 comment letters that addressed the Rule 17g-5 proposal on June 16, 2008.⁴

⁴ Letter dated June 12, 2008 from G. Brooks Euler ("Euler Letter"); letter dated July 14, 2008 from Robert Dobilas, President, CEO, Realpoint LLC ("Realpoint Letter"); letter dated July 21, 2008 from Dottie Cunningham, Chief Executive Officer, Commercial Mortgage Securities Association ("CMSA Letter"); letter dated July 22, 2008 from Richard Metcalf, Director, Corporate Affairs Department, Laborers' International Union of North America ("LIUNA Letter"); letter dated July 23, 2008 from Kent Wideman, Group Managing Director, Policy & Rating Committee and Mary Keogh, Managing Director, Policy & Regulatory Affairs, DBRS ("DBRS Letter"); letter dated July 24, 2008 from Takefumi Emori, Managing Director, Japan Credit Rating Agency, Ltd. ("JCR Letter"); letter dated July 24, 2008 from Amy Borrus, Deputy Director, Council of Institutional Investors ("Council Letter"); letter dated July 24, 2008 from Joseph A. Hall and Michael Kaplan, Davis Polk, and Wardwell ("DPW Letter"); letter dated July 24, 2008 from Vickie A. Tillman, Executive Vice President, Standard & Poor's Ratings Services ("S&P Letter"); letter dated July 24, 2008 from Deborah A. Cunningham and Boyce I. Greer, Co-Chairs Company, Co-Chairs, SIFMA Credit Rating Agency Task Force ("Second SIFMA Letter"); letter dated July 25, 2008 from Sally Scutt, Managing Director, and Pierre de Lauzun, Chairman, Financial Markets Working Group, International Banking Federation ("IBFED Letter"); letter dated July 25, 2008 from Denise L. Nappier, Treasurer, State of Connecticut ("Nappier Letter"); letter dated July 25, 2008 from Suzanne C. Hutchinson, Mortgage Insurance Companies of America ("MICA Letter"); letter dated July 25, 2008 from Kieran P. Quinn, Chairman, Mortgage Bankers Association ("MBA Letter"); letter dated July 25, 2008 from Sean J. Egan, President, Egan-Jones Ratings Co. ("Egan-Jones Letter"); letter dated July 25, 2008 from Charles D. Brown, General Counsel, Fitch Ratings ("Fitch Letter"); letter dated July 25, 2008 from Bill Lockyer, State Treasurer, California ("Lockyer Letter"); letter dated July 25, 2008 from Jeremy Reifsnnyder and Richard Johns, Co-Chairs, American Securitization Forum Credit Rating Agency Task Force ("ASF Letter"); letter dated July 25, 2008 from Annemarie G. DiCola, Chief Executive Officer, Trepp, LLC ("Trepp Letter"); letter dated July 25, 2008 from Kurt N. Schacht, Executive Director and Linda L. Rittenhouse, Senior Policy Analyst, CFA Institute Centre for Financial Market Integrity ("CFA Institute Letter"); letter dated July 25, 2008 from Karrie McMillan, General Counsel, Investment Company Institute ("ICI Letter"); letter dated July 25, 2008 from Michael Decker, Co-Chief Executive Officer and Mike Nicholas, Co-Chief Executive Officer, Regional Bond Dealers Association ("RBDA Letter"); letter dated July 25, 2008 from Richard M. Whiting, Executive Director and General Counsel, Financial Services Roundtable ("Roundtable Letter"); letter dated July 25, 2008 from James H. Gellert, Chairman and CEO and Dr. Patrick J. Caragata, Founder and Executive Vice Chairman, Rapid Ratings International Inc. ("Rapid Ratings Letter"); letter dated July 25, 2008 from Gregory W. Smith, General Counsel, Colorado Public

While some commenters expressed support for it,⁵ the majority of commenters raised significant legal and practical issues with the proposal.⁶ The Commission is re-proposing the amendment, with substantial modifications, to solicit further comment.

II. Proposed Amendments to Rule 17g-2

A. Rule 17g-2

The Commission adopted Rule 17g-2, in part, pursuant to authority in Section 17(a)(1) of the Exchange Act requiring NRSROs to make and keep such records, and make and disseminate such reports, as the Commission prescribes by rule as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the Exchange Act.⁷ Paragraph (a) of Rule 17g-2 requires an NRSRO to make and retain certain records relating to its

Employees' Retirement Association ("Colorado PERA Letter"); letter dated July 25, 2008 from Cleary Gottlieb Steen & Hamilton LLP, ("CGSH Letter"); letter dated July 25, 2008 from Keith A. Styracula, Chairman, Structured Products Association ("SPA Letter"); letter dated July 25, 2008 from Yasuhiro Harada, Chairman and Co-CEO, Rating and Investment Information, Inc. ("R&I Letter"); letter dated July 28, 2008 from Michel Madelain, Chief Operating Officer, Moody's Investors Service ("Moody's Letter"); letter dated July 28, 2008 from Keith F. Higgins, Chair, Committee on Federal Regulation of Securities and Vicki O. Tucker, Chair, Committee on Securitization and Structured Finance, American Bar Association ("ABA Business Law Committees Letter"); letter dated July 29, 2008 from Glenn Reynolds, CEO and Peter Petas, President CreditSights, Inc. ("CreditSights Letter"); letter dated July 31, 2008 from Robert S. Khuzami, Managing Director and General Counsel, Deutsche Bank Americas ("DBA Letter"); letter dated August 5, 2008 from John Taylor, President and CEO, National Community Reinvestment Coalition ("NCRC Letter"); letter dated August 8, 2008 from Jeffrey A. Perlowitz, Managing Director and Co-Head of Global Securitized Markets, and Myongsu Kong, Director and Counsel, Citigroup Global Markets Inc. ("Citi Letter"); letter dated August 12, 2008 from John J. Niebuhr, Managing Director, Lehman Brothers, Inc. ("Lehman Letter"); letter dated August 17, 2008 from Olivier Raingeard, Ph.D. ("Raingeard Letter"); letter dated August 22, 2008 from Robert Dobilas, CEO and President, Realpoint LLC ("Second Realpoint Letter"); letter dated August 27, 2008 from Larry G. Mayewski, Executive Vice President & Chief Rating Officer, A.M. Best Company ("A.M. Best Letter"). These comments are available on the Commission's Internet Web site, located at <http://www.sec.gov/comments/s7-13-08/s71308.shtml>, and in the Commission's Public Reference Room in its Washington DC headquarters.

⁵ See, e.g., LIUNA Letter; Nappier Letter; ICI Letter; RBDA Letter; NCRC Letter.

⁶ See, e.g., ASF Letter; CFA Institute Letter; Roundtable Letter; ABA Business Law Committees Letter; Citi Letter; Lehman Letter; Moody's Letter; S&P Letter; DPW Letter; CGSH Letter; DBA Letter; A.M. Best Letter; Realpoint Letter; CMSA Letter; DBRS Letter; Second SIFMA Letter; MBA Letter; Fitch Letter; SPA Letter; R&I Letter; JCR Letter.

⁷ See Section 5 of the Rating Agency Act and 15 U.S.C. 78q(a)(1).

business. For example, paragraph (a)(2) requires an NRSRO to make a number of different records with respect to each current credit rating such as the identity of any analyst that participated in determining the credit rating.⁸ Paragraph (b) of Rule 17g-2 requires an NRSRO to retain certain other business records made in the normal course of business operations such as non-public information and work papers used to form the basis of credit rating.⁹ Paragraph (c) of Rule 17g-2 requires that the records identified in paragraphs (a) and (b) be retained for three years.¹⁰ Paragraph (d) of Rule 17g-2 prescribes the manner in which the records must be maintained by the NRSRO.¹¹ For example, it provides that the records must be maintained in a manner that makes the records easily accessible to the main office of the NRSRO.¹²

B. The Amendments to Rule 17g-2(a) and (d) Adopted Today

In the June 16, 2008 *Proposing Release*, the Commission proposed amendments to Rule 17g-2 which would create a new paragraph (a)(8) and amend paragraph (d). The new paragraph (a)(8) would require an NRSRO to make and retain a record of the ratings history of each outstanding credit rating it maintains showing all rating actions (initial rating, upgrades, downgrades, placements on watch for upgrade or downgrade, and withdrawals) and the date of such actions identified by the name of the security or obligor rated and, if applicable, the CUSIP for the rated security or the Central Index Key (CIK) number for the rated obligor. This full record of credit rating histories would be maintained by the NRSRO as part of its internal records that are available to Commission staff. In addition, the proposed amendments to paragraph (d) of Rule 17g-2 would require an NRSRO to make that record publicly available on its corporate Web site in XBRL format six months after the date of the current rating action.¹³ Finally, the proposed amendments also would amend the instructions to Exhibit 1 to Form NRSRO to require the disclosure of the Web address where the XBRL Interactive Data File could be accessed in order to inform persons who use credit ratings where the ratings histories can be obtained.¹⁴

⁸ 17 CFR 240.17g-2(a)(2)(i).

⁹ 17 CFR 240.17g-2(b).

¹⁰ 17 CFR 240.17g-2(c).

¹¹ 17 CFR 240.17g-2(d).

¹² *Id.*

¹³ See June 16, 2008 *Proposing Release*, 73 FR at 36228-36230.

¹⁴ See *id.*

The Commission noted in the *June 16, 2008 Proposing Release* that the purpose of this disclosure would be to provide users of credit ratings, investors, and other market participants and observers the raw data with which to compare how the NRSROs initially rated an obligor or security and, subsequently, adjusted those ratings, including the timing of the adjustments.¹⁵ In order to expedite the establishment of a pool of data sufficient to provide a useful basis of comparison, the proposal would have applied this requirement to all outstanding credit ratings of securities and obligors as well as to all future credit ratings.

As discussed in more detail in the Companion Adopting Release,¹⁶ several NRSROs offered comments to the proposed amendments to paragraph (d) of Rule 17g-2, raising two significant concerns. First, NRSROs that issue unsolicited ratings accessible only to subscribers (“subscriber-paid credit ratings”) and others stated that publicly disclosing all their ratings histories, even with a time delay of six months, would adversely impact their business and, therefore, could prove to be anti-competitive.¹⁷ Second, NRSROs that issue ratings paid for by the obligor being rated or the issuer, underwriter or sponsor of the security being rated (“issuer-paid credit ratings”) stated that a requirement to make all ratings actions available free of charge in a machine readable format would cause them to lose revenues they derive from selling downloadable packages of their credit ratings.¹⁸ These commenters also questioned whether the requirement would be permitted under the U.S. Constitution, arguing that it could be considered a taking of private property without just compensation.¹⁹

In the Companion Adopting Release, the Commission is adopting new paragraph (a)(8) as proposed but significantly modifying the proposed amendments to paragraph (d).²⁰ Specifically, the amendments to paragraph (d) as adopted will require an NRSRO to make publicly available, in an XBRL format and on a six-month delay, ratings action histories for 10% of the outstanding issuer-paid credit ratings required to be retained pursuant to paragraph (a)(8) for each class of

credit rating for which it is registered and for which it has issued 500 or more issuer-paid credit ratings. Consequently, the public disclosure requirement only will apply to issuer-paid credit ratings.

As explained in the Companion Adopting Release, the Commission believes it is appropriate at this time to limit the rule’s application to issuer-paid credit ratings. NRSROs that sell subscriber-paid credit ratings have suggested that requiring the histories of all these ratings to be publicly disclosed could seriously impact their businesses. This could reduce competition by causing NRSROs to withdraw registrations or discourage credit rating agencies from seeking registration. Accordingly, the Commission wants to gather more data on this issue before deciding on whether the rule should apply to subscriber-paid credit ratings. At the same time, the Commission does not want to delay adopting a final rule, particularly if it could begin providing meaningful information to users of credit ratings. In this regard, the Commission notes that issuer-paid credit ratings account for over 98% of the current credit ratings issued by NRSROs according to information furnished by NRSROs in Form NRSRO. Moreover, seven of the ten registered NRSROs currently maintain 500 or more credit ratings in at least one class of credit ratings for which they are registered. Consequently, applying this rule to issuer-paid credit ratings should result in a substantial amount of new information for users of credit ratings. It also will allow market observers to begin analyzing the information and developing performance metrics based on it.

The Commission is mindful of the potential impact on NRSROs that determine issuer-paid credit ratings and, therefore, the amendments being adopted contain modifications discussed above. The Commission believes that by limiting the ratings actions histories that need to be disclosed to a random selection of 10% of outstanding credit ratings, applying the requirement to issuer-paid credit ratings only, and allowing for a six-month delay before a ratings action is required to be disclosed, the amendment as adopted addresses the concerns among commenters that the rule would cause them to lose revenue. With respect to NRSROs that earn revenues from issuer-paid credit ratings but sell access to packages of the ratings as well, the Commission believes that customers that are willing to pay for full and immediate access to downloadable information for all of an NRSRO’s ratings actions are unlikely to

reconsider their purchase of that product due to the ability to access ratings histories for 10% of the NRSRO’s outstanding issuer-paid credit ratings selected on a random basis and disclosed with a six-month time lag. As indicated below, the Commission is seeking detailed comment on how a ratings history public disclosure requirement can be tailored to address concerns that disclosing this information would adversely impact the businesses of NRSROs that primarily determine subscriber-paid credit ratings.

In this release, the Commission is seeking comment on whether the requirement to publicly disclose ratings action histories should be applied to subscriber-paid credit ratings. As indicated in questions below, the Commission is soliciting detailed information about the potential impact of applying the rule to subscriber-paid credit ratings. The responses to those questions will inform the Commission’s deliberations as to whether this rule ultimately should be expanded to cover subscriber-paid credit ratings.

C. The Proposed Amendments

As discussed above, the Commission believes that the amendments to paragraph (d) of Rule 17g-2 being adopted today will provide users of credit ratings with information to begin assessing the performance of NRSROs subject to the rule. At the same time, the Commission continues to believe that its original proposal to require public disclosure of ratings action histories for all current credit ratings could provide substantial benefits to users of credit ratings. The Commission, therefore, is proposing to amend paragraph (d) of Rule 17g-2. Specifically, the Commission would add subparagraphs (1), (2) and (3) to paragraph (d). Paragraph (d)(1) would contain the record retention requirements of paragraph (d) as it was originally adopted by the Commission on June 5, 2007.²¹ Paragraph (d)(2) would contain the ratings history disclosure requirements being adopted by the

²¹ See *June 5, 2007 Adopting Release*. As originally adopted, paragraph (d) provided that “[a]n original, or a true and complete copy of the original, of each record required to be retained pursuant to paragraphs (a) and (b) of [Rule 17g-2] must be maintained in a manner that, for the applicable retention period specified in paragraph (c) of [Rule 17g-2], makes the original record or copy easily accessible to the principal office of the [NRSRO] and to any other office that conducted activities causing the record to be made or received.” See *June 5, 2007 Adopting Release*, 72 FR at 33622.

¹⁵ See *id.*

¹⁶ See *Companion Adopting Release*.

¹⁷ See ABA Business Law Committee Letter; Realpoint Letter; Pollock Letter; Egan-Jones Letter; Multiple-Markets Letter; Rapid Ratings Letter; AFP Letter; R&I Letter; Moody’s Letter.

¹⁸ See S&P Letter; Moody’s Letter.

¹⁹ See S&P Letter; Egan-Jones Letter; Fitch Letter; R&I Letter;

²⁰ See *Companion Adopting Release*.

Commission in the Companion Adopting Release.²²

Paragraph (d)(3) would contain the disclosure requirements the Commission is proposing in this release. These proposed amendments would require that NRSROs disclose ratings history information for 100% of their current issuer-paid credit ratings in an XBRL format. Further, they only would apply to issuer-paid credit ratings determined on or after June 26, 2007 (the effective date of the Rating Agency Act). Therefore, under new paragraph (d)(3), an NRSRO would not need to disclose ratings action histories for issuer-paid credit ratings that were determined prior to that date (though NRSROs would continue to be required to publicly disclose ratings action histories provided for the randomly selected 10% of outstanding issuer-paid credit ratings in each registration class where there are 500 or more outstanding credit ratings). The prospective nature of the proposed rule is designed to ease the burden of compliance. In addition, to mitigate concerns regarding the loss of revenues NRSROs derive from selling downloads and data feeds to their current outstanding issuer-paid credit ratings, a credit rating action would not need to be disclosed until 12 months after the action is taken.

The purpose of this proposed amendment is to provide users of credit ratings, investors, and other market participants and observers with the maximum amount of raw data with which to compare how NRSROs subject to the rule initially rated an obligor or security and, subsequently, adjusted those ratings, including the timing of the adjustments. The Commission believes that requiring the disclosure of

the ratings action history of each issuer-paid credit rating would create the opportunity for market participants to use the information to develop performance measurement statistics that would supplement those required to be published by the NRSROs themselves in Exhibit 1 to Form NRSRO. The intent is to tap into the expertise and flexibility of credit market observers and participants to create better and more useful means to compare issuer-paid credit ratings. In addition, the Commission believes that the proposed amendment would foster greater accountability for NRSROs that determine issuer-paid credit ratings as well as competition among such NRSROs by making it easier for persons to analyze the actual performance of credit ratings in terms of accuracy in assessing creditworthiness. This could make NRSROs subject to the rule more accountable for their ratings by enhancing the transparency of the results of their rating processes for particular securities and obligors and classes of securities and obligors and encourage competition within the industry by making it easier for users of credit ratings to judge the output of such NRSROs.

The Commission recognizes that releasing information on all ratings actions could cause financial loss for some firms. For that reason, the proposed amendment would provide that a ratings action need not be made publicly available until twelve months after the date of the rating action.

The Commission is proposing these amendments, in part, under authority to require NRSROs to make and keep for prescribed periods such records as the Commission prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.²³ The Commission preliminarily believes the proposed new public disclosure requirements are necessary and appropriate in the public interest and for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act. Specifically, the proposed amendments would allow market participants to compare credit rating histories for issuer-paid credit ratings on an obligor-by-obligor or instrument-by-instrument basis. Users of credit ratings would be able to compare side-by-side how two or more NRSROs subject to the rule initially rated a particular obligor or security, when the NRSROs took actions to adjust the rating upward or

downward, and the degree of those adjustments. Furthermore, users of credit ratings, academics and information vendors could use the raw data to perform analyses comparing how the NRSROs subject to the rule differ in initially determining issuer-paid credit ratings and in their monitoring of these ratings. This could identify an NRSRO that is an outlier because it determines particularly high or low issuer-paid credit ratings or is slow or quick to re-adjust outstanding ratings. It also could help identify which NRSROs subject to the rule tend to be more accurate in their issuer-paid credit ratings. This information also may identify NRSROs subject to the rule whose objectivity may be impaired because of the conflicts of interest surrounding issuer-paid credit ratings.

The Commission generally requests comment on all aspects of this proposed amendment. In addition, the Commission requests comment on the following questions related to the proposal.

- Is the proposed application of the rule to prospective credit ratings, *i.e.*, credit ratings that are initially determined on or after June 26, 2007, appropriate and do commenters believe it would provide meaningful information if the rule was limited to credit ratings made on or after that date? Should the Commission adopt a final rule that uses another date such as the date the Rating Agency Act was enacted? If June 26, 2007 is the appropriate date, how long would it take for NRSROs to build up ratings history information to permit meaningful comparisons between NRSROs? What are the advantages and disadvantages of applying a disclosure rule on a prospective basis?

- Should the Commission adopt a final rule that applies retrospectively to all outstanding credit ratings? Commenters should explain the benefits of retrospective application and how they would justify the costs.

- Is the twelve-month delay before publicly disclosing a rating action sufficiently long to address concerns regarding the revenues NRSROs derive from selling downloads of, and data feeds to, their current issuer-paid credit ratings? Should the delay be for a longer period such as 18 months, 24 months, 30 months or 36 months or longer? Alternatively, should the Commission adopt a final rule that has a shorter time lag such as three months or six months or no time lag in place?

- In addition to revenues derived from selling data feeds to current issuer-paid credit ratings, do NRSROs derive revenues from selling access to their

²² See *Companion Adopting Release*. These amendments provide: “[An NRSRO] must make and keep publicly available on its corporate Internet Web site in an XBRL (eXtensible Business Reporting Language) format the ratings action information for ten percent of the outstanding credit ratings required to be retained pursuant to paragraph (a)(8) of [Rule 17g-2] and which were paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated, selected on a random basis, for each class of credit rating for which it is registered and for which it has issued 500 or more outstanding credit ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated. Any ratings action required to be disclosed pursuant to this paragraph (d) need not be made public less than six months from the date such ratings action is taken. If a credit rating made public pursuant to this paragraph is withdrawn or the instrument rated matures, the [NRSRO] must randomly select a new outstanding credit rating from that class of credit ratings in order to maintain the 10 percent disclosure threshold. In making the information available on its corporate Internet Web site, the [NRSRO] shall use the List of XBRL Tags for NRSROs as specified on the Commission’s Internet Web site.”

²³ See Section 17(a)(1) of the Exchange Act (15 U.S.C. 78q(a)(1)).

ratings histories? If so, how material are these revenues when compared to revenues earned by NRSROs from selling downloads of, and data feeds to, current issuer-paid credit ratings and revenues earned from fees paid by obligors, issuers, underwriters and sponsors to determine and monitor credit ratings? Commenters providing information should quantify and breakout the amount of revenues earned by NRSROs issuer-paid credit ratings in dollars and/or percentages for each of the following categories: (1) Revenues from fees for determining and monitoring issuer-paid credit ratings; (2) revenues from selling access (by download, data feed or other method) to all current issuer-paid credit ratings; and (3) revenues from selling information about ratings actions histories of issuer-paid credit ratings.

- Should the proposed amendments apply equally to issuer-paid and subscriber-paid credit ratings? For example, in what ways and to what extent might the objectivity of NRSROs in determining subscriber-paid credit ratings be impaired because of conflicts of interest? What would be the benefits for applying the rule's requirements to subscriber-paid credit ratings? What would be the costs of applying the rule's requirements to subscriber-paid credit ratings?

- Are the goals of the rule—greater accountability of NRSROs and promotion of competition—achievable if subscriber-paid credit ratings are not subject to the rule's requirements? How would these goals be enhanced if subscriber-paid credit ratings were subject to the rule's requirements?

- Do NRSROs derive revenues from selling information about ratings action histories for subscriber-paid credit ratings? If so, are those revenues material as compared to revenues they receive from selling subscriptions to current subscriber-paid credit ratings? Commenters providing information should quantify and breakout the amount of revenues earned by NRSROs in dollars and/or percentages for each of the following: (1) Selling subscriptions to all current subscriber-paid credit ratings; and (2) selling information about ratings actions histories of subscriber-paid credit ratings.

- Similarly, do subscribers value ratings action histories for subscriber-paid credit ratings? Do subscribers value the in-depth analysis that is delivered with a rating action? How material is the value that subscribers place on the historical rating action itself as compared to the value they place on the in-depth analysis or materials that are delivered along with the rating action?

Do commenters believe that the business of an NRSRO that determines subscriber-paid credit ratings would be materially compromised if the ratings action histories for the ratings were required to be publicly disclosed (but not the in-depth analysis or other materials)?

- Do persons who subscribe to NRSROs' subscriber-paid credit ratings value the current ratings only? Alternatively, do they subscribe to the ratings because subscriber-paid credit ratings identify trends sooner than issuer-paid credit ratings as some suggest? For example, do commenters believe the fact that the determination and monitoring of subscriber-paid credit ratings are funded by subscribers mean the NRSROs act more quickly to adjust the credit ratings? If so, would disclosing a rating action one year after it occurred reveal information that a subscriber otherwise would pay for in order to make a credit assessment or has the rating action become sufficiently stale that its value, if any, is limited to it being an item of historical information. If a credit rating action with respect to a subscriber-paid credit rating has intrinsic value beyond providing historical perspective, would this intrinsic value still exist two years after the rating action? If so, what length of delay would be sufficient to address NRSROs' concerns regarding the loss of revenues from subscribers for access to their subscriber-paid credit ratings, while also achieving the Commission's goals, among others, of increasing accountability and promoting competition among NRSROs? What effect would subjecting subscriber-paid credit ratings to the rule's requirements have on competition? Would it compromise the viability of NRSROs that determine subscriber-paid credit ratings? For example, to what extent, if any, would subjecting subscriber-paid credit ratings to the rule's requirements undercut competition by erecting barriers to entry or otherwise compromise the viability of NRSROs that determine subscriber-paid credit ratings?

- If there is a length of time greater than one year that would better address concerns regarding the revenues NRSROs derive from subscriber-paid credit ratings (*e.g.*, 18 months, 24 months, 30 months, 36 months or longer), should that time lag only apply to subscriber-paid credit ratings or should it apply to both issuer-paid and subscriber-paid credit ratings?

- As an alternative to adopting a final rule that applies to subscriber-paid credit ratings (along with issuer-paid credit ratings), should the Commission

adopt a final rule amending paragraph (d) of Rule 17g-2 to require that an NRSRO publicly disclose credit rating actions for a random sample of 10% of the current subscriber-paid credit ratings for each class of credit rating for which they are registered and have issued 500 or more ratings? If the Commission were to adopt such an amendment, would the time lag of six months in the rule being adopted today be sufficient to address concerns regarding the revenues NRSROs earn from selling subscriptions to their subscriber-paid credit ratings. If not, should the Commission adopt an amendment to paragraph (d) of Rule 17g-2 that extends the time lag to a longer period of time for subscriber-paid credit ratings (*e.g.*, 12 months, 18 months, 24 months, 30 months, or 36 months or longer)? Are there other ways that the Commission could adjust the requirements of the proposed rule to apply a public disclosure requirement to ratings action histories of subscriber-paid credit ratings? Commenters should provide reasons and/or data for why a certain time lag is appropriate.

- Similarly, if commenters believe that some form of public disclosure requirement should be applied to the histories of both issuer-paid and subscriber-paid credit ratings, what percentage of the histories should each type of credit rating be required to be disclosed and what time lag should be granted? For example, should both types of credit ratings be subject to the requirement that ratings action histories be publicly disclosed for a random sample of 10% of the outstanding credit ratings with a six month time lag?

Alternatively, should ratings action histories of issuer-paid credit ratings be disclosed at a higher percentage with a longer time lag, *e.g.*, 20%, 50% or 100% of the outstanding credit ratings and a 12, 16, or 24 month time lag? Should ratings action histories for subscriber-paid credit ratings be disclosed at a different percentage than issuer-paid credit ratings, *e.g.*, 10%, 20%, or 50%? Commenters should provide reasons and/or data in their responses.

- What diligence do potential subscribers to subscriber-paid credit ratings perform in deciding whether to subscribe to such ratings of a particular NRSRO? To what extent do NRSROs make ratings histories of subscriber-paid credit ratings available to potential subscribers? To what extent and in what ways are NRSROs that determine subscriber-paid credit ratings subject to competitive pressures? To what extent does the interest in developing a reputation for accuracy discipline the

accuracy of an NRSRO that determines subscriber-paid credit ratings?

- Do NRSROs issue unsolicited credit ratings that are not paid for by selling subscriptions to access the ratings? For example, do NRSROs that primarily determine issuer-paid credit ratings for most, but not all, securities issued by companies in a particular industry group determine unsolicited ratings for securities issued by the remaining companies to round out coverage of the industry? Do NRSROs issue such unsolicited ratings to establish a track record for rating particular types of obligors or securities?

- If NRSROs issue unsolicited (and not subscriber-paid for) credit ratings, to what extent are these ratings issued relative issuer-paid or subscriber-paid credit ratings? For example, what percentage of an NRSRO's outstanding credit ratings are comprised of unsolicited (and not subscriber paid for) credit ratings?

- Do NRSROs that issue unsolicited (and not subscriber-paid for) credit ratings make the ratings publicly available for free?

- What types of conflicts arise from determining unsolicited (and not subscriber-paid for) credit ratings? For example, is there the potential that an NRSRO would issue a lower than warranted credit rating in order to pressure an obligor or issuer to pay the NRSRO for the rating? Would the public disclosure of ratings histories for unsolicited (but not subscriber-paid for) credit ratings help to mitigate this conflict?

- Should the Commission adopt a final rule that requires the disclosure of the ratings histories of unsolicited (and not subscriber-paid for) credit ratings along with the issuer-paid for credit ratings? What would be the benefits and costs of requiring the disclosure of such credit ratings?

- Should the Commission adopt a final rule that requires unsolicited (and not subscriber-paid for) credit ratings to be included for the purposes of determining whether an NRSRO has issued 500 or more credit ratings in a particular class of credit rating under Rule 17g-2(d) adopted today? What would be the benefits and costs of such a requirement?

- Should the Commission adopt a final rule that requires unsolicited (and not subscriber paid for) credit ratings to be included in the publicly disclosed ratings histories for a random sample of 10% of the credit ratings in a particular class of credit ratings under Rule 17g-2(d) adopted today? What would be the benefits and costs of such a requirement?

- Should the Commission adopt a final rule that requires a sample of unsolicited (and not subscriber paid for) credit ratings to be separately disclosed from issuer-paid credit ratings? If so, what should be the number of credit ratings in a particular class of credit ratings triggering that public disclosure? What percentage of unsolicited rating should be disclosed? What, if any, time delay should apply to the disclosure of a random sample of unsolicited ratings?

III. Re-Proposed Amendments to Rule 17g-5

A. Rule 17g-5

Section 15E(h)(1) of the Exchange Act requires an NRSRO to establish, maintain, and enforce policies and procedures reasonably designed, taking into consideration the nature of its business, to address and manage conflicts of interest.²⁴ Section 15E(h)(2) of the Exchange Act requires the Commission to adopt rules to prohibit or require the management and disclosure of conflicts of interest relating to the issuance of credit ratings.²⁵ The statute also identifies certain types of conflicts relating to the issuance of credit ratings that the Commission may include in its rules.²⁶ Furthermore, it contains a catchall provision for any other potential conflict of interest that the Commission deems is necessary or appropriate in the public interest or for the protection of investors to include in its rules.²⁷ The Commission implemented these statutory provisions through the adoption of Rule 17g-5, which prohibits the conflicts identified in the statute and certain additional conflicts either outright or if the NRSRO has not disclosed them and established policies and procedures to manage them.²⁸

Paragraph (a) of Rule 17g-5²⁹ prohibits a person within an NRSRO from having a conflict of interest relating to the issuance of a credit rating that is identified in paragraph (b) of the rule *unless* the NRSRO has disclosed the type of conflict of interest in its application for registrations with the Commission in compliance with Rule 17g-1 (*i.e.*, on Form NRSRO) and has implemented policies and procedures to address and manage the type of conflict of interest in accordance with Section 15E(h)(1) of the Exchange Act.³⁰ Paragraph (b) of Rule 17g-5 currently

identifies nine types of conflicts that are subject to the provisions of paragraph (a):

- Being paid by issuers or underwriters to determine credit ratings with respect to securities or money market instruments they issue or underwrite;³¹

- Being paid by obligors to determine credit ratings with respect to the obligors;³²

- Being paid for services in addition to determining credit ratings by issuers, underwriters, or obligors that have paid the NRSRO to determine a credit rating;³³

- Being paid by persons for subscriptions to receive or access the credit ratings of the NRSRO and/or for other services offered by the NRSRO where such persons may use the credit ratings of the NRSRO to comply with, and obtain benefits or relief under, statutes and regulations using the term "NRSRO;"³⁴

- Being paid by persons for subscriptions to receive or access the credit ratings of the NRSRO and/or for other services offered by the NRSRO where such persons also may own investments or have entered into transactions that could be favorably or adversely impacted by a credit rating issued by the NRSRO;³⁵

- Allowing persons within the NRSRO to directly own securities or money market instruments of, or having other direct ownership interests in, issuers or obligors subject to a credit rating determined by the NRSRO;³⁶

- Allowing persons within the NRSRO to have a business relationship that is more than an arms length ordinary course of business relationship with issuers or obligors subject to a credit rating determined by the NRSRO;³⁷

- Having a person associated with the NRSRO that is a broker or dealer engaged in the business of underwriting securities or money market instruments;³⁸ and

- Any other type of conflict of interest relating to the issuance of credit ratings by the NRSRO that is material to the NRSRO and that is identified by the NRSRO in Exhibit 6 to Form NRSRO in accordance with section 15E(a)(1)(B)(vi) of the Act (15 U.S.C. 78o-7(a)(1)(B)(vi)) and Rule 17g-1.³⁹

³¹ 17 CFR 240.17g-5(b)(1).

³² 17 CFR 240.17g-5(b)(2).

³³ 17 CFR 240.17g-5(b)(3).

³⁴ 17 CFR 240.17g-5(b)(4).

³⁵ 17 CFR 240.17g-5(b)(5).

³⁶ 17 CFR 240.17g-5(b)(6).

³⁷ 17 CFR 240.17g-5(b)(7).

³⁸ 17 CFR 240.17g-5(b)(8).

³⁹ 17 CFR 240.17g-5(b)(9).

²⁴ 15 U.S.C. 78o-7(h)(1).

²⁵ 15 U.S.C. 78o-7(h)(2).

²⁶ See 15 U.S.C. 78o-7(h)(2)(A)-(D).

²⁷ See 15 U.S.C. 78o-7(h)(2)(E).

²⁸ See 17 CFR 240.17g-5.

²⁹ 17 CFR 240.17g-5(a).

³⁰ 15 U.S.C. 78o-7(h)(1).

Paragraph (c) of Rule 17g-5 specifically prohibits outright four types of conflicts of interest.⁴⁰ Consequently, an NRSRO would violate the rule regardless of whether it had disclosed them and established procedures reasonably designed to address them. The four prohibited conflicts are:

- The NRSRO issues or maintains a credit rating solicited by a person that, in the most recently ended fiscal year, provided the NRSRO with net revenue (as reported under Rule 17g-3) equaling or exceeding 10% of the total net revenue of the NRSRO for the fiscal year;⁴¹
- The NRSRO issues or maintains a credit rating with respect to a person (excluding a sovereign nation or an agency of a sovereign nation) where the NRSRO, a credit analyst that participated in determining the credit rating, or a person responsible for approving the credit rating, directly owns securities of, or has any other direct ownership interest in, the person that is subject to the credit rating;⁴²
- The NRSRO issues or maintains a credit rating with respect to a person associated with the NRSRO;⁴³ or
- The NRSRO issues or maintains a credit rating where a credit analyst who participated in determining the credit rating, or a person responsible for approving the credit rating is an officer or director of the person that is subject to the credit rating.

B. The Amendments to Paragraphs (a) and (b) of Rule 17g-5 Proposed in the June 16, 2008 Release

In the *June 16, 2008 Proposing Release*, the Commission proposed to amend paragraph (b) of Rule 17g-5⁴⁴ to add to the list of conflicts that must be disclosed and managed the additional conflict of repeatedly being paid by certain issuers, sponsors, or underwriters (hereinafter collectively “arrangers”) to rate structured finance products.⁴⁵ This conflict is a subset of the broader conflict of interest already identified in paragraph (b)(1) of Rule 17g-5; namely, “being paid by issuers and underwriters to determine credit ratings with respect to securities or money market instruments they issue or

underwrite.”⁴⁶ Specifically, the proposed amendment would have redesignated paragraph (b)(9) of Rule 17g-5 as paragraph (b)(10) and in new paragraph (b)(9) identified the following conflict: Issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument.⁴⁷

Furthermore, the Commission proposed amendments to paragraph (a) of Rule 17g-5 that would have established additional conditions—beyond disclosing the conflict and establishing procedures to manage it—that would need to be met for an NRSRO to issue or maintain a credit rating subject to this conflict.⁴⁸ Specifically, the Commission proposed a new paragraph (a)(3) that would have required, as a condition to the NRSRO rating a structured finance product, that the information provided to the NRSRO and used by the NRSRO in determining an initial credit rating and, thereafter, performing surveillance on the credit rating be disclosed through a means designed to provide reasonably broad dissemination of the information.⁴⁹ The proposed amendments did not specify which entity—the NRSRO or the arranger—would need to disclose the information.

The proposed amendments would have required further that, for offerings not registered under the Securities Act, the information would need to be disclosed only to investors and credit rating agencies on the day the offering price is set and, subsequently, publicly disclosed on the first business day after the offering closes. These additional conditions in new paragraph (a)(3) only would have applied to the conflict identified in proposed new paragraph (b)(9). The conflicts currently identified in paragraph (b) of Rule 17g-5 would have continued to be subject only to the

conditions set forth in paragraphs (a)(1) and (a)(2).

The Commission also provided in the *June 16, 2008 Proposing Release* three proposed interpretations of how the information could be disclosed under the requirements of the proposed rule in a manner consistent with the provisions of the Securities Act.⁵⁰ These interpretations addressed disclosure under the proposed amendment in the context of public, private, and offshore securities offerings.⁵¹

C. The Comments on the June 16, 2008 Proposed Amendments

The Commission received 38 comment letters in response to the *June 16, 2008 Proposing Release* that addressed these proposed amendments to Rule 17g-5. The majority of commenters opposed the amendment or raised substantial practical and legal questions about how it would operate when it became effective.⁵² Many of these commenters questioned whether the rule would achieve its goal of increasing competition.⁵³ For example, some stated that it would not provide credit rating agencies the opportunity to determine unsolicited ratings because they would receive the information too late to issue a timely rating or that they would have a lesser understanding of the transaction and would, therefore, be unable to produce an accurate rating.⁵⁴ One commenter stated that the surveillance information called for under the proposed amendment is already available to the public for a fee through third party vendors.⁵⁵

Many commenters were concerned with the disclosure of proprietary information.⁵⁶ These commenters were concerned that if issuers and underwriters were forced to disclose proprietary information, they would instead choose not to share this information with the NRSROs, which could affect the accuracy of the rating.⁵⁷ Commenters also were concerned that disclosing the information could create liability issues under Sections 11 and 12 of the Securities Act, particularly if the disclosing party is not the issuer or

⁴⁰ 17 CFR 240.17g-5(c)(1)-(4).

⁴¹ 17 CFR 240.17g-5(c)(1).

⁴² 17 CFR 240.17g-5(c)(2). In the *June 5, 2007 Adopting Release*, the Commission stated that the prohibition applied to “direct” ownership of securities and, therefore, would not apply to indirect ownership interests, for example, through mutual funds or blind trusts. *See, June 5, 2007 Adopting Release*, 72 FR at 33598.

⁴³ 17 CFR 240.17g-5(c)(3).

⁴⁴ 17 CFR 240.17g-5.

⁴⁵ *June 16, 2008 Proposing Release*, 73 FR at 36219-36226, 36251.

⁴⁶ 17 CFR 240.17g-5(b)(1). As the Commission noted when adopting Rule 17g-5, the concern with conflict identified in paragraph (b)(1) “is that an NRSRO may be influenced to issue a more favorable credit rating than warranted in order to obtain or retain the business of the issuer or underwriter.” *June 5, 2007 Adopting Release*, 72 FR at 33595.

⁴⁷ *June 16, 2008 Proposing Release*, 73 FR at 36251.

⁴⁸ *June 16, 2008 Proposing Release*, 73 FR at 36219-36226, 36251.

⁴⁹ *See id.* This proposed requirement would have been in addition to the current requirements of paragraph (a) that an NRSRO disclose the type of conflict of interest in Exhibit 6 to Form NRSRO; and establish, maintain and enforce written policies and procedures to address and manage the conflict of interest. 17 CFR 240.17g-5(a)(1) and (2).

⁵⁰ *See June 16, 2008 Proposing Release*, 73 FR at 36222-36226.

⁵¹ *Id.*

⁵² *See id.*

⁵³ *See* A.M. Best Letter; Raingeard Letter; Citi Letter; DBA Letter; ABA Business Law Committees Letter; SPA Letter; CHSG Letter.

⁵⁴ *See, e.g.*, CGSH Letter; Citi Letter; DBA Letter; Egan-Jones Letter; LIUNA Letter; Realpoint Letter.

⁵⁵ Trepp Letter.

⁵⁶ *See* CMSA Letter; IBFED Letter; MICA Letter; MBA Letter; ASF Letter; Roundtable Letter; SPA Letter; Citi Letter; Lehman Letter.

⁵⁷ *See, e.g.* Citi Letter; DBA Letter; Lehman Letter; Moody's Letter; ASF Letter.

originator or if the information disclosed was not prepared for the purpose of being used as offering materials.⁵⁸ At least one commenter was concerned that if the information was presented to investors outside the context of a disclosure document, there would be significant risk that investors might misinterpret the data.⁵⁹ Other commenters raised concerns that disclosing the information could violate foreign law or, at the very least, put U.S. credit rating agencies at a disadvantage to compete in foreign markets where other credit rating agencies are not subject to the same disclosure requirements.⁶⁰ One NRSRO stated that if it were forced to disclose information on offshore offerings, it would have to withdraw from registration as an NRSRO in certain classes.⁶¹ Some commenters suggested that instead of requiring the information to be disclosed to a range of market participants, it should only be disclosed to other NRSROs that seek to undertake an unsolicited rating.⁶² The commenters stated that NRSROs would be subject to the same confidentiality agreements that arrangers make with NRSROs they hire to rate structured finance products.⁶³

The Commission specifically asked for comments on which party should be required to disclose the information given to an NRSRO. Some commenters believed that the NRSRO was in the best position to disclose this information.⁶⁴ However, many of the NRSROs stated that requiring them to disclose the information would put them at risk and they requested that another party be required to make the disclosure or that NRSROs be given a safe harbor if they were required to disclose the information.⁶⁵ Commenters also were split about the type of information that should be disclosed. Some commenters believed that all the information an NRSRO receives from an arranger should be required to be disclosed,⁶⁶ while other commenters wanted to

prevent a “data dump” and believed only the information the NRSRO uses to determine a rating should be disclosed.⁶⁷ At least one commenter wanted the disclosure to include the methodologies and underlying assumptions used by the NRSRO.⁶⁸

Comments supporting the proposal generally argued that the Commission should go farther to address the conflict by, for example, considering whether it should be prohibited outright,⁶⁹ extending its application to other classes of ratings such as those for municipal securities,⁷⁰ or requiring the dissemination of more information such as each loan pool submitted to the NRSRO regardless of whether it is the ultimate pool used in determining the final rating.⁷¹

Several commenters offered technical suggestions as to how the rule should be modified. For example, two commenters requested that the timing of the disclosure of information used to determine a credit rating be made prior to the pricing date—one suggested six weeks and the other two weeks—to provide sufficient time to determine an unsolicited rating.⁷² Another commenter suggested that the definition of “security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage backed securities transaction” was overly broad and should be clarified.⁷³

D. The Re-Proposed Amendments

After reviewing these comments, the Commission has made significant changes to the proposed amendments and is re-proposing them, as modified, for further comment. As discussed in more detail below, under the re-proposed amendments: (1) NRSROs that are hired by arrangers to perform credit ratings for structured finance products would need to disclose to other NRSROs (and only other NRSROs) the deals for which they were in the process of determining such credit ratings; (2) the arrangers would need to provide the NRSROs they hire to rate structured finance products with a representation that they will provide information given to the hired NRSRO to other NRSROs (and only other NRSROs); and (3) NRSROs seeking to access information maintained by the NRSROs and the arrangers would need to furnish the Commission an annual certification that

they are accessing the information solely to determine credit ratings and will determine a minimum number of credit ratings using the information.

More specifically, under the re-proposed amendments, NRSROs that are paid by arrangers to determine credit ratings for structured finance products would be required to maintain a password protected Internet Web site that lists each deal they have been hired to rate. They also would be required to obtain representations from the arranger hiring the NRSRO to determine the rating that the arranger will post all information provided to the NRSRO to determine the rating and, thereafter, to monitor the rating on a password protected Internet Web site. NRSROs not hired to determine and monitor the ratings would be able to access the NRSRO Internet Web sites to learn of new deals being rated and then access the arranger Internet Web sites to obtain the information being provided by the arranger to the hired NRSRO during the entire initial rating process and, thereafter, for the purpose of surveillance. However, the ability of NRSROs to access these NRSRO and arranger Internet Web sites would be limited to NRSROs that certify to the Commission on an annual basis, among other things, that they are accessing the information solely for the purpose of determining or monitoring credit ratings, that they will keep the information confidential and treat it as material non-public information, and that they will determine credit ratings for at least 10% of the deals for which they obtain information. They also would be required to disclose in the certification the number of deals for which they obtained information through accessing the Internet Web sites and the number of ratings they issued using that information during the year covered by their most recent certification.

The Commission is re-proposing these amendments to Rule 17g-5, in part, pursuant to the authority in Section 15E(h)(2) of the Exchange Act.⁷⁴ The provisions in this section of the statute provide the Commission with authority to prohibit, or require the management and disclosure of, any potential conflict of interest relating to the issuance of credit ratings by an NRSRO.⁷⁵ The Commission preliminarily believes the re-proposed amendments are necessary and appropriate in the public interest and for the protection of investors because they are designed to address conflicts of interest and improve the

⁵⁸ See ICI Letter; R&I Letter; Moody's Letter; Fitch Letter; S&P Letter; DBRS Letter; ASF Letter; CGSH Letter; ABA Business Law Committees Letter; DBA Letter; Citi Letter; Lehman Letter.

⁵⁹ See CGSH Letter.

⁶⁰ See S&P Letter; Moody's Letter; Fitch Letter; R&I Letter.

⁶¹ R&I Letter.

⁶² See DBRS Letter; ASF Letter; CreditSights Letter.

⁶³ See DBRS Letter; ASF Letter; CreditSights Letter.

⁶⁴ See Second SIFMA Letter; ICI Letter; Rapid Ratings Letter.

⁶⁵ See A.M. Best Letter; DBRS Letter; Fitch Letter; S&P Letter; R&I Letter; Moody's Letter. At least one commenter opposed a safe harbor for NRSROs. See Rapid Ratings Letter.

⁶⁶ See Fitch Letter; ICI Letter; CreditSights Letter; S&P Letter.

⁶⁷ See ASF Letter; CFA Institute Letter.

⁶⁸ See Council Letter.

⁶⁹ See RBDA Letter.

⁷⁰ See e.g., Lockyer Letter; Nappier Letter; ICI Letter.

⁷¹ See e.g., LIUNA Letter.

⁷² See Egan-Jones Letter and Realpoint Letter.

⁷³ ICI Letter; A.M. Best Letter; S&P Letter.

⁷⁴ 15 U.S.C. 78o-7(h)(2).

⁷⁵ *Id.*

quality of credit ratings for structured finance products by making it possible for more NRSROs to rate structured finance products. Generally, the information relied on by the hired NRSROs to rate structured finance products is non-public. This makes it difficult for other NRSROs to rate these securities and money market instruments. As a result, the products frequently are issued with ratings from only one or two NRSROs and only by NRSROs that are hired by the issuer, sponsor, or underwriter (*i.e.*, NRSROs that are subject to the conflict of being repeatedly paid by certain arrangers to rate these securities and money market instruments).

The goal is to increase the number of ratings extant for a given structured finance security or money market instrument and, in particular, promote the issuance of ratings by NRSROs that are not hired by the arranger. This would provide users of credit ratings with a broader range of views on the creditworthiness of the security or money market instrument and potentially expose an NRSRO that was unduly influenced by the “issuer-pay” conflict into issuing higher than warranted ratings. Furthermore, the proposal also is designed to make it more difficult for arrangers to exert influence over the NRSROs they hire to determine ratings for structured finance products. Specifically, by opening up the rating process to more NRSROs, the proposal could make it easier for the hired NRSRO to resist such pressure by increasing the likelihood that any steps taken to inappropriately favor the arranger could be exposed to the market through the ratings issued by other NRSROs.

A paragraph-by-paragraph description of the proposed amendments follows.

1. Proposed New Paragraph (b)(9)

As re-proposed, new paragraph (b)(9) of Rule 17g-5 would be the same as proposed in the *June 16, 2008 Proposing Release*.⁷⁶ Specifically, the amendment would add the following conflict to the types of conflicts identified in paragraph (b) of the rule: Issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument.⁷⁷ An NRSRO having this conflict would be subject to the provisions in new

paragraph (a)(3) of Rule 17g-5 (as well as the existing disclosure and management provisions in paragraphs (a)(1) and (a)(2)).

Under the proposed rule text, the type of security or money market instrument subject to the conflict would be one that is “issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction.” The Commission’s intent is to have the definition be sufficiently broad to cover all structured finance products and, therefore, not limit the rule’s scope to structured finance products that meet narrower definitions such as the one in Section 3(a)(62)(B)(iv) of the Exchange Act.⁷⁸ Moreover, the Commission notes that Section 15E(i)(1)(B) of the Exchange Act (adopted as part of the Rating Agency Act) uses identical language to describe a potentially unfair, coercive or abusive practice relating to the ratings of securities or money market instruments.⁷⁹ The Commission adopted Rule 17g-6(a)(4), in part, under this statutory authority.⁸⁰ This paragraph uses the same language—“issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction”—to describe the prohibited practice. As used in Rule 17g-6 and proposed in new paragraph (b)(9) to Rule 17g-5, the Commission intends this definition to cover the broad range of structured finance products, including, but not limited to, securities collateralized by pools of loans or receivables (*e.g.*, mortgages, auto loans, school loans credit card receivables, leases), collateralized debt obligations, synthetic collateralized debt obligations that reference debt securities or indexes, and hybrid collateralized debt obligations.

The Commission generally requests comment on all aspects of this proposed new paragraph to Rule 17g-5. In addition, the Commission requests comment on the following question related to the proposal.

- Would the definition of the securities and money market instruments covered by this conflict—namely, ones “issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction”—apply to all types of structured finance products? Should the

definition be made broader or narrowed?

2. Proposed New Paragraph (a)(3)

As re-proposed, paragraph (a)(3) would be substantially different than proposed in the *June 16, 2008 Proposing Release*.⁸¹ Specifically, an NRSRO subject to the conflict identified in new paragraph (b)(9)—issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument—would have to take a number of actions described in the following sections.

a. Proposed New Paragraph (a)(3)(i)

Under proposed new paragraph (a)(3)(i) of Rule 17g-5, the NRSRO would be required to maintain on a password-protected Internet Web site a list of each structured finance security or money market instrument for which it currently is in the process of determining an initial credit rating in chronological order and identifying the type of security or money market instrument, the name of the issuer, the date the rating process was initiated, and the Internet Web site address where the issuer, sponsor, or underwriter of the security or money market instrument represents that the information described in paragraphs (a)(3)(iii)(C) and (D) (see below discussion) can be accessed. The NRSRO would need to post this information no later than when the arranger first transmits information to the NRSRO that is to be used in the rating process. Further, the list would need to be maintained in chronological order so NRSROs accessing the Internet Web site would be able to determine the most recently initiated rating processes.

The text of proposed paragraph (a)(3)(i) only refers to transactions where the NRSRO is in the process of determining an “initial” credit rating. The Commission does not intend that the rule require the NRSRO to include on the Internet Web site information about securities or money market instruments for which the NRSRO has issued a final rating and now is monitoring the rating. The proposed amendment is designed to alert other NRSROs about new deals and direct them to the Internet Web site of the arranger where information to determine initial ratings and monitor the ratings can be accessed.

⁷⁸ 15 U.S.C. 78c(a)(62)(B)(iv). This provision—a component of the definition of “NRSRO”—refers to issuers of asset-backed securities (as that term is defined in Section 1101(c) of part 229 of Title 17 of the Code of Federal Regulations, as in effect on the date of enactment of this paragraph. *Id.*

⁷⁹ 15 U.S.C. 78o-7(i)(1)(B).

⁸⁰ 17 CFR 240.17g-6(a)(4).

⁷⁶ See *June 16, 2008 Proposing Release*, 73 FR at 36251.

⁷⁷ *Id.*

⁸¹ See *June 16, 2008 Proposing Release*, 73 FR at 36219–36226, 36251.

Consequently, once a final rating is issued, the NRSRO can remove the information about the security or money market instrument from the list it maintains on the Internet Web site. Similarly, if the arranger decides to terminate the rating process without having a final rating issued, the NRSRO would be permitted to remove the information from the list.

Finally, the Commission intends that the address for the Internet Web site contained in the list would be the portal for accessing information the arranger would be making available for all securities and money market instruments subject to this proposed rule. For example, a particular arranger might be disclosing information about hundreds of different structured finance securities and money market instruments on the Internet Web site it maintains for the purposes of this proposed requirement. The NRSRO only would need to disclose the address of this Internet Web site and not the actual link to the information, provided an NRSRO using the arranger's Internet Web site can navigate to the specific deal information it is seeking after entering the site.

The Commission generally requests comment on all aspects of this proposed new paragraph to Rule 17g-5. In addition, the Commission requests comment on the following questions related to the proposal.

- Would the information required to be maintained on the NRSRO's Internet site be sufficient to alert other NRSROs that the rating process has commenced and where they can locate information to determine an unsolicited rating? For example, should the rule require the NRSRO to alert by e-mail all NRSROs that obtain a password to access the site when new information is posted to the site? Would such a requirement be feasible?

- Are there specific requirements that the Commission could put into the rule text to clarify how the information should be presented on the NRSRO's Internet Web site?

b. Proposed New Paragraph (a)(3)(ii)

Under proposed new paragraph (a)(3)(ii) of Rule 17g-5, the NRSRO would be required to provide free and unlimited access to the password-protected Internet Web site it maintains during the applicable calendar year to any NRSRO that provides it with a copy of the certification described in proposed new paragraph (e) of Rule 17g-5 (see below discussion) that covers that calendar year. The Commission intends that the only prerequisite to an NRSRO obtaining access to the Internet

Web site is that the NRSRO execute the certification described below and furnish it to the Commission. Nonetheless, it would be appropriate for the NRSRO maintaining the Internet Web site to require an NRSRO seeking access to the site to represent that the copy of the certification being submitted to obtain access was a true copy of the certification and that it was, in fact, furnished to the Commission.

Proposed paragraphs (a)(3)(i) and (ii) are designed to create a mechanism to alert other NRSROs seeking to rate finance products that an arranger has initiated the rating process and to inform the other NRSROs where information being provided by the arranger to the hired NRSRO to determine the credit rating may be obtained. The goal is to provide the other NRSROs with the information being provided to the hired NRSRO on a real-time basis so they have sufficient time to develop initial ratings contemporaneously with the hired NRSRO. It would be incumbent on the other NRSROs to routinely monitor the Internet Web sites of the issuer-pay NRSROs to ascertain when new structured finance securities or money market instruments were in the process of being rated.

The Commission generally requests comment on all aspects of this proposed new paragraph to Rule 17g-5. In addition, the Commission requests comment on the following question related to the proposal.

- Should the NRSRO maintaining the Internet Web site be permitted to charge a fee for other NRSROs to access it? For example, should they be permitted a fee to recover some or all of their costs for maintaining the Internet Web site?

c. Proposed New Paragraph (a)(3)(iii)

Under proposed paragraph (a)(3)(iii), the NRSRO would be required to obtain from the arranger of each structured finance security or money market instrument four representations described below. The rule would provide that NRSRO could rely on the representations if the reliance was reasonable. Obtaining the representations would provide the NRSRO with a safe harbor if the arranger did not act in accordance with a representation. However, the NRSRO would need to demonstrate that its reliance on the representation was reasonable. For example, if the NRSRO became aware that an arranger breached prior representations a number of times, it would not be reasonable to rely on a future representation.

The four representations are discussed in the sections below.

i. Proposed New Paragraph (a)(3)(iii)(A)

Under proposed new paragraph (a)(3)(iii)(A), the arranger would need to represent that it will maintain the information described in proposed paragraphs (a)(3)(iii)(C) and (a)(3)(iii)(D) of Rule 17g-5 available on an identified password protected Internet Web site that presents the information in a manner indicating which information currently should be relied on to determine or monitor the credit rating. Under this representation, the arranger would agree, in effect, to make the information it provides to the hired NRSRO available to any other NRSRO at the same time. Thus, the arranger would need to post the information on the Internet Web site at the same time the information is given to the hired NRSRO. Any time this information is updated or new information is given to the hired NRSRO, the information would need to be posted on the Internet Web site contemporaneously.

Furthermore, the arranger must tag the information in a manner that informs NRSROs accessing the Internet Web site which information currently is operative for the purpose of determining the credit rating. The purpose of this "current" requirement is to ensure that NRSROs accessing the Internet Web site would be using the correct information to determine their credit ratings. For example, the Commission understands that the composition of the pool of assets underlying a structured finance product may change during the rating process as some assets are removed from the pool and replaced with other assets. The Internet Web site would need to include each asset pool provided to the NRSRO hired to rate the security or money market instrument. If more than one loan tape has been provided, the arranger would need to identify which loan tape was currently being relied on to determine the credit rating. Moreover, the arranger would need to indicate which information is final and will be used by the NRSRO to determine the credit rating that is published. It would be in the interest of the arranger to ensure that the NRSROs developing credit ratings through accessing the Internet Web site rely on up-to-date and final information. Otherwise, their credit ratings may be based on erroneous information, which could impact the final rating.

The Commission considered only requiring that the final information be posted on the Internet Web site. However, this could put the NRSROs developing ratings using the Internet Web sites at a disadvantage since they might be getting the information shortly

before the hired NRSRO issues its initial rating. The Commission preliminarily believes that the inclusion of all iterations of the various components of information (e.g., loan tapes, legal documents) used to determine the credit rating would allow the NRSROs accessing the Internet Web site to more actively participate in the rating process as they could follow the progression of changes that lead to the final information upon which the credit rating should be based. This could make it easier for them to more quickly issue an initial credit rating when the loan pool, legal documentation and other relevant information is finalized. The goal is to have them issue credit ratings contemporaneously with the hired NRSRO so investors can have the benefit of these ratings before purchasing the securities or money market instruments.

The Commission generally requests comment on all aspects of this proposed new paragraph to Rule 17g-5. In addition, the Commission requests comment on the following question related to the proposal.

- Should the Commission only require that final information be posted on the Internet Web site to avoid the potential that an NRSRO would use erroneous information to determine a credit rating?

ii. Proposed New Paragraph (a)(3)(iii)(B)

Under proposed new paragraph (a)(3)(iii)(B), the arranger would need to represent that it will provide access to its password-protected Internet Web site during the applicable calendar year to any NRSRO that provides it with a copy of the certification described in proposed paragraph (e) of Rule 17g-5 that covers that calendar year. The Commission is proposing to limit the access to this information to other NRSROs. The intent is to address concerns that disclosing this information to a broader array of entities would implicate disclosure requirements under the Securities Act. The Commission acknowledges that investors and other market participants may benefit from greater disclosure of this information. However, the Commission believes that the more appropriate mechanism to enhance such disclosure would be to amend rules under the Securities Act. The Commission notes in particular that Regulation AB, which is a principles-based rule, requires among other things, disclosure of the material characteristics of the asset pool, the structure of the transaction and of any material credit

enhancements.⁸² When adopting Regulation AB in 2004, the Commission noted that a determination that information would be provided to a credit rating agency should be considered in determining whether information is not material under Regulation AB:

If an issuer concludes that it need not disclose information in response to a particular disclosure line item because the issuer determines that the information is not material, but agrees to provide the information to credit rating agencies, the issuer should consider its determination regarding materiality in the context of the decision to provide the information to rating agencies.⁸³

The amendment, as proposed in the *June 16, 2008 Proposing Release*, would have allowed credit rating agencies not registered with the Commission to obtain the information about the structured finance products necessary to determine “unsolicited” credit ratings.⁸⁴ The Commission preliminarily believes that allowing these entities to access the information could be problematic because the Commission has no authority to examine them and, thereby, review whether they are using the information solely to develop credit ratings. Preliminarily, the Commission believes that the better approach is to limit access to NRSROs. Furthermore, this could provide an incentive for credit rating agencies to register with the Commission, which would benefit users of credit ratings by increasing the number of NRSROs.

The Commission generally requests comment on all aspects of this proposed new paragraph to Rule 17g-5. In addition, the Commission requests comment on the following question related to the proposal.

- Should other entities besides NRSROs be permitted to access the arrangers’ Internet Web sites? For example, should credit rating agencies not registered with the Commission be permitted to access the sites? If so, how could the amendment be crafted to ensure that only entities meeting the definition of “credit rating agency” in Section 3(a)(61) of the Exchange Act be permitted to access the arrangers’ Internet Web sites?

⁸² See Items 1111, 1113 and 1114 of Regulation AB.

⁸³ Securities Act Release No. 8518 (December 22, 2004).

⁸⁴ *June 16, 2008 Proposing Release*, 73 FR at 36251.

iii. Proposed New Paragraph (a)(3)(iii)(C)

Under proposed new paragraph (a)(3)(iii)(C), the arranger would need to represent that it will post on its password-protected Internet Web site all information the arranger provides to the NRSRO for the purpose of determining the initial credit rating for the security or money market instrument, including information about the characteristics of the assets underlying or referenced by the security or money market instrument, and the legal structure of the security or money market instrument, at the same time such information is provided to the NRSRO.

The Commission anticipates that the information that would be disclosed (i.e., the information provided to the hired NRSRO to determine the initial rating) generally would include the characteristics of the assets in the pool underlying or referenced by the structured finance product and the legal documentation setting forth the capital structure of the trust, payment priorities with respect to the tranche securities issued by the trust (the waterfall), and all applicable covenants regarding the activities of the trust. For example, for an initial rating for an RMBS, this information generally would include the loan tape (frequently a spreadsheet) that identifies each loan in the pool and its characteristics such as type of loan, principal amount, loan-to-value ratio, borrower’s FICO score, and geographic location of the property. In addition, the disclosed information also would include a description of the structure of the trust, the credit enhancement levels for the tranche securities to be issued by the trust, and the waterfall cash flow priorities.

The Commission intends that the proposed amendment only apply to written information provided to the hired NRSRO. However, if the amendment is adopted, the Commission would review whether arrangers started providing information about the structured finance product orally to avoid having to disclose it on their Internet Web sites. The Commission believes that ultimately this would not benefit the arranger since the NRSROs developing credit ratings through using the Internet Web sites would be basing their ratings without the benefit of all of the information. This could adversely impact the ratings and lead to more frequent rating actions during the surveillance process when the securities or money market instruments do not perform as anticipated. Moreover, because the information would be disclosed only to other NRSROs,

concerns of arrangers about releasing proprietary information should be mitigated.

The Commission generally requests comment on all aspects of this proposed new paragraph to Rule 17g-5. In addition, the Commission requests comment on the following question related to the proposal.

- Should the amendment require the arranger to represent that it will not provide any information to the hired NRSRO that is material without also disclosing that information on the Internet Web site?
- For the purposes of this amendment, should the Commission provide a standardized list of information that, at a minimum, should be disclosed? If so, what information should the list include? Do any commenters believe that this would have the effect of impermissibly regulating the substance of credit ratings and the methodologies used to determine credit ratings?

iv. Proposed New Paragraph (a)(3)(iii)(D)

Under proposed new paragraph (a)(3)(iii)(D), the arranger would need to represent that it will post on the password-protected Internet Web site all information the arranger provides to the NRSRO for the purpose of undertaking credit rating surveillance on the security or money market instrument, including information about the characteristics and performance of the assets underlying or referenced by the security or money market instrument at the same time such information is provided to the NRSRO. This would be the information, if any, that the arranger provides to the hired NRSRO to perform any ratings surveillance.⁸⁵ The Commission anticipates that generally this information would consist of reports from the trustee describing how the assets in the pool underlying the structured finance product are performing. For an RMBS credit rating, this information likely would include the "trustee report" customarily generated to reflect the performance of the loans constituting the collateral pool. For example, an RMBS trustee may generate reports describing the percentage of loans that are 30, 60, and 90 days in arrears, the percentage that have defaulted, the recovery of principal from defaulted loans, and information regarding any modifications to the loans in the asset pool.

The disclosure of this information would allow NRSROs that determined

unsolicited initial ratings to monitor on a continuing basis the creditworthiness of the tranche securities issued by the trust. Under the representation, the arranger would need to provide this information at the time it is provided to the NRSRO hired to perform the rating. The Commission notes that the representation only relates to information provided by the arranger to the hired NRSRO. If the hired NRSRO conducts surveillance using information provided by third-party vendors, this information would not need to be disclosed. Instead, the NRSROs monitoring "unsolicited" ratings would need to contract with the third-party vendor to obtain the information.

As with the initial rating information provided under proposed paragraph (a)(3)(iii)(C), the Commission does not intend the rule to require the disclosure of oral communications between the NRSRO and the issuer, sponsor, or underwriter. The information provided on the issuer's Web site only would need to be the written information given to the NRSRO.

The Commission generally requests comment on all aspects of this proposed new paragraph to Rule 17g-5. In addition, the Commission requests comment on the following question related to the proposal.

- What type of information for monitoring ratings of structured finance products is typically provided by arrangers to NRSROs? What type of information is typically obtained by NRSROs contracting with third-party vendors?
- For the purposes of this amendment, should the Commission provide a standardized list of information that, at a minimum, should be disclosed? If so, what information should the list include? Do any commenters believe that this would have the effect of impermissibly regulating the substance of credit ratings and the methodologies used to determine credit ratings?

3. Proposed New Paragraph (e)

An NRSRO, in order to access the Internet Web sites maintained by other NRSROs and the arrangers, would need to annually execute and furnish to the Commission the following certification:

The undersigned hereby certifies that it will access the Internet Web sites described in § 240.17g-5(a)(3) solely for the purpose of determining or monitoring credit ratings. Further, the undersigned certifies that it will keep the information it accesses pursuant to § 240.17g-5(a)(3) confidential and treat it as material nonpublic information subject to its written policies and procedures established, maintained, and enforced pursuant to section

15E(g)(1) of the Act (15 U.S.C. 78o-7(g)(1)) and § 240.17g-4. Further, the undersigned certifies that it will determine and maintain credit ratings for at least 10% of the issued securities and money market instruments for which it accesses information pursuant to § 240.17g-5(a)(3)(iii), if it accesses such information for 10 or more issued securities or money market instruments in the calendar year covered by the certification. Further, the undersigned certifies one of the following as applicable: (1) In the most recent calendar year during which it accessed information pursuant to § 240.17g-5(a)(3), the undersigned accessed information for [Insert Number] issued securities and money market instruments through Internet Web sites described in § 240.17g-5(a)(3) and determined and maintained credit ratings for [Insert Number] of such securities and money market instruments; or (2) The undersigned previously has not accessed information pursuant to § 240.17g-5(a)(3) 10 or more times in a calendar year.

The NRSRO would need to furnish this certification to the Commission each calendar year that the NRSRO seeks access to the NRSRO and arranger Internet Web sites. In addition, the NRSRO would be required to certify that it will determine and maintain credit ratings for at least 10% of the issued securities and money market instruments if it accesses information pursuant to the proposed rule 10 or more times in a calendar year. The use of the term "issued securities and money market instruments" is intended to address potential deals that are posted on the Internet Web sites but that ultimately do not result in final ratings because the arranger decides not to issue the securities or money market instruments. An NRSRO that accessed such information would not need to count it among the final deals that would be used to determine whether it met the 10% threshold.

The 10% threshold is designed to require the NRSRO to determine a meaningful amount of credit ratings without forcing it to undertake work that it may not have the capacity or resources to perform. For example, the NRSRO may access information about a proposed deal that involves a structure or a type of assets that are new and that the NRSRO has not developed a methodology to incorporate into its ratings. It would not be appropriate or prudent to require the NRSRO to determine a credit rating in this case. At the same time, the Commission believes there should be some minimum level of credit ratings issued to demonstrate that the NRSRO is accessing the information for the purpose of determining credit ratings.

An NRSRO that has accessed information under this program for one calendar would be required to report in

⁸⁵ Re-proposed paragraph (a)(3)(iii)(D) of Rule 17g-5.

its next certification the number of times it accessed the information for issued securities and money market instruments and the number of credit ratings determined using that information. This is designed to provide a level of verification that the NRSRO is, in fact, accessing the information for purposes of determining credit ratings.

The Commission generally requests comment on all aspects of this proposed new paragraph to Rule 17g-5. In addition, the Commission requests comment on the following questions related to the proposal.

- Should the minimum requirement for the number of credit ratings that must be determined using the information posted on arranger Internet Web sites be higher than 10% of the deals reviewed? For example, should it be 15%, 20%, 50% or a larger percentage? Alternatively, should the requirement be less than 10%? For example, should it be 5% or 2%?

- If an NRSRO accesses information 10 or more times in a calendar year and does not determine credit ratings for 10% or more of the deals reviewed, should the NRSRO be prohibited from accessing the NRSRO and sponsor information in the future? If so, should the NRSRO be prohibited from accessing the information for a prescribed period of time (e.g., 6 months, 12 months, 18 months, 24 months or some longer period)?

E. Proposed Amendment to Regulation FD

The Commission is proposing to amend Regulation FD⁸⁶ to accommodate the information disclosure program that would be established under the re-proposed amendments to paragraphs (a) and (b) of Rule 17g-5. Regulation FD requires that an issuer or any person acting on an issuer's behalf publicly disclose material non-public information if the information is disclosed to certain persons.⁸⁷ Under Rule 100(b)(2)(iii) of Regulation FD, the issuer or person acting on the issuer's behalf need not make the public disclosure if the disclosure of material non-public information is made to an entity whose primary business is the issuance of credit ratings, provided the information is disclosed solely for the purpose of developing a credit rating and the entity's ratings are publicly available.⁸⁸ Thus, under this provision, the information can be disclosed to a credit rating agency if: (1) It is being disclosed

for the purpose of developing a credit rating; and (2) the credit rating agency makes the rating publicly available. The Commission is proposing to amend Rule 100(b)(2)(iii) of Regulation FD to permit the disclosure of material non-public information to NRSROs irrespective of whether they make their ratings publicly available. This would accommodate subscriber-based NRSROs that do not make their ratings publicly available for free and it would accommodate NRSROs that access the information under the proposed Rule 17g-5 disclosure program but ultimately do not issue a credit rating using the information.

Under the re-proposed amendments to paragraphs (a) and (b) of Rule 17g-5, arrangers would agree to disclose information to any credit rating agency registered with the Commission as an NRSRO. The information disclosed likely would include material non-public information and, consequently, the arranger would need to rely on the exclusions to Regulation FD in order to disclose it to NRSROs without simultaneously making a public disclosure of the information. Currently, the exclusions in Regulation FD include disclosing material non-public information "to an entity whose primary business is the issuance of credit ratings, provided the information is disclosed solely for the purpose of developing a credit rating and the entity's ratings are publicly available."⁸⁹ NRSROs that operate under the issuer-pays model make their ratings available to the public for free because they typically are compensated by the issuer or arranger whose security is being rated. Subscriber-based NRSROs are not compensated by the issuer or arrangers but, rather, by subscribers who pay for access to their ratings. Consequently, their credit ratings are not disclosed to the public free of charge but, instead, only to those persons who agree to pay them for access to the credit ratings.

The Commission preliminarily believes that credit rating agencies that are registered with the Commission as NRSROs should be able to receive material non-public information from arrangers for the purpose of developing unsolicited credit ratings for structured finance products. The Commission recognizes that their credit ratings are not as broadly disseminated as the credit ratings of the issuer-pays credit rating agencies. However, because the proposed amendment would limit the exclusion to NRSROs, the entities receiving the material non-public

information would be subject to Section 15E(g) of the Exchange Act and Rule 17g-4 thereunder.⁹⁰ These statutory and regulatory provisions require NRSROs to establish, maintain and enforce policies and procedures reasonably designed to prevent the misuse of material non-public information. Furthermore, the Commission has examination authority with respect to NRSROs. Moreover, the proposed disclosure program for Rule 17g-5 would be triggered only when an issuer-pay NRSRO is hired to perform a credit rating. Therefore, a publicly disclosed credit rating for the structured finance product likely would be issued along with any unsolicited ratings from subscriber-based NRSROs. For these reasons, the Commission preliminarily believes it would be appropriate to eliminate the requirement in Regulation FD to make the ratings public for credit rating agencies that are registered with the Commission as NRSROs and who receive the information under the proposed disclosure program under Rule 17g-5.

Finally, the Commission also is proposing to amend the current text in Rule 100(b)(2)(iii) of Regulation FD that identifies credit rating agencies as "an entity whose primary business is the issuance of credit ratings."⁹¹ Since the adoption of Regulation FD, Congress, through the Rating Agency Act, enacted a statutory definition of "credit rating agency."⁹² The definition is in Section 3(a)(61) of the Exchange Act.⁹³ The Commission, therefore, proposes to use the statutory definition of "credit rating agency" in Rule 100(b)(2)(iii) of Regulation FD.

The Commission generally requests comment on all aspects of this proposed new paragraph to Rule 17g-5. In addition, the Commission requests comment on the following questions related to the proposal.

- Is the proposed change to Regulation FD necessary or appropriate? Would a different approach work better? For instance, would it be better to revise the exception in Regulation FD to apply to any information given to any NRSRO so long as the ratings of at least one NRSRO are publicly available.

- Should the Commission broaden the exclusion to information that is provided to NRSROs beyond the proposed Rule 17g-5 disclosure program (e.g., information provided to develop ratings for corporate issuers)?

⁹⁰ 15 U.S.C. 78o-7(g).

⁹¹ 17 CFR 243.100(b)(2)(iii).

⁹² See 15 U.S.C. 78c(a)(61).

⁹³ 15 U.S.C. 78c(a)(61).

⁸⁶ 17 CFR 243.100, 243.101, 243.102 and 243.103.

⁸⁷ See 17 CFR 243.100(a).

⁸⁸ See 17 CFR 243.100(b)(2)(iii).

⁸⁹ 17 CFR 243.100(b)(2)(iii).

• Does disclosure of this information to all NRSROs raise any concerns that Regulation FD was designed to address?

• Would the Commission's use of the statutory definition of "credit rating agency" in Section 3(a)(61) of the Exchange Act in Rule 100(b)(2)(iii) of Regulation FD prevent entities that currently receive information under the exclusion from continuing to receive such information? Commenters that believe it would prevent entities from continuing to receive the information should specifically describe how the entities in question would not meet the statutory definition of "credit rating agency."

IV. General Request for Comment

The Commission invites interested persons to submit written comments on any aspect of the proposed amendments, in addition to the specific requests for comments. Further, the Commission invites comment on other matters that might have an effect on the proposals contained in the release, including any competitive impact.

V. Paperwork Reduction Act

Certain provisions of the proposed amendment to Rule 17g-2 and the re-proposed amendment to Rule 17g-5 (collectively, the "Proposed Rule Amendments") contain a "collection of information" within the meaning of the Paperwork Reduction Act of 1995 ("PRA"). The Commission is submitting these proposed amendments to the Office of Management and Budget ("OMB") for review in accordance with the PRA. An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid control number. The titles for the collections of information are:

- (1) Rule 17g-2, Records to be made and retained by nationally recognized statistical rating organizations (OMB Control Number 3235-0628); and
- (2) Rule 17g-5, Conflicts of interest (a proposed new collection of information).

A. Collections of Information Under the Proposed Rule Amendments

The Commission is proposing for comment rule amendments to prescribe additional requirements for NRSROs. The proposed amendments to Rule 17g-2 would require NRSROs to make publicly available ratings action histories for certain issuer-paid credit ratings. In addition, the re-proposed amendments to Rule 17g-5 would modify rules the Commission adopted in 2007 to implement conflicts of interest requirements under the Rating

Agency Act. Both sets of amendments would contain recordkeeping and disclosure requirements that would be subject to the PRA. The collection of information obligations imposed by the Proposed Rule Amendments would be mandatory. The Proposed Rule Amendments, however, would apply only to credit rating agencies that are registered with the Commission as NRSROs. Such registration is voluntary.⁹⁴

In summary, the Proposed Rule Amendments would require an NRSRO to publicly disclose certain ratings actions histories and would require an NRSRO and an issuer to disclose to other NRSROs certain information required to determine and monitor a credit rating for a structured finance security or money market instrument.⁹⁵

B. Proposed Use of Information

The collections of information in the Proposed Rule Amendments are designed to provide users of credit ratings with information upon which to evaluate the performance of NRSROs and to enhance the accuracy of credit ratings for structured finance products by increasing competition among NRSROs who rate these products.

C. Respondents

In adopting the final rules under the Rating Agency Act, the Commission estimated that approximately 30 credit rating agencies would be registered as NRSROs.⁹⁶ The Commission believes that this estimate continues to be appropriate for identifying the number of respondents for purposes of the amendments. Since the initial set of rules under the Rating Agency Act became effective in June 2007, ten credit rating agencies have registered with the Commission as NRSROs.⁹⁷ The registration program has been in effect for over a year; consequently, the Commission expects additional entities will register. While 20 more entities may not ultimately register, the Commission believes the estimate is within reasonable bounds and appropriate given that it adds an element of conservatism to its paperwork burden estimates as well as cost estimates.

⁹⁴ See Section 15E of the Exchange Act (15 U.S.C. 78o-7).

⁹⁵ See proposed Rule 17g-2(d) and re-proposed Rule 17g-5(a)(3), (b)(9) and (e).

⁹⁶ See *June 5, 2007 Adopting Release*, 72 FR at 33607.

⁹⁷ A.M. Best Company, Inc.; DBRS Ltd.; Fitch; Japan Credit Rating Agency, Ltd.; Moody's; Rating and Investment Information, Inc.; S&P; LACE Financial Corp.; Egan-Jones Rating Company; and Realpoint LLC.

In addition, under the re-proposed amendments to Rule 17g-5, arrangers of structured finance products would need to disclose certain information to NRSROs. For purposes of the PRA estimate, based on staff information gained from the NRSRO examination process, the Commission estimates that there would be approximately 200 respondents, which is the same number of respondents the Commission originally proposed would be affected by the amendments. The Commission received no comments on this estimate when originally proposed.

The Commission generally requests comment on all aspects of these estimates for the number of respondents and the number of arrangers. In addition, the Commission requests specific comment on the following items related to these estimates.

- Should the Commission use the number of credit rating agencies currently registered as NRSROs rather than the estimated number of 30 ultimate registrants? Alternatively, is there a basis to estimate a different number of likely registrants?
- Should the Commission use different estimates for the number of NRSROs that would be subject to the proposed amendments to Rule 17g-2 and re-proposed amendments to Rule 17g-5. For example, should the Commission develop estimates based on the number of NRSROs that determine issuer-paid credit ratings as opposed to subscriber-paid credit ratings?
- Are there sources that could provide credible information that could be used to determine the number of issuers that would be subject to the proposed paperwork burdens? Commenters should identify any such sources and explain how a given source could be used to either support the Commission's estimate or arrive at a different estimate.

Commenters should provide specific data and analysis to support any comments they submit with respect to these burden estimates.

D. Total Annual Recordkeeping and Reporting Burden

As discussed in further detail below, the Commission estimates the total recordkeeping burden resulting from the Proposed Rule Amendments would be approximately 169,045 hours on an

annual basis⁹⁸ and 69,315 hours on a one-time basis.⁹⁹

The total annual and one-time hour burden estimates described below are averages across all types of NRSROs expected to be affected by the Proposed Rule Amendments. The size and complexity of NRSROs range from small entities to entities that are part of complex global organizations employing thousands of credit analysts. Consequently, the burden hour estimates represent the average time across all NRSROs. The Commission further notes that, given the significant variance in size between the largest NRSROs and the smallest NRSROs, the burden estimates, as averages across all NRSROs, are skewed higher because the largest firms currently predominate in the industry.

1. Proposed Amendments to Rule 17g-2

Rule 17g-2 requires an NRSRO to make and keep current certain records relating to its business and requires an NRSRO to preserve those and other records for certain prescribed time periods.¹⁰⁰ The version of Rule 17g-2 adopted today ("New Rule 17g-2") requires an NRSRO to make and retain a record showing the ratings action histories and with respect to each current credit rating.¹⁰¹ New Rule 17g-2 also requires an NRSRO to make public, in XBRL format and with a six-month grace period, the ratings action histories required under new paragraph (a)(8) for a random sample of 10% of the issuer-paid credit ratings for each ratings class for which it has issued 500 or more ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated.¹⁰²

When adopting New Rule 17g-2, the Commission determined that, on average, an NRSRO subject to the requirements will spend approximately 30 hours to publicly disclose the rating action histories in XBRL format and, thereafter, 10 hours per year to update this information.¹⁰³ Accordingly, the

⁹⁸ This total is derived from the total annual hours set forth in the order that the totals appear in the text: 105 + 14,880 + 4,000 + 150,000 + 60 = 169,045.

⁹⁹ This total is derived from the total one-time hours set forth in the order that the totals appear in the text: 315 + 9,000 + 60,000 = 69,315.

¹⁰⁰ 17 CFR 240.17g-2.

¹⁰¹ Paragraph (a)(8) of Rule 17g-2.

¹⁰² Amendment to Rule 17g-2(d).

¹⁰³ The Commission also based this estimate on the current one-time and annual burden hours for an NRSRO to publicly disclose its Form NRSRO. No alternatives to these estimates as proposed were suggested by commenters and the Commission adopted these hour burdens. See *Companion Adopting Release*.

total aggregate one-time burden to the industry to make the rating action histories publicly available in XBRL format will be 210 hours,¹⁰⁴ and the total aggregate annual burden hours will be 70 hours.¹⁰⁵ The Commission based the total estimates on the fact that based on information furnished on Form NRSRO, seven of the ten currently registered NRSROs issue 500 or more ratings under the issuer-pay model in at least one of the classes of ratings for which they are registered. The Commission believed that even as the number of registered NRSROs expands to the 30 ultimately expected to register, this number will remain constant, as new entrants are likely to operate on a subscriber-pay basis, at least in the near future. In addition, the Commission believed that each of the NRSROs affected by this new requirement already has, or will have, an Internet Web site.

The proposed amendments to Rule 17g-2(d) would require NRSROs to publicly disclose ratings action histories of all outstanding issuer-paid credit ratings with up to a 12-month time lag before a new rating action must be disclosed. The Commission estimates, based on staff experience, that the hour burdens for an NRSRO to publicly disclose this information would increase 50% from the current estimates for disclosing ratings action histories for a randomly selected sample of 10% of the outstanding issuer-paid credit ratings. Therefore, the Commission estimates that the one-time annual hour burden will increase from 30 hours to 45 hours¹⁰⁶ and the annual hour burden will increase from 10 hours to 15 hours.¹⁰⁷ Accordingly, the Commission estimates that the total aggregate one-time burden for NRSROs to comply with this requirement would be approximately 315 hours,¹⁰⁸ and the total aggregate annual burden hours would be approximately 105 hours.¹⁰⁹

The Commission requests comment on all aspects of these burden estimates for the proposed amendments to Rule 17g-2(d). In addition, the Commission requests specific comment on the following items related to these estimates:

- If the Commission were to adopt a final rule that subjected subscriber-paid credit ratings to the public disclosure requirement, would the hour burden

¹⁰⁴ 30 hours × 7 NRSROs = 210 hours.

¹⁰⁵ 10 hours × 7 NRSROs = 70 hours.

¹⁰⁶ 50% of 30 hours = 15 hours + 30 hours = 45 hours.

¹⁰⁷ 50% of 10 hours = 5 hours + 10 hours = 15 hours.

¹⁰⁸ 45 hours × 7 NRSROs = 315 hours.

¹⁰⁹ 15 hours × 7 NRSROs = 105 hours.

estimates per firm be the same as estimated by the Commission above or would they change. Commenters should give specific hour estimates in their comments.

- If the Commission were to adopt a final rule subjecting subscriber-paid credit ratings to the public disclosure requirements being adopted today (the random sample of 10% of issuer-paid credit ratings in a class of rating), would the hour burden estimates per firm be the same as estimated by the Commission in the Adopting Release or would they change. Commenters should give specific hour estimates in their comments.

- Are there publicly available reports or other data sources the Commission should consider in arriving at these burden estimates?

- Are the estimates of the one-time and recurring burdens of the re-proposed additional disclosures accurate? If not, should they be higher or lower?

Commenters should provide specific data and analysis to support any comments they submit with respect to these burden estimates.

2. Re-Proposed Rule 17g-5

Rule 17g-5 requires an NRSRO to manage and disclose certain conflicts of interest.¹¹⁰ The rule also prohibits specific types of conflicts of interest.¹¹¹ The re-proposed amendments to Rule 17g-5 would add an additional conflict to paragraph (b) of Rule 17g-5 for NRSROs to manage. This re-proposed conflict of interest would be issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of an asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument.¹¹² Under the re-proposal, an NRSRO would be prohibited from issuing a credit rating for a structured finance product, unless certain information about the transaction and the assets underlying the structured finance product are disclosed.¹¹³

Specifically, an NRSRO rating such products would need to disclose to other NRSROs the following information on a password protected Internet Web site:

- A list of each such security or money market instrument for which it is currently in the process of determining

¹¹⁰ 17 CFR 240.17g-5.

¹¹¹ 17 CFR 240.17g-5(c).

¹¹² See re-proposed Rule 17g-5(b)(9). The current paragraph (b)(9) would be renumbered as (b)(10).

¹¹³ See re-proposed Rule 17g-5(a)(3).

an initial credit rating in chronological order and identifying the type of security or money market instrument, the name of the issuer, the date the rating process was initiated, and the Internet Web site address where the issuer, sponsor, or underwriter of the security or money market instrument represents that the information described in paragraphs (a)(3)(iii)(C) and (D) of re-proposed Rule 17g-5 can be accessed.¹¹⁴

For purposes of this PRA, the Commission estimates that it would take an NRSRO approximately 300 hours to develop a system, as well as policies and procedures, for the disclosures required by the re-proposed rule. This estimate is based on the Commission's experience with, and burden estimates for, the recordkeeping requirements for NRSROs.¹¹⁵ Accordingly, the Commission believes, based on staff experience, an NRSRO would take approximately 300 hours on a one-time basis to implement a disclosure system to comply with the proposal in that a respondent would need a set of policies and procedures for disclosing the information, as well as a system for making the information publicly available. This would result in a total one-time hour burden of 9,000 hours for 30 NRSROs.¹¹⁶

In addition to the one-time hour burden, the re-proposed amendments would result in an annual hour burden to the NRSRO arising from the requirement to make disclosures for each deal being rated. In the June 18 Proposing Release, the Commission estimated that a large NRSRO would have rated approximately 2,000 new RMBS and CDO transactions in a given year. The Commission based this estimate on the number of new RMBS and CDO deals rated in 2006 by two of the largest NRSROs which rated structured finance transactions. The Commission adjusted this number to 4,000 transactions in order to account for other types of structured finance products, including commercial real estate MBS and other consumer assets. Accordingly, the Commission estimated that a large NRSRO would rate approximately 4,000 new structured finance transactions during a calendar year. The Commission did not receive any comments with respect to that estimate. The Commission recognizes that the number of new structured finance transactions has dropped precipitously since 2006 because of the

credit market turmoil. Nonetheless, the Commission preliminarily is retaining the estimate of 4,000 new deals per year as an element of conservatism and to account for future market developments.

Based on the number of outstanding structured finance ratings submitted by the ten registered NRSROs on their Form NRSROs, the Commission estimates that the three largest NRSROs account for 97% of the market for structured finance ratings. Therefore, the Commission estimates that each of the NRSROs in this category would be hired to rate 97% of the 4,000 new deals per year for a total of 11,640 ratings.¹¹⁷ The Commission further estimates that the NRSROs that are not in this category would each rate 3% of the 4,000 new deals for a total of 3,240 ratings.¹¹⁸ Thus, the Commission estimates that the total structured finance ratings issued by all NRSROs in a given year would be 14,880.¹¹⁹ Based on staff experience, the Commission estimates that it would take approximately 1 hour per transaction for the NRSRO to update the lists maintained on the NRSROs' password protected Internet Web sites. Therefore, the Commission estimates for purposes of the PRA that the total annual hour burden for the industry would be 14,880 hours.¹²⁰

The re-proposed amendments also would require that the arranger disclose the following information:

- All information the issuer, sponsor, or underwriter provides to the nationally recognized statistical rating organization for the purpose of determining the initial credit rating for the security or money market instrument, including information about the characteristics of the assets underlying or referenced by the security or money market instrument, and the legal structure of the security or money market instrument, at the same time such information is provided to the nationally recognized statistical rating organization; and
- All information the issuer, sponsor, or underwriter provides to the nationally recognized statistical rating organization for the purpose of undertaking credit rating surveillance on the security or money market instrument, including information about the characteristics and performance of the assets underlying or referenced by the security or money market instrument at the same time such information is provided to the

nationally recognized statistical rating organization.¹²¹

The Commission estimates that there would be approximately 200 such respondents. For purposes of this PRA, the Commission estimates that it would take a respondent approximately 300 hours to develop a system, as well as policies and procedures, for the disclosures required by the re-proposed rule. This estimate is based on the Commission's experience with, and burden estimates for, the recordkeeping requirements for NRSROs.¹²² Accordingly, the Commission believes, based on staff experience, an arranger would take approximately 300 hours on a one-time basis to implement a disclosure system to comply with the proposal, which includes the estimate that a respondent would need a set of policies and procedures for disclosing the information, as well as a system for making the information publicly available. This would result in a total one-time hour burden of 60,000 hours for 200 respondents.¹²³ The Commission received no comments on an identical burden estimate in the original proposing release.

In addition to the one-time hour burden, the re-proposed amendments would result in an annual hour burden for arrangers. Specifically, the re-proposed amendments would require disclosure of information on a transaction-by-transaction basis when an initial rating process is commenced. Based on staff experience, the Commission estimates that each respondent would disclose information for approximately 20 new transactions per year and that it would take approximately 1 hour per transaction to post the information to the password protected Internet Web sites. The Commission estimates that a large NRSRO would have rated approximately 2,000 new RMBS and CDO transactions in a given year. The Commission is basing this estimate on the number of new RMBS and CDO deals rated in 2006 by two of the largest NRSROs that rated structured finance transactions. The Commission is adjusting this number to 4,000 transactions in order to include other types of structured finance products, including commercial MBS and other consumer assets. Therefore, the Commission estimates for purposes of the PRA that each respondent would arrange approximately 20 new

¹¹⁴ See re-proposed Rule 17g-5(a)(3)(i).

¹¹⁵ See June 5, 2007 Adopting Release, 72 FR at 33609.

¹¹⁶ 300 hours × 30 NRSROs = 9,000 hours.

¹¹⁷ (4,000 ratings × .97) × 3 = 11,640.

¹¹⁸ (4,000 ratings × .03) × 27 = 3,240.

¹¹⁹ (3,880 × 3) + (120 × 27) = 14,880 transactions.

¹²⁰ 14,880 ratings × 1 hour = 14,880 hours.

¹²¹ See re-proposed Rule 17g-5(a)(3)(iii).

¹²² See June 5, 2007 Adopting Release, 72 FR at 33609.

¹²³ 300 hours × 200 respondents = 60,000 hours.

transactions per year.¹²⁴ The Commission notes that the number of new transactions per year would vary by the size of issuer and that this estimate would be an average across all respondents. Larger respondents may arrange in excess of 20 new deals per year, while a smaller arranger may only initiate one or two new deals on an annual basis. Based on this analysis, the Commission estimates that it would take a respondent approximately 20 hours¹²⁵ to disclose this information under the re-proposed rule, on an annual basis, for a total aggregate annual hour burden of 4,000 hours.¹²⁶ The Commission received no comments on an identical burden estimate in the original proposing release.

In addition, re-proposed Rule 17g-5(a)(3)(iii)(D) would require disclosure of information provided to an NRSRO to be used for credit rating surveillance on a security or money market instrument. Because surveillance would cover more than just initial ratings, the Commission, in the original proposing release, estimated based on staff information gained from the NRSRO examination process that monthly disclosure would be required with respect to approximately 125 transactions on an ongoing basis. Also based on staff information gained from the NRSRO examination process, the Commission estimated that it would take a respondent approximately 0.5 hours per transaction to disclose the information. Therefore, the Commission estimates that each respondent would spend approximately 750 hours¹²⁷ on an annual basis disclosing information under re-proposed Rule 17g-5, for a total aggregate annual burden hours of 150,000 hours.¹²⁸ The Commission received no comments on an identical estimate in the original proposing release.

Finally, an NRSRO that wishes to access information on another NRSRO's Web site or on an arranger's Web site would need to provide the Commission with an annual certification described in proposed new paragraph (e) to Rule 17g-5. The Commission estimates that this annual certification would become a matter of routine over time and should take less time than it takes an NRSRO to submit its annual certification under Rule 17g-1(f).¹²⁹ The annual certification required under Rule 17g-

1(f) involves the disclosure of substantially more information than the certification in proposed paragraph (e) of Rule 17g-5. The Commission estimated that it would take an NRSRO approximately 10 hours to complete the Rule 17g-1(f) annual certification.¹³⁰ Given that the proposed paragraph (e) certification would require much less information, the Commission estimates, based on staff experience, that it would take an NRSRO approximately 20% of the time it takes to do the Rule 17g-5 annual certification. Further, for the purposes of the estimate, the Commission is assuming that all 30 NRSROs ultimately registered with the Commission would complete the certification. For these reasons, the Commission estimates it would take an NRSRO approximately 2 hours¹³¹ to complete the proposed paragraph (e) certification for an aggregate annual hour burden to the industry of 60 hours.¹³²

The Commission again requests comment on all aspects of these burden estimates for the amendments to Rule 17g-5 as re-proposed. In addition, the Commission requests specific comment on the following items related to these estimates:

- Are there publicly available reports or other data sources the Commission should consider in arriving at these burden estimates?
- Are the estimates of the one-time and recurring burdens of the re-proposed additional disclosures accurate? If not, should they be higher or lower?

Commenters should provide specific data and analysis to support any comments they submit with respect to these burden estimates.

E. Collection of Information Is Mandatory

The recordkeeping and notice requirements for the Proposed Rule Amendments would be mandatory.

F. Confidentiality

The disclosures that would be required under the proposed amendments to Rule 17g-2(d) would be public. The disclosures that would be required under the re-proposed amendments to Rule 17g-5 would be made available to other NRSROs. The NRSROs would need to provide certifications agreeing to keep the propose Rule 17g-5 information confidential.

G. Record Retention Period

There is no record retention period for the Proposed Rule Amendments.

H. Request for Comment

The Commission requests comment on the proposed collections of information in order to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information would have practical utility; (2) evaluate the accuracy of the Commission's estimates of the burden of the proposed collections of information; (3) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; (4) evaluate whether there are ways to minimize the burden of the collection of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and (5) evaluate whether the Proposed Rule Amendments would have any effects on any other collection of information not previously identified in this section.

Persons who desire to submit comments on the collection of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090, and refer to File No. S7-04-09. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication of this document in the **Federal Register**; therefore, comments to OMB are best assured of having full effect if OMB receives them within 30 days of this publication. Requests for the materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-04-09, and be submitted to the Securities and Exchange Commission, Records Management Office, 100 F Street, NE., Washington, DC 20549.

VI. Costs and Benefits of the Re-Proposed Rules

The Commission is sensitive to the costs and benefits that result from its rules. The Commission has identified certain costs and benefits of the Proposed Rule Amendments and requests comment on all aspects of this cost-benefit analysis, including

¹²⁴ 4,000 new transactions/200 issuers = 20 new transactions.

¹²⁵ 20 transactions × 1 hour = 20 hours.

¹²⁶ 20 hours × 200 respondents = 4,000 hours.

¹²⁷ 125 transactions × 30 minutes × 12 months = 45,000 minutes/60 minutes = 750 hours.

¹²⁸ 750 hours × 200 respondents = 150,000 hours.

¹²⁹ 17 CFR 240.17g-1(f).

¹³⁰ See June 5, 2007 Adopting Release, 72 FR at 33609.

¹³¹ 20% of 10 hours = 2 hours.

¹³² 2 hours × 30 NRSROs = 60 hours.

identification and assessment of any costs and benefits not discussed in the analysis.¹³³ The Commission seeks comment and data on the value of the benefits identified. The Commission also welcomes comments on the accuracy of its cost estimates in each section of this cost-benefit analysis, and requests those commenters to provide data so the Commission can improve the cost estimates, including identification of statistics relied on by commenters to reach conclusions on cost estimates. Finally, the Commission seeks estimates and views regarding these costs and benefits for particular types of market participants, as well as any other costs or benefits that may result from the adoption of these Proposed Rule Amendments.

A. Benefits

The purposes of the Rating Agency Act, as stated in the accompanying Senate Report, are to improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating industry.¹³⁴ As the Senate Report states, the Rating Agency Act establishes “fundamental reform and improvement of the designation process” with the goal that “eliminating the artificial barrier to entry will enhance competition and provide investors with more choices, higher quality ratings, and lower costs.”¹³⁵

The Proposed Rule Amendments are designed to improve the transparency of credit ratings performance by making credit ratings actions publicly available and the accuracy of credit ratings for structured finance products by increasing competition among the

NRSROs that rate these securities and money market instruments.

The proposed amendment to Rule 17g-2(d) would require NRSROs to publicly disclose all of their ratings actions histories for issuer-paid credit ratings, in XBRL format and with a one-year grace period. This disclosure would allow the marketplace to better compare the performance of NRSROs determining issuer-paid credit ratings. The Commission preliminarily believes that making this information publicly available will provide users of credit ratings with innovative and potentially more useful metrics with which to compare NRSROs.

In addition, under the re-proposed amendments to Rule 17g-5, NRSROs that are paid by arrangers to determine credit ratings for structured finance products would be required to maintain a password-protected Internet Web site that lists each deal they have been hired to rate. They also would be required to obtain representations from the arranger hiring the NRSRO to determine the rating that the arranger will post all information provided to the NRSRO to determine the rating and, thereafter, to monitor the rating on a password-protected Internet Web site. NRSROs not hired to determine and monitor the ratings would be able to access the NRSRO Internet Web sites to learn of new deals being rated and then access the arranger Internet Web sites to obtain the information being provided by the arranger to the hired NRSRO during the entire initial rating process and, thereafter, for the purpose of surveillance. However, the ability of NRSROs to access these NRSRO and arranger Internet Web sites would be limited to NRSROs that certify to the Commission on an annual basis, among other things, that they are accessing the information solely for the purpose of determining or monitoring credit ratings, that they will keep the information confidential and treat it as material non-public information, and that they will determine credit ratings for at least 10% of the deals for which they obtain information. They also would be required to disclose in the certification the number of deals for which they obtained information through accessing the Internet Web sites and the number of ratings they issued using that information during the year covered by their most recent certification.

The Commission is re-proposing these amendments to Rule 17g-5, in part, pursuant to the authority in Section 15E(h)(2) of the Exchange Act.¹³⁶ The

provisions in this section of the statute provide the Commission with authority to prohibit, or require the management and disclosure of, any potential conflict of interest relating to the issuance of credit ratings by an NRSRO.¹³⁷ The Commission preliminarily believes the re-proposed amendments are necessary and appropriate in the public interest and for the protection of investors because they are designed to address conflicts of interest and improve the quality of credit ratings for structured finance products by making it possible for more NRSROs to rate structured finance products. Generally, the information relied on by the hired NRSROs to rate structured finance products is non-public. This makes it difficult for other NRSROs to rate these securities and money market instruments. As a result, the products frequently are issued with ratings from only one or two NRSROs and only by NRSROs that are hired by the issuer, sponsor, or underwriter (*i.e.*, NRSROs that are subject to the conflict of being repeatedly paid by certain arrangers to rate these securities and money market instruments).

The goal is to increase the number of ratings extant for a given structured finance security or money market instrument and, in particular, promote the issuance of ratings by NRSROs that are not hired by the arranger. This would provide users of credit ratings with a broader range of views on the creditworthiness of the security or money market instrument and potentially expose an NRSRO that was unduly influenced by the “issuer-pay” conflict into issuing higher than warranted ratings. Furthermore, the proposal also is designed to make it more difficult for arrangers to exert influence over the NRSROs they hire to determine ratings for structured finance products. Specifically, by opening up the rating process to more NRSROs, the proposal could make it easier for the hired NRSRO to resist such pressure by increasing the likelihood that any steps taken to inappropriately favor the arranger could be exposed to the market through the ratings issued by other NRSROs.

The Commission generally requests comment on all aspects of these Proposed Rule Amendment benefits. In addition, the Commission requests specific comment on the following items related to these benefits.

- Are there metrics available to quantify these benefits and any other benefits the commenter may identify, including the identification of sources

¹³³ For the purposes of this cost/benefit analysis, the Commission is using salary data from the Securities Industry and Financial Markets Association (“SIFMA”) Report on Management and Professional Earnings in the Securities Industry 2007, which provides base salary and bonus information for middle-management and professional positions within the securities industry. The Commission believes that the salaries for these securities industry positions would be comparable to the salaries of similar positions in the credit rating industry. Finally, the salary costs derived from the report and referenced in this cost benefit section are modified to account for an 1800-hour work year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. The Commission used comparable assumptions in adopting the final rules implementing the Rating Agency Act in 2007, requested comments on such assumptions, and received no comments in response to its request. See *June 5, 2007 Adopting Release*, 72 FR at 33611, note 576. Hereinafter, references to data derived from the report as modified in the manner described above will be cited as “SIFMA 2007 Report as Modified.”

¹³⁴ *Senate Report*, p. 2.

¹³⁵ *Id.*, p. 7.

¹³⁶ 15 U.S.C. 78o-7(h)(2).

¹³⁷ *Id.*

of empirical data that could be used for such metrics?

Commenters should provide specific data and analysis to support any comments they submit with respect to these benefit estimates.

B. Costs

The cost of compliance with the Proposed Rule Amendments to a given NRSRO would depend on its size and the complexity of its business activities. The size and complexity of NRSROs vary significantly. Therefore, the cost could vary significantly across NRSROs. The Commission is providing estimates of the average cost per NRSRO taking into consideration the variance in size and complexity of NRSROs. The cost of compliance would also vary depending on which classes of credit ratings an NRSRO issues and how many outstanding ratings it has in each class. NRSROs which issue credit ratings for structured finance products would incur higher compliance costs than those NRSROs which do not issue such credit ratings or issue very few credit ratings in that class. For these reasons, the cost estimates represent the average cost across all NRSROs.

1. Proposed Amendment to Rule 17g-2

The proposed amendment to Rule 17g-2 would require NRSROs to make 100% of their ratings action histories for issuer-paid credit ratings publicly available in an XBRL Interactive Data File, with a one year grace period.¹³⁸ As discussed with respect to the PRA, the Commission estimates that, on average, an NRSRO would spend approximately 45 hours to publicly disclose this information in an XBRL Interactive Data File and, thereafter, 15 hours per year to update the information.¹³⁹ Furthermore, as discussed in the PRA the Commission estimates that although there will be 30 NRSROs, this amendment only applies to seven NRSROs. For these reasons, the total aggregate one-time burden to the industry to make the history of its rating actions publicly available in an XBRL Interactive Data File would be 315 hours¹⁴⁰ and the total aggregate annual burden hours would be 105 hours.¹⁴¹ For cost purposes, the Commission preliminarily believes that a senior programmer would perform these

functions. Accordingly, the Commission estimates that an NRSRO would incur an average one-time cost of \$13,005 and an average annual cost of \$4,335, as a result of the proposed amendment.¹⁴² Consequently, the total aggregate one-time cost to the industry would be \$91,035¹⁴³ and the total aggregate annual cost to the industry would be \$30,345.¹⁴⁴

In addition, the proposed rules may impose other costs. For example, making some information about ratings action histories available to the public for free may have some impact on the business models of NRSROs, although the proposed rules are designed to minimize any impact. Further, the rule may affect NRSROs with different business models differently, although the Commission seeks comment on how best to promote competition among NRSROs. The rule also may impose costs to purchase software to make this information publicly available.

The Commission notes that in the *Companion Adopting Release* the Commission provided cost estimates for complying with all the final amendments to Rule 17g-2 being adopted. In that release, the Commission used a different methodology based on cost data provided by one large NRSRO.¹⁴⁵ The Commission is not relying exclusively on cost data for the purposes of these amendments to Rule 17g-2 because the NRSRO was discussing cost estimates for complying with all the proposed amendments to Rule 17g-2 (not just the amendment relating to the requirement to publicly disclose certain ratings action histories in an XBRL format).

The Commission generally requests comment on all aspects of these cost estimates for the proposed amendments to Rule 17g-2. In addition, the Commission requests specific comment on the following items related to these cost estimates:

- What costs would result from lost revenues incurred because NRSROs subject to the rule may not be able to sell ratings action histories if they are publicly disclosed under the proposed rule?
- If the Commission were to adopt a final rule that subjected subscriber-paid

credit ratings to the public disclosure requirement, would the cost estimates per firm be the same as estimated by the Commission above or would they change. Commenters should give specific cost estimates in their comments.

- If the Commission were to adopt a final rule subjecting subscriber-paid credit ratings to the public disclosure requirements being adopted today (the random sample of 10% of issuer-paid credit ratings in a class of credit rating), would the cost estimates per firm be the same as estimated by the Commission in the *Adopting Release* or would they change. Commenters should give specific cost estimates in their comments.

- Would these proposals impose costs on other market participants, including persons who use credit ratings to make investment decisions or for regulatory purposes, and persons who purchase services and products from NRSROs?

- Would there be costs in addition to those identified above, such as costs arising from systems changes and restructuring business practices to account for the new reporting requirement?

- Should the Commission rely more on the cost data provided by the large NRSRO in its comments to the amendments to Rule 17g-2 proposed in the *June 16, 2008 Proposing Release*? If so, how should the Commission modify that cost data to reflect that the *June 16, 2008 Proposing Release* proposed several different amendments to Rule 17g-2?

Commenters should provide specific data and analysis to support any comments they submit with respect to these burden estimates.

2. Re-Proposed Rule 17g-5

Rule 17g-5 requires an NRSRO to manage and disclose certain conflicts of interest.¹⁴⁶ The rule also prohibits specific types of conflicts of interest.¹⁴⁷ The re-proposed amendments to Rule 17g-5 would add an additional conflict to paragraph (b) of Rule 17g-5 for NRSROs to manage. This re-proposed conflict of interest would be issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of an asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument.¹⁴⁸ Under the re-proposal, an NRSRO

¹³⁸ See proposed amendment to Rule 17g-2(d).

¹³⁹ The Commission also bases this estimate on the estimated one time and annual burden hours it would take an NRSRO to publicly disclose its Form NRSRO on its Web site. No comments were received on these estimates in the final rule release. See *June 5, 2007 Adopting Release*, 72 FR at 33609.

¹⁴⁰ 45 hours × 7 NRSROs = 315 hours.

¹⁴¹ 15 hours × 7 NRSROs = 105 hours.

¹⁴² The SIFMA 2007 Report as Modified indicates that the average hourly cost for a Senior Programmer is \$289. Therefore, the average one-time cost would be \$13,005 [(45 hours) × (\$289 per hour)] and the average annual cost would be \$4,335 [(15 hours per year) × (\$289 per hour)].

¹⁴³ 315 hours × \$289 per hour.

¹⁴⁴ 105 hours × \$289 per hour.

¹⁴⁵ See letter dated July 28, 2008 from Michel Madelain, Chief Operating Officer, Moody's Investors Service.

¹⁴⁶ 17 CFR 240.17g-5.

¹⁴⁷ 17 CFR 240.17g-5(c).

¹⁴⁸ See re-proposed Rule 17g-5(b)(9). The current paragraph (b)(9) would be renumbered as (b)(10).

would be prohibited from issuing a credit rating for a structured finance product, unless certain information about the transaction and the assets underlying the structured finance product are disclosed.¹⁴⁹

Specifically, an NRSRO rating such products would need to disclose to other NRSROs the following information on a password protected Internet Web site:

- A list of each such security or money market instrument for which it is currently in the process of determining an initial credit rating in chronological order and identifying the type of security or money market instrument, the name of the issuer, the date the rating process was initiated, and the Internet Web site address where the issuer, sponsor, or underwriter of the security or money market instrument represents that the information described in paragraphs (a)(3)(iii)(C) and (D) of re-proposed Rule 17g-5 can be accessed.¹⁵⁰

The Commission estimates that the average one-time cost to each NRSRO to establish the Internet Web site would be \$65,850¹⁵¹ and the total aggregate one-time cost to all NRSROs would be \$1,975,500.¹⁵² Further, as discussed with respect to the PRA, the Commission estimates that it would take a large NRSRO approximately 3,880 hours¹⁵³ and a small NRSRO approximately 120 hours¹⁵⁴ to disclose the information under re-proposed Rule 17g-5(a)(3)(i), on an annual basis, for a total aggregate annual hour burden of 14,880 hours.¹⁵⁵ For these reasons, the Commission estimates that the average annual cost to a large NRSRO would be \$795,400, the average annual cost to NRSROs not in that category would be

\$24,600¹⁵⁶ and the total annual cost to the NRSROs would be \$3,050,400.¹⁵⁷

The Commission received one comment on the proposed costs in the *June 16, 2008 Proposing Release*.¹⁵⁸ The commenter stated that if the amendments to Rule 17g-5(a)(3) were adopted, as proposed, it would cost the NRSRO approximately \$29,750,000 to build, test, and deploy a system to comply with the June proposed amendments, and that the annual ongoing costs would be approximately \$8,224,700. These estimates were based on the NRSRO being the entity that is required to disclose the information. The commenter stated it would need to disclose information that came to it in electronic, e-mail, paper, and voice formats, to sort through which information was used to determine the rating, and to then disclose this information. The re-proposed amendments do not require the NRSRO to disclose the information provided to it to determine initial ratings and subsequently monitor those ratings (the arranger would need to disclose this information).

In addition, the proposed rule requiring NRSROs and arrangers to share information with other NRSROs may affect the quantity and quality of information they provide. Moreover, the requirement to disclose ratings actions histories for a random sample of 10% of certain outstanding credit ratings may create an incentive not to access the information. The Commission seeks comments on the possible effects and alternatives to mitigate them. The proposed rule also could require an NRSRO to purchase software to implement the public disclosure of the ratings action histories.

The re-proposed amendments also would require that the arranger to disclose the following information:

- All information the issuer, sponsor, or underwriter provides to the nationally recognized statistical rating organization for the purpose of determining the initial credit rating for the security or money market instrument, including information about the characteristics of the assets underlying or referenced by the security or money market instrument, and the legal structure of the security or money

market instrument, at the same time such information is provided to the nationally recognized statistical rating organization; and

- All information the issuer, sponsor, or underwriter provides to the nationally recognized statistical rating organization for the purpose of undertaking credit rating surveillance on the security or money market instrument, including information about the characteristics and performance of the assets underlying or referenced by the security or money market instrument at the same time such information is provided to the nationally recognized statistical rating organization.¹⁵⁹

For purposes of the PRA, the Commission estimates that it would take a respondent approximately 300 hours to develop a system, as well as policies and procedures to disclose the information as required under the re-proposed rule. This would result in a total one-time hour burden of 60,000 hours for 200 respondents.¹⁶⁰ For these reasons, the Commission estimates that the average one-time cost to each respondent would be \$65,850¹⁶¹ and the total aggregate one-time cost to the industry would be \$13,116,000.¹⁶²

As discussed with respect to the PRA, in addition to the one-time hour burden, respondents also would be required to disclose the required information under re-proposed Rule 17g-5(a)(3) on a transaction by transaction basis. Based on staff information gained from the NRSRO examination process, the Commission estimates that the re-proposed amendments would require each respondent to disclose information with respect to approximately 20 new transactions per year and that it would take approximately 1 hour per transaction to make the information publicly available.¹⁶³ Therefore, as

¹⁴⁹ See re-proposed Rule 17g-5(a)(3).

¹⁵⁰ See re-proposed Rule 17g-5(a)(3)(i).

¹⁵¹ The Commission estimates an NRSRO would have a Compliance Manager and a Programmer Analyst perform these responsibilities, and that each would spend 50% of the estimated hours performing these responsibilities. The SIFMA 2007 Report as Modified indicates that the average hourly cost for a Compliance Manager is \$245 and the average hourly cost for a Programmer Analyst is \$194. Therefore, the average one-time cost to an NRSRO would be $(150 \text{ hours} \times \$245) + (150 \text{ hours} \times \$194) = \$65,850$.

¹⁵² $\$65,850 \times 30 \text{ NRSROs} = \$1,975,500$

¹⁵³ $3,880 \text{ transactions} \times 1 \text{ hour} = 3,880 \text{ hours}$.

¹⁵⁴ $120 \text{ transactions} \times 1 \text{ hour} = 120 \text{ hours}$.

¹⁵⁵ $(3,880 \text{ hours} \times 3) + (120 \text{ hours} \times 27) = 14,880 \text{ hours}$.

¹⁵⁶ The Commission estimates an NRSRO would have a Webmaster perform these responsibilities. The SIFMA 2007 Report as Modified indicates that the average hourly cost for a Webmaster is \$205. Therefore, the average one-time cost to a large NRSRO would be $3,880 \text{ hours} \times \$205 = \$795,400$ and the average one-time cost to NRSROs not in that category would be $120 \text{ hours} \times \$205 = \$24,600$.

¹⁵⁷ $(\$795,400 \times 3) + (\$24,600 \times 27) = \$3,050,400$.

¹⁵⁸ S&P Letter.

¹⁵⁹ See re-proposed Rule 17g-5(a)(3)(iii).

¹⁶⁰ $300 \text{ hours} \times 200 \text{ respondents} = 60,000 \text{ hours}$.

¹⁶¹ The Commission estimates an issuer would have a Compliance Manager and a Programmer Analyst perform these responsibilities, and that each would spend 50% of the estimated hours performing these responsibilities. The SIFMA 2007 Report as Modified indicates that the average hourly cost for a Compliance Manager is \$245 and the average hourly cost for a Programmer Analyst is \$194. Therefore, the average one-time cost to an issuer would be $(150 \text{ hours} \times \$245) + (150 \text{ hours} \times \$194) = \$65,850$.

¹⁶² $\$65,850 \times 200 \text{ respondents} = \$13,116,000$.

¹⁶³ This estimate assumes the respondent has already implemented the system and policies and procedures for disclosure. The Commission cannot estimate the number of initial transactions per year with certainty. The Commission believes that the number of deals that each respondent will disclose information on will vary widely based on the size of the entity. In addition, the Commission preliminarily believes that the number of asset-backed or mortgage-backed issuances being rated by

discussed with respect to the PRA, the Commission estimates that it would take a respondent approximately 20 hours¹⁶⁴ to disclose this information under re-proposed Rule 17g-5(a)(3)(iii), on an annual basis, for a total aggregate annual hour burden of 4,000.¹⁶⁵ For these reasons, the Commission estimates that the average annual cost to a respondent would be \$4,100¹⁶⁶ and the total annual cost to the industry would be \$820,000.¹⁶⁷

Re-proposed Rule 17g-5(a)(3)(iii)(D) would require respondents to disclose information provided to an NRSRO to undertake credit rating surveillance on a structured product. Because surveillance would cover more than just initial ratings, the Commission estimates that a respondent would be required to disclose information with respect to approximately 125 transactions on an ongoing basis and that the information would be provided to the NRSRO on a monthly basis. As discussed with respect to the PRA, the Commission estimates that each respondent would spend approximately 750 hours¹⁶⁸ on an annual basis disclosing the information for a total aggregate annual burden hours of 150,000 hours.¹⁶⁹ For these reasons, the Commission estimates that the average annual cost to a respondent would be \$153,750¹⁷⁰ and the total annual cost to the industry would be \$30,750,000.¹⁷¹

Finally, an NRSRO that wishes to access information on another NRSRO's Web site or on an arranger's Web site would need to provide the Commission with an annual certification described in proposed new paragraph (e) to Rule 17g-5. In the PRA, the Commission estimates it would take an NRSRO approximately 2 hours¹⁷² to complete the proposed paragraph (e) certification for an aggregate annual hour burden to the industry of 60 hours.¹⁷³ For these

NRSROs in the next few years would be difficult to predict given the recent credit market turmoil.

¹⁶⁴ 20 transactions × 1 hour = 20 hours.

¹⁶⁵ 20 hours × 200 respondents = 4,000 hours.

¹⁶⁶ The Commission estimates an NRSRO would have a Webmaster perform these responsibilities. The SIFMA 2007 Report as Modified indicates that the average hourly cost for a Webmaster is \$205. Therefore, the average one-time cost to a respondent would be 20 hours × \$205 = \$4,100.

¹⁶⁷ \$4,100 × 200 respondents = \$820,000.

¹⁶⁸ 125 transactions × 30 minutes × 12 months = 45,000 minutes / 60 minutes = 750 hours.

¹⁶⁹ 750 hours × 200 respondents = 150,000 hours.

¹⁷⁰ The Commission estimates an NRSRO would have a Webmaster perform these responsibilities. The SIFMA 2007 Report as Modified indicates that the average hourly cost for a Webmaster is \$205. Therefore, the average one-time cost to a respondent would be 750 hours × \$205 = \$153,750.

¹⁷¹ \$153,750 × 200 respondents = \$30,750,000.

¹⁷² 20% of 10 hours = 2 hours.

¹⁷³ 2 hours × 30 NRSROs = 60 hours.

reasons, the Commission estimates it would cost an NRSRO approximately \$490 dollars per year¹⁷⁴ and the industry \$14,700 per year to comply with the proposed requirement.¹⁷⁵

The Commission generally requests comment on all aspects of these cost estimates for the re-proposed amendments to Rule 17g-5. In addition, the Commission requests specific comment on the following items related to these cost estimates:

- Would these proposals impose costs on other market participants, including persons who use credit ratings to make investment decisions or for regulatory purposes, and persons who purchase services and products from NRSROs?
- Would there be costs in addition to those identified above, such as costs arising from systems changes and restructuring business practices to account for the new reporting requirement?

Commenters should provide specific data and analysis to support any comments they submit with respect to these burden estimates.

C. Total Estimated Costs of This Rulemaking

Based on the figures discussed above, the Commission estimates that the total one-time costs related to this re-proposed rulemaking would be approximately \$15,182,535¹⁷⁶ and the total annual costs would be \$34,665,445.¹⁷⁷

VII. Consideration of Burden on Competition and Promotion of Efficiency, Competition, and Capital Formation

Under Section 3(f) of the Exchange Act,¹⁷⁸ the Commission shall, when engaging in rulemaking that requires the Commission to consider or determine if an action is necessary or appropriate in the public interest, consider whether the action will promote efficiency, competition, and capital formation. Section 23(a)(2) of the Exchange Act¹⁷⁹ requires the Commission to consider the anticompetitive effects of any rules the Commission adopts under the Exchange Act. Section 23(a)(2) prohibits the

¹⁷⁴ The Commission estimates that an NRSRO would have a Compliance Manager prepare the annual certification. The 2007 SIFMA Report as Modified indicates that the average hourly cost for a Compliance Manager is \$245. Therefore, the average annual cost to an NRSRO would be: 2 hours × \$245 = \$490.

¹⁷⁵ 30 NRSROs × \$490 = \$14,700.

¹⁷⁶ \$91,035 + \$1,975,500 + \$13,116,000 = \$15,182,535.

¹⁷⁷ \$30,345 + \$3,050,400 + \$820,000 + \$30,750,000 + \$14,700 = \$34,665,445.

¹⁷⁸ 15 U.S.C. 78c(f).

¹⁷⁹ 15 U.S.C. 78w(a)(2).

Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. As discussed below, the Commission's preliminary view is that the Proposed Rule Amendments should promote efficiency, competition, and capital formation.

The proposed amendment to paragraph (d) of Rule 17g-2 is designed to provide the marketplace with additional information for comparing the ratings performance of NRSROs that determine issuer-paid credit ratings and, therefore, provide users of credit ratings with more useful metrics with which to compare these NRSROs. Increased disclosure of ratings history for issuer-paid credit ratings could make the performance of the NRSROs more transparent to the marketplace and, thereby, highlight those firms that do a better job analyzing credit risk. This could cause users of credit ratings to give greater weight to credit ratings of NRSROs that distinguish themselves by determining more accurate credit ratings than their peers. Moreover, to the extent this improves the quality of the credit ratings, persons that use credit ratings to make investment or lending decisions would have better information upon which to base their decisions. As a consequence, the rule could result in a more efficient allocation of capital and loans to issuers and obligors based on the risk appetites of the investors and lenders. The Commission believes that this enhanced disclosure would benefit smaller NRSROs that determine issuer-paid credit ratings to the extent they do a better job of assessing creditworthiness.

The Commission is not proposing to require the public disclosure of ratings action histories for subscriber-paid credit ratings at this time out of competitive concerns. However, as indicated by the detailed solicitations of comment above, the Commission is considering how to make more information publicly available and accessible about the performance of these ratings. The Commission believes that the proposed rule would address concerns about the competitive impact of the public disclosure requirement and at the same time foster greater accountability of NRSROs with respect to their issuer-paid credit ratings as well as increase competition among NRSROs by making it easier for persons to analyze the actual performance of their credit ratings.

The re-proposed amendments to paragraphs (a) and (b) of Rule 17g-5 could enhance competition among NRSROs. The goal of these proposals is

to provide a mechanism for NRSROs to determine unsolicited credit ratings, which would provide users of credit ratings with more assessments of the creditworthiness of a structured finance product. This mechanism could expose NRSROs whose procedures and methodologies for determining credit ratings are less conservative in order to gain business. It also could mitigate the impact of rating shopping, since NRSROs not hired to rate a deal could nonetheless issue a credit rating. These potential impacts of the re-proposed amendments could help to restore confidence in credit ratings and, thereby, promote capital formation. They also could promote the more efficient allocation of capital by investors to the extent the quality of credit ratings is improved. In addition, by creating a mechanism for determining unsolicited ratings, they could increase competition by allowing smaller NRSROs to demonstrate proficiency in rating structured products.

The Commission generally requests comment on all aspects of this analysis of the burden on competition and promotion of efficiency, competition, and capital formation. In addition, the Commission requests specific comment on the following items related to this analysis:

- Would the Proposed Rule Amendments have an adverse effect on efficiency, competition, and capital formation that is neither necessary nor appropriate in furtherance of the purposes of the Exchange Act? Commenters should provide specific data and analysis to support any comments they submit with respect to these burden estimates.

VIII. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or “SBREFA,”¹⁸⁰ the Commission must advise OMB whether a proposed regulation constitutes a major rule. Under SBREFA, a rule is “major” if it has resulted in, or is likely to result in:

- An annual effect on the economy of \$100 million or more;
- A major increase in costs or prices for consumers or individual industries;
- or
- A significant adverse effect on competition, investment, or innovation.

If a rule is “major,” its effectiveness will generally be delayed for 60 days pending Congressional review. The

Commission requests comment on the potential impact of the Proposed Rule Amendments on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their view to the extent possible.

IX. Initial Regulatory Flexibility Analysis

The Commission has prepared the following Initial Regulatory Flexibility Analysis (“IRFA”), in accordance with the provisions of the Regulatory Flexibility Act,¹⁸¹ regarding the Proposed Rule Amendments to Rules 17g–2 and 17g–5 under the Exchange Act.

The Commission encourages comments with respect to any aspect of this IRFA, including comments with respect to the number of small entities that may be affected by the Proposed Rule Amendments. Comments should specify the costs of compliance with the Proposed Rule Amendments and suggest alternatives that would accomplish the goals of the amendments. Comments will be considered in determining whether a Final Regulatory Flexibility Analysis is required and will be placed in the same public file as comments on the Proposed Rule Amendments. Comments should be submitted to the Commission at the addresses previously indicated.

A. Reasons for the Proposed Action

The Proposed Rule Amendments would prescribe additional requirements for NRSROs to address concerns relating to the transparency of ratings actions and the conflicts of interest at NRSROs.

B. Objectives

The objectives of the Rating Agency Act are “to improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating industry.”¹⁸² The Proposed Rule Amendments are designed to improve the transparency of credit ratings performance by making credit ratings actions publicly available and the accuracy of credit ratings for structured finance products by increasing competition among the NRSROs that rate these securities and money market instruments.

C. Legal Basis

Pursuant to the Sections 3(b), 15E, 17(a), 23(a) and 36 of the Exchange Act,¹⁸³

D. Small Entities Subject to the Rule

Paragraph (a) of Rule 0–10 provides that for purposes of the Regulatory Flexibility Act, a small entity “[w]hen used with reference to an ‘issuer’ or a ‘person’ other than an investment company” means “an ‘issuer’ or ‘person’ that, on the last day of its most recent fiscal year, had total assets of \$5 million or less.”¹⁸⁴ The Commission believes that an NRSRO with total assets of \$5 million or less would qualify as a “small” entity for purposes of the Regulatory Flexibility Act.

As noted in the Adopting Release,¹⁸⁵ the Commission believes that approximately 30 credit rating agencies ultimately would be registered as an NRSRO. Of the approximately 30 credit rating agencies estimated to be registered with the Commission, the Commission estimates that approximately 20 may be “small” entities for purposes of the Regulatory Flexibility Act.¹⁸⁶

E. Reporting, Recordkeeping, and Other Compliance Requirements

The proposed amendment would revise paragraph (d) of Rule 17g–2 to require NRSROs to publicly disclose, in XBRL format and with a one-year delay, ratings action histories for all outstanding issuer-paid credit ratings.¹⁸⁷ The disclosure of this information could enhance the metrics by which users of credit ratings evaluate the performance of NRSROs determining issuer-paid credit ratings.

The re-proposal would amend paragraphs (a) and (b) of Rule 17g–5 and add new paragraph (e) to the rule. Under the re-proposed amendments, NRSROs that are paid by arrangers to determine credit ratings for structured finance products would be required to maintain a password protected Internet Web site that lists each deal they have been hired to rate. They also would be required to obtain representations from the arranger hiring the NRSRO to determine the rating that the arranger will post all information provided to the NRSRO to determine the rating and, thereafter, to monitor the rating on a password protected Internet Web site.

¹⁸³ 15 U.S.C. 78c(b), 78o–7, 78q(a), and 78w.

¹⁸⁴ 17 CFR 240.0–10(a).

¹⁸⁵ June 5, 2007 Adopting Release, 72 FR at 33618.

¹⁸⁶ See 17 CFR 240.0–10(a).

¹⁸⁷ Proposed amendment to paragraph (d) of Rule 17g–2.

¹⁸⁰ Pub. L. No. 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

¹⁸¹ 5 U.S.C. 603.

¹⁸² See Senate Report.

NRSROs not hired to determine and monitor the ratings would be able to access the NRSRO Internet Web sites to learn of new deals being rated and then access the arranger Internet Web sites to obtain the information being provided by the arranger to the hired NRSRO during the entire initial rating process and, thereafter, for the purpose of surveillance. However, the ability of NRSROs to access these NRSRO and arranger Internet Web sites would be limited to NRSROs that certify to the Commission on an annual basis, among other things, that they are accessing the information solely for the purpose of determining or monitoring credit ratings, that they will keep the information confidential and treat it as material non-public information, and that they will determine credit ratings for at least 10% of the deals for which they obtain information. They also would be required to disclose in the certification the number of deals for which they obtained information through accessing the Internet Web sites and the number of ratings they issued using that information during the year covered by their most recent certification.

F. Duplicative, Overlapping, or Conflicting Federal Rules

The Commission believes that there are no federal rules that duplicate, overlap, or conflict with the Proposed Rule Amendments.

G. Significant Alternatives

Pursuant to Section 3(a) of the Regulatory Flexibility Act,¹⁸⁸ the Commission must consider certain types of alternatives, including: (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part of the rule, for small entities.

The Commission is considering whether it is necessary or appropriate to establish different compliance or reporting requirements or timetables; or clarify, consolidate, or simplify compliance and reporting requirements under the rule for small entities. Because the Proposed Rule Amendments are designed to improve the overall quality of ratings and enhance the Commission's oversight,

the Commission preliminarily believes that small entities should be covered by the rule.

H. Request for Comments

The Commission encourages the submission of comments to any aspect of this portion of the IRFA. Comments should specify costs of compliance with the Proposed Rule Amendments and suggest alternatives that would accomplish the objective of the Proposed Rule Amendments.

X. Statutory Authority

The Commission is proposing amendments to Rule 17g-5 pursuant to the authority conferred by the Exchange Act, including Sections 3(b), 15E, 17, 23(a) and 36.¹⁸⁹

List of Subjects in 17 CFR Parts 240 and 243

Brokers, Reporting and recordkeeping requirements, Securities.

Text of Re-Proposed Rules

In accordance with the foregoing, the Commission proposes to amend Title 17, Chapter II of the Code of Federal Regulations as follows.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

2. Section 240.17g-2, as amended by a final rule published elsewhere in this issue of the **Federal Register**, is amended by revising paragraph (d) to read as follows:

§ 240.17g-2 Records to be made and retained by nationally recognized statistical rating organizations.

* * * * *

(d)(1) *Manner of retention.* An original, or a true and complete copy of the original, of each record required to be retained pursuant to paragraphs (a) and (b) of this section must be maintained in a manner that, for the applicable retention period specified in paragraph (c) of this section, makes the original record or copy easily accessible to the principal office of the nationally recognized statistical rating organization

¹⁸⁹ 15 U.S.C. 78c(b), 78o-7, 78q, 78w(a), and 78mm.

and to any other office that conducted activities causing the record to be made or received.

(2) A nationally recognized statistical rating organization must make and keep publicly available on its corporate Internet Web site in an XBRL (eXtensible Business Reporting Language) format the ratings action information for ten percent of the outstanding credit ratings required to be retained pursuant to paragraph (a)(8) of this section and which were paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated, selected on a random basis, for each class of credit rating for which it is registered and for which it has issued 500 or more outstanding credit ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated. Any ratings action required to be disclosed pursuant to this paragraph (d)(2) need not be made public less than six months from the date such ratings action is taken. If a credit rating made public pursuant to this paragraph (d)(2) is withdrawn or the instrument rated matures, the nationally recognized statistical rating organization must randomly select a new outstanding credit rating from that class of credit ratings in order to maintain the 10 percent disclosure threshold. In making the information available on its corporate Internet Web site, the nationally recognized statistical rating organization shall use the List of XBRL Tags for NRSROs as specified on the Commission's Internet Web site.

(3) A nationally recognized statistical rating organization must make and keep publicly available on its corporate Internet Web site in an XBRL (eXtensible Business Reporting Language) format the ratings action information required to be retained pursuant to paragraph (a)(8) of this section for any rating initially rated by the nationally recognized statistical rating organization on or after June 26, 2007 paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated. Any ratings action required to be disclosed pursuant to this paragraph (d)(3) need not be made public less than twelve months from the date such ratings action is taken. In making the information available on its corporate Internet Web site, the nationally recognized statistical rating organization shall use the List of XBRL Tags for NRSROs as specified on the Commission's Internet Web site.

* * * * *

3. Section 240.17g-5 is amended by:

¹⁸⁸ 5 U.S.C. 603(c).

- a. Removing the word “and” at the end of paragraph (a)(1);
- b. Removing the period at the end of paragraph (a)(2) and in its place adding “; and”;
- c. Adding paragraph (a)(3);
- d. Redesignating paragraph (b)(9) as paragraph (b)(10); and
- e. Adding new paragraph (b)(9) and paragraph (e);

The additions read as follows:

§ 240.17g-5 Conflicts of interest.

(a) * * *

(3) In the case of the conflict of interest identified in paragraph (b)(9) of this section relating to issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction, the nationally recognized statistical rating organization:

(i) Maintains on a password-protected Internet Web site a list of each such security or money market instrument for which it is currently in the process of determining an initial credit rating in chronological order and identifying the type of security or money market instrument, the name of the issuer, the date the rating process was initiated, and the Internet Web site address where the issuer, sponsor, or underwriter of the security or money market instrument represents that the information described in paragraphs (a)(3)(iii)(C) and (D) of this section can be accessed;

(ii) Provides free and unlimited access to such password-protected Internet Web site during the applicable calendar year to any nationally recognized statistical rating organization that provides it with a copy of the certification described in paragraph (e) of this section that covers that calendar year;

(iii) Obtains from the issuer, sponsor, or underwriter of each such security or money market instrument a representation that can reasonably be relied upon that the issuer, sponsor, or underwriter will:

(A) Maintain the information described in paragraphs (a)(3)(iii)(C) and (D) of this section available at an identified password-protected Internet Web site that presents the information in a manner indicating which information currently should be relied on to determine or monitor the credit rating;

(B) Provide access to such password-protected Internet Web site during the

applicable calendar year to any nationally recognized statistical rating organization that provides it with a copy of the certification described in paragraph (e) of this section that covers that calendar year;

(C) Post on such password-protected Internet Web site all information the issuer, sponsor, or underwriter provides to the nationally recognized statistical rating organization for the purpose of determining the initial credit rating for the security or money market instrument, including information about the characteristics of the assets underlying or referenced by the security or money market instrument, and the legal structure of the security or money market instrument, at the same time such information is provided to the nationally recognized statistical rating organization; and

(D) Post on such password-protected Internet Web site all information the issuer, sponsor, or underwriter provides to the nationally recognized statistical rating organization for the purpose of undertaking credit rating surveillance on the security or money market instrument, including information about the characteristics and performance of the assets underlying or referenced by the security or money market instrument at the same time such information is provided to the nationally recognized statistical rating organization.

* * * * *

(b) * * *

(9) Issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument.

* * * * *

(e) *Certification.* In order to access a password-protected Internet Web site described in paragraph (a)(3) of this section, a nationally recognized statistical rating organization must furnish to the Commission, for each calendar year for which it is requesting a password, the following certification, signed by a person duly authorized by the certifying entity:

The undersigned hereby certifies that it will access the Internet Web sites described in § 240.17g-5(a)(3) solely for the purpose of determining or monitoring credit ratings. Further, the undersigned certifies that it will keep the information it accesses pursuant to § 240.17g-5(a)(3) confidential and treat it as

material nonpublic information subject to its written policies and procedures established, maintained, and enforced pursuant to section 15E(g)(1) of the Act (15 U.S.C. 78o-7(g)(1)) and § 240.17g-4. Further, the undersigned certifies that it will determine and maintain credit ratings for at least 10% of the issued securities and money market instruments for which it accesses information pursuant to § 240.17g-5(a)(3)(iii), if it accesses such information for 10 or more issued securities or money market instruments in the calendar year covered by the certification. Further, the undersigned certifies one of the following as applicable: (1) In the most recent calendar year during which it accessed information pursuant to § 240.17g-5(a)(3), the undersigned accessed information for [Insert Number] issued securities and money market instruments through Internet Web sites described in § 240.17g-5(a)(3) and determined and maintained credit ratings for [Insert Number] of such securities and money market instruments; or (2) The undersigned previously has not accessed information pursuant to § 240.17g-5(a)(3) 10 or more times in a calendar year.

PART 243—REGULATION FD

4. The authority citation for part 243 continues to read as follows:

Authority: 15 U.S.C. 78c, 78i, 78j, 78m, 78o, 78w, 78mm, and 80a-29, unless otherwise noted.

5. Section § 243.100 is amended by revising paragraph (b)(2)(iii) to read as follows:

§ 243.100 General rule regarding selective disclosure.

* * * * *

(b) * * *

(2) * * *

(iii) If the information is disclosed solely for the purpose of developing a credit rating, to:

(A) Any nationally recognized statistical rating organization, as that term is defined in Section 3(a)(62) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(62)), pursuant to § 240.17g-5(a)(3) of this chapter; or

(B) Any credit rating agency as that term is defined in Section 3(a)(62) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(62)) that makes its credit ratings publicly available; or

* * * * *

By the Commission.

Dated: February 2, 2009.

Elizabeth M. Murphy,
Secretary.

[FR Doc. E9-2514 Filed 2-6-09; 8:45 am]

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Federal Register

**Monday,
February 9, 2009**

Part III

Environmental Protection Agency

40 CFR Part 63

**Revision of Source Category List for
Standards Under Section 112(k) of the
Clean Air Act; National Emission
Standards for Hazardous Air Pollutants:
Area Source Standards for Aluminum,
Copper, and Other Nonferrous Foundries;
Proposed Rule**

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA-HQ-OAR-2008-0236; FRL-8766-6]

RIN 2060-AO93

Revision of Source Category List for Standards Under Section 112(k) of the Clean Air Act; National Emission Standards for Hazardous Air Pollutants: Area Source Standards for Aluminum, Copper, and Other Nonferrous Foundries

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is revising the area source category list by changing the name of the "Secondary Aluminum Production" category to "Aluminum Foundries" and the "Nonferrous Foundries, not elsewhere classified (nec)" category to "Other Nonferrous Foundries." At the same time, EPA is proposing national emission standards for the Aluminum Foundries, Copper Foundries, and Other Nonferrous Foundries area source categories. These proposed emission standards for new and existing sources reflect EPA's proposed determination regarding the generally available control technology or management practices for each area source category.

DATES: Comments must be received on or before March 11, 2009 unless a public hearing is requested by February 19, 2009. If a hearing is requested on the proposed rule, written comments must be received by March 26, 2009. Under the Paperwork Reduction Act, comments on the information collection provisions are best assured of having full effect if the Office of Management and Budget (OMB) receives a copy of your comments on or before March 11, 2009.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2008-0236, by one of the following methods:

- <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.
- *E-mail:* Comments may be sent by electronic mail (e-mail) to a-and-r-Docket@epa.gov, Attention Docket ID No. EPA-HQ-OAR-2008-0236.
- *Fax:* Fax your comments to: 202-566-9744, Attention Docket ID No. EPA-HQ-OAR-2008-0236.
- *Mail:* Send your comments to: Air and Radiation Docket and Information Center, Environmental Protection Agency, Mailcode: 2822T, 1200

Pennsylvania Ave., NW., Washington, DC 20460, Attention: Docket ID No. EPA-HQ-OAR-2008-0236. Please include a total of two copies. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th St., NW., Washington, DC 20503.

• *Hand Delivery or Courier:* Deliver your comments to EPA Docket Center, Room 3334, 1301 Constitution Ave., NW., Washington, DC 20460. Such deliveries are only accepted during the Docket Center's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-HQ-OAR-2008-0236. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means that 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 will be made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available (e.g., CBI or other information whose disclosure is restricted by statute). Certain other

material, such as copyrighted material, will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the EPA Docket Center, Public Reading Room, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air Docket is (202) 566-1742.

FOR FURTHER INFORMATION CONTACT: For questions about the proposed standards for aluminum foundries, contact Mr. David Cole, Office of Air Quality Planning and Standards, Outreach and Information Division, Regulatory Development and Policy Analysis Group (C404-05), Environmental Protection Agency, Research Triangle Park, NC 27711; Telephone Number: (919) 541-5565; Fax Number: (919) 541-0242; E-mail address: Cole.David@epa.gov. For questions about the proposed standards for copper foundries and other nonferrous foundries, contact Mr. Gary Blais, Office of Air Quality Planning and Standards, Outreach and Information Division, Regulatory Development and Policy Analysis Group (C404-05), Environmental Protection Agency, Research Triangle Park, NC 27711; Telephone Number: (919) 541-3223; Fax Number: (919) 541-0242; E-mail address: Blais.Gary@epa.gov.

SUPPLEMENTARY INFORMATION: The information presented in this preamble is organized as follows:

- I. General Information
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 - C. Regulatory Flexibility Act
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 - H. Executive Order 13211: Actions Concerning Regulations That

- Significantly Affect Energy Supply, Distribution, or Use
- I. National Technology Transfer Advancement Act
- J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

I. General Information

A. Does this action apply to me?

The regulated categories and entities potentially affected by the proposed standards include:

Category	NAICS code ¹	Examples of regulated entities
Industry:		
Aluminum Foundries	331524	Area source facilities that pour molten aluminum into molds to manufacture aluminum castings (excluding die casting).
Copper Foundries	331525	Area source facilities that pour molten copper and copper-based alloys (e.g., brass, bronze) into molds to manufacture copper and copper-based alloy castings (excluding die casting).
Other Nonferrous Foundries	331528	Area source facilities that pour molten nonferrous metals (except aluminum and copper) into molds to manufacture nonferrous castings (excluding die casting). Establishments in this industry purchase nonferrous metals, such as nickel, zinc, and magnesium that are made in other establishments.

¹ North American Industry Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. To determine whether your facility would be regulated by this action, you should examine the applicability criteria in 40 CFR 63.11544 of subpart ZZZZZZ (National Emission Standards for Hazardous Air Pollutants: Area Source Standards for Aluminum, Copper, and Other Nonferrous Foundries). If you have any questions regarding the applicability of this action to a particular entity, consult either the air permit authority for the entity or your EPA Regional representative, as listed in 40 CFR 63.13 of subpart A (General Provisions).

B. What should I consider as I prepare my comments to EPA?

Do not submit CBI to EPA through <http://www.regulations.gov> or e-mail. Send or deliver information identified as CBI only to the following address: Roberto Morales, OAQPS Document Control Officer (C404-02), Office of Air Quality Planning and Standards, Environmental Protection Agency, Research Triangle Park, NC 27711, Attention: Docket ID No. EPA-HQ-OAR-2008-0236. Clearly mark the part or all of the information that you claim to be CBI. For CBI contained in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific

information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

C. Where can I get a copy of this document?

In addition to being available in the docket, an electronic copy of this proposed action will also be available on the Worldwide Web (WWW) through the Technology Transfer Network (TTN). Following signature, a copy of the proposed action will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at the following address: <http://www.epa.gov/ttn/oarpg/>. The TTN provides information and technology exchange in various areas of air pollution control.

D. When would a public hearing occur?

If anyone contacts EPA requesting to speak at a public hearing concerning the proposed rule by February 19, 2009, we will hold a public hearing on February 24, 2009. If you are interested in attending the public hearing, contact Ms. Christine Adams at (919) 541-5590 to verify that a hearing will be held. If a public hearing is held, it will be held at EPA's campus located at 109 T.W.

Alexander Drive in Research Triangle Park, NC, or an alternate site nearby.

II. Revision to the Source Category List

This notice announces a revision to the area source category list developed under our Integrated Urban Air Toxics Strategy pursuant to section 112(c)(3) of the Clean Air Act (CAA). The revision changes the name of the "Secondary Aluminum Production" source category to "Aluminum Foundries". The revision also changes the name of the "Nonferrous Foundries, nec" source category to "Other Nonferrous Foundries."¹

We are proposing to change the name of the "Secondary Aluminum Production" source category because we incorrectly named the category in the notice adding "Secondary Aluminum Production" to our list of area source categories (66 FR 8220, January 20, 2001). Upon identifying the error, we prepared a memorandum explaining the error.² The memorandum stated that the

¹ This is a change in name only and in no way affects the scope or coverage of the source category. Nonferrous foundries not elsewhere classified (nec) are simply those foundries melting nonferrous metals other than copper and aluminum. Copper and aluminum foundries were assigned their own unique SIC and NAICS codes.

² Memorandum from Barbara Driscoll to Docket Number OAR-2002-0036 (Docket for Final Revision of Area Source Category List Under Sections 112(c)(3) and 112(k)(3)(B)(iii) of the Clean Air Act). "Basis for Determination of New Area Source Categories Listed for Future Regulatory Development on November 22, 2002." Docket Item IV-B-11.

listing of the "Secondary Aluminum Production" category was not based on secondary aluminum facilities, but rather on the emissions from a different source category—"Aluminum Foundries." In addition, background documentation for the 1990 emissions inventory, from which the source category listed in the Integrated Urban Air Toxics Strategy was derived, states that the contribution of aluminum foundries to the CAA section 112(k) inventory of urban hazardous air pollutants (HAP) was based on the 1990 Toxic Release Inventory (TRI) for facilities reporting under Standard Industrial Classification (SIC) code 3365 ("aluminum foundries except die casting") and the obsolete SIC code 3361 ("aluminum foundries—castings").³ We are therefore changing the name of the "Secondary Aluminum Production" source category to "Aluminum Foundries", which is consistent with the inventory and the record supporting our original listing decision.

We also are revising the name of the "Nonferrous Foundries, nec" category to "Other Nonferrous Foundries" to clarify that the source category includes all nonferrous foundries except aluminum foundries and copper foundries. This change has no impact on the type of sources included in the category or on the scope of the category.

III. Background Information for the Proposed Area Source Standards

A. What is the statutory authority and regulatory approach for the proposed standards?

Section 112(d) of the CAA requires us to establish national emission standards for hazardous air pollutants (NESHAP) for both major and area sources of HAP that are listed for regulation under CAA section 112(c). A major source emits or has the potential to emit 10 tons per year (tpy) or more of any single HAP or 25 tpy or more of any combination of HAP. An area source is a stationary source that is not a major source.

Section 112(k)(3)(B) of the CAA calls for EPA to identify at least 30 HAP that, as the result of emissions from area sources, pose the greatest threat to public health in the largest number of urban areas. EPA implemented this provision in 1999 in the Integrated Urban Air Toxics Strategy (64 FR 38715, July 19, 1999). In the Strategy, EPA identified 30 HAP that pose the greatest potential health threat in urban areas;

these HAP are referred to as the "30 urban HAP." Section 112(c)(3) requires EPA to list sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the emissions of the 30 urban HAP are subject to regulation. We implemented these requirements through the Integrated Urban Air Toxics Strategy (64 FR 38715, July 19, 1999). A primary goal of the Strategy is to achieve a 75 percent reduction in cancer incidence attributable to HAP emitted from stationary sources.

Under CAA section 112(d)(5), we may elect to promulgate standards or requirements for area sources "which provide for the use of generally available control technology or management practices (GACT) by such sources to reduce emissions of hazardous air pollutants." Additional information on GACT is found in the Senate report on the legislation (Senate Report Number 101-228, December 20, 1989), which describes GACT as

* * * methods, practices and techniques which are commercially available and appropriate for application by the sources in the category considering economic impacts and the technical capabilities of the firms to operate and maintain the emissions control systems.

Consistent with the legislative history, we can consider costs and economic impacts in determining GACT, which is particularly important when developing regulations for source categories, like these, that have a majority of firms classified as small businesses according to the Small Business Administration standards in 13 CFR 121.201. Small businesses for the three foundry source categories that are the subject of this proposed rule are those with fewer than 500 employees.

Determining what constitutes GACT involves considering the control technologies and management practices that are generally available to the area sources in the source category. We also consider the standards applicable to major sources in the same industrial sector to determine if the control technologies and management practices are transferable and generally available to area sources. However, we did not identify any major sources in these three source categories.

Under appropriate circumstances, we may also consider technologies and practices at area and major sources in similar categories to determine whether such technologies and practices could be considered generally available for the area source category at issue. Finally, as noted above, in determining GACT for a particular area source category, we consider the costs and economic

impacts of available control technologies and management practices on that category.

We are proposing these three foundry national emission standards in response to a court-ordered deadline that requires EPA to issue standards for source categories listed pursuant to section 112(c)(3) and (k) by June 15, 2009 (*Sierra Club v. Johnson*, No. 01-1537, D.D.C., March 2006).

B. What source categories are affected by the proposed standards?

1. Overview of the Three Source Categories

Aluminum, copper, and other nonferrous foundries all produce castings of nonferrous metals that are used in products that require specific mechanical properties, machinability, and/or corrosion resistance. Aluminum, copper, and other nonferrous foundries account for approximately 16 percent by weight of all foundry castings (iron and steel foundries account for the other 84 percent). Aluminum and aluminum alloy castings account for 11 percent compared to 2 percent for copper and copper alloy castings and 3 percent for other nonferrous castings. Usually, these nonferrous metals are cast in combinations with each other or with some of about 40 other elements to make many different nonferrous alloys. A few of the more common nonferrous alloys are brass, bronze, magnesium, nickel-copper alloys (Monel); nickel-chromium-iron alloys; aluminum-copper alloys; aluminum-silicon alloys; aluminum-magnesium alloys; and titanium alloys. Aluminum, copper, and other nonferrous foundries are much smaller emitters of particulate matter (PM) and metal HAP than iron and steel foundries, which typically melt much larger quantities of metal on a per facility basis.

Most of the aluminum, copper, and other nonferrous foundries in the United States are small businesses according to the Small Business Administration size classifications (less than 500 employees), and about 70 percent of the facilities employ fewer than 50 people. Conversely, only 11 foundries (1 percent of the total) employ 500 or more people, and all of these are aluminum foundries. Although most foundries manufacture castings for sale to other companies, an important exception is the relatively few "captive" foundries operated by large original equipment manufacturers, such as automobile manufacturers.

³Note that most secondary aluminum facilities are major sources and are subject to 40 CFR part 63, subpart RRR. These facilities recycle aluminum scrap and do not produce foundry castings.

2. Aluminum Foundries

The area source category "Aluminum Foundries" is comprised of facilities that pour molten aluminum into molds to manufacture aluminum castings. The relevant North American Industry Classification System (NAICS) code is 331524 and is identified as "aluminum foundries except die casting."⁴ This source category was improperly listed under the name "Secondary Aluminum Production" (66 FR 8220, January 20, 2001). As discussed in section II of this preamble, we are revising the area source category list to correct the name of the category. The category is properly labeled "Aluminum Foundries," and as the 2001 listing decision reflects, the category was listed due to emissions of the urban HAP beryllium, cadmium, lead compounds, manganese, and nickel (the "aluminum foundry HAP").

Information on aluminum foundries that classify themselves as primarily in NAICS 331524 is available from the U.S. Census Bureau, whose most recent census survey (2002) identified 542 aluminum foundries. The industry is characterized by many small businesses, with 154 plants (28 percent) having only one to four employees, and 531 plants (98 percent) having fewer than 500 employees.

3. Copper Foundries

The area source category "Copper Foundries" is comprised of facilities that pour molten copper and copper-based alloys into molds to manufacture copper and copper-based alloy castings (excluding die casting). Copper foundries in the 2002 census survey produce a wide variety of castings, including copper and copper-based alloys, brass, engineered copper alloy (*i.e.*, manganese bronze, silicon brass and bronze, aluminum bronze, and copper nickel), tin bronze, and red and semi-red brass. EPA listed the Copper Foundries area source category in the Integrated Urban Air Toxics Strategy (67 FR 70427, November 22, 2002) due to emissions of the urban HAP lead compounds, manganese, and nickel (the "copper foundry HAP").

The NAICS code for copper foundries is 331525 ("copper foundries except die casting"). Information on copper foundries that classify themselves as primarily in NAICS 331525 is also available from the U.S. Census Bureau, whose most recent census survey (2002) identified 281 copper foundries. The

copper foundry industry consists of small businesses, with 80 plants (28 percent) having only one to four employees, and all of the plants having fewer than 250 employees.

4. Nonferrous Foundries

The area source category "Other Nonferrous Foundries" is comprised of facilities that pour molten nonferrous metals (excluding aluminum, copper, and copper-based alloys) into molds to manufacture nonferrous metal castings (excluding die casting). Nonferrous foundries in the 2002 census survey produce a variety of nonferrous metal castings, including nickel and nickel-based alloys, zinc and zinc-based alloys, and magnesium and magnesium-based alloys. EPA listed "Nonferrous Foundries, nec" in the Integrated Urban Air Toxics Strategy (67 FR 70427, November 22, 2002) due to emissions of the urban HAP chromium, lead compounds, and nickel (the "other nonferrous foundry HAP"). As explained in section II of this preamble, we are changing the name of the "Nonferrous Foundries, nec" area source category to "Other Nonferrous Foundries" to clarify that the source category includes all nonferrous foundries except aluminum and copper foundries.

The NAICS code for nonferrous foundries is 331528 ("other nonferrous foundries except die casting"). Information on nonferrous foundries that classify themselves as primarily in NAICS 331528 is also available from the U.S. Census Bureau, whose most recent census survey (2002) identified 143 nonferrous foundries. The nonferrous foundry industry is also characterized by many small businesses, with 51 plants (36 percent) having only one to four employees and all of the plants having fewer than 500 employees.

C. What are the production operations, emission sources, and available controls?

1. Production Operations

The processes used at aluminum, copper, and other nonferrous foundries are similar; the primary difference is the type of metal that is melted and cast. Foundries produce complex metal shapes by melting the metal in a furnace and pouring the molten metal into a mold to solidify into the desired shape. Foundry processes include: (1) Melting metal ingot, alloyed ingot, scrap, or a combination in a melting furnace; (2) alloying the molten metal (if necessary); (3) pouring the molten metal into a mold where it forms the desired shape, cools, and solidifies (this process is also

referred to as casting); (4) removing the cast from the mold; (5) cleaning (*e.g.*, shot blasting, grinding); and (6) finishing the casting surface. Foundries using sand casting may also have facilities that prepare sand molds and cores onsite.

The metal HAP emissions that were used as the basis for the 1990 inventory are emitted from the melting furnaces, where solid metal (*e.g.*, ingot, scrap, alloys) is heated to high temperatures to produce molten metal. The most common types of melting furnaces used at aluminum, copper, and other nonferrous foundries are reverberatory (more common for aluminum foundries), crucible, and induction furnaces. Gas-fired (and sometimes oil-fired) reverberatory furnaces heat the metal to melting temperatures with direct-fired, wall-mounted burners. These furnaces are brick-lined and constructed with a curved roof. The term "reverberatory" is used because heat rising from ignited fuel is reflected (reverberated) back down from the curved furnace roof and into the melted charge. A typical reverberatory furnace has an enclosed melt area where the flame heat source operates directly above the molten metal. Reverberatory furnaces have capacities ranging from 1 to 150 tons of molten metal. The advantages of reverberatory melters are the high-volume processing rate and low operating and maintenance costs. The disadvantages are the high metal oxidation rates, low efficiencies, and large floor space requirements.

Gas-fired crucible furnaces are small-capacity indirect melters and holders typically used for small melting applications or exclusively as a holding furnace. The metal is placed or poured into a ceramic crucible, which is contained in a circular furnace and is fired by a gas burner. The energy is applied indirectly to the metal by heating the crucible. The advantages of crucible furnaces are their ability to change alloys quickly, their low oxidation losses, and their low maintenance costs. Disadvantages include low efficiency and size limitations.

There are two general types of induction furnaces: Channel and coreless. Channel furnaces use an electromagnetic field to heat the metal between two coils and induce a flowing pattern of the molten metal, which serves to maintain uniform temperatures without mechanical stirring. Coreless furnaces heat the metal via an external primary coil and are slightly less efficient than channel furnaces, but their melt capacity per unit floor area is much higher. Channel furnaces are used

⁴ Aluminum die casters are included under the SIC code 3363 and NAICS 331521 and are defined as establishments primarily engaged in introducing molten aluminum, under high pressure, into molds or dies to make aluminum die castings.

almost exclusively as holding furnaces, while coreless furnaces are used mainly for melting finely shredded scrap, where they are most cost competitive with gas-fired furnaces. The advantages of induction furnaces include high melting efficiency, low emissions, low metal oxidation losses, and high alloy uniformity due to increased mixing. Their disadvantages relate primarily to their high capital and operating costs. Induction furnaces range in size from very small to 7.5 tons per melt.

Tower furnaces are less common than the furnaces discussed above. In tower furnaces, metal ingot and scrap are loaded from the top of a vertical tower, and burners at the bottom of the tower melt the metal. The advantages of the tower furnaces are high efficiency and low oxidation losses. The disadvantages of tower furnaces are their high capital costs and the furnace size, which is restricted by height limitations.

2. Emission Sources and Available Controls

Melting furnaces at aluminum, copper, and other nonferrous foundries are the emission sources of the HAP for which these area source categories were listed. Emissions of HAP metals from aluminum, copper, and other nonferrous foundries are directly related to the quantity of trace HAP metals that enter with the scrap and ingot that is charged to the melting furnaces. We collected industry survey data, reviewed operating permits, and held discussions with industry and trade association representatives to identify potential control technologies and management practices for these source categories. We identified two primary methods to control metal HAP emissions from foundries: (1) Management practices (*i.e.*, specifications that limit the amount of metal HAP in charge materials, and suppression techniques, such as covers) and (2) add-on pollution control devices, such as baghouses. Our review indicated that most foundries already use management practices, often as part of their standard operating procedures, to reduce emissions of PM and metal HAP. Typical management practices include using covers or enclosures on melting furnaces when they are melting; using clean scrap; defining specifications for charge materials (*e.g.*, specified range for lead, certified ingot); and monitoring melting and pouring temperature.

The vast majority⁵ of melting furnaces at aluminum foundries are not

equipped with emission control devices for PM, which may be attributed to differences in certain physical properties and characteristics of melting aluminum compared to melting copper and other nonferrous metals. For example, melting aluminum may result in lower emissions compared to the other nonferrous metals for several reasons. Higher melting temperatures result in higher emissions of PM and greater volatilization of HAP metals. Aluminum melts at approximately 1,200 °F, whereas copper melts at about 2,000 °F, nickel melts at 2,650 °F, and iron and steel melt at 2,300 to 2,800 °F. In addition, most aluminum foundries melt aluminum ingot, alloyed ingot, and internal scrap that is recycled, all of which typically have very low concentrations of HAP metals. From our survey of aluminum foundries, we found that the materials charged to the melting furnaces contained, on average, only 0.4 percent of the urban HAP for which the source category was listed. In contrast, some copper-based alloys, such as leaded brass, contain up to 3.5 percent lead.

Melting furnaces for copper, copper-based alloys (primarily brass and bronze), and other nonferrous metals also use management practices to control emissions. In addition, many of the melting furnaces at copper and other nonferrous foundries, especially at the larger foundries, are equipped with baghouses or cartridge filters to control emissions of PM and metal HAP.

IV. Summary of the Proposed Standards

A. Do these proposed standards apply to my facility?

The proposed standards would apply to all existing or new melting operations (the affected source), including all of the various types of melting furnaces, at an aluminum, copper, or other nonferrous foundry that meets certain applicability criteria. A melting operation is an existing affected source if construction or reconstruction of the melting operation commenced on or before February 9, 2009. A melting operation is a new affected source if construction or reconstruction of the melting operation commences after February 9, 2009.

The proposed standards apply to each aluminum foundry, copper foundry, or other nonferrous foundry that: (1) Is an area source; (2) uses material that contains or has the potential to emit

had PM control devices, and our review of operating permits for 36 aluminum foundries with 297 melting furnaces showed that only two foundries with 12 of the 297 melting furnaces (4 percent) had PM control devices.

HAP for which the source category was listed (*i.e.*, “aluminum foundry HAP”, “copper foundry HAP”, and “other nonferrous foundry HAP”); and (3) melts 600 tpy or greater of metal. Any material that contains beryllium, cadmium, lead, or nickel in amounts greater than or equal to 0.1 percent by weight (as the metal), or contains manganese in amounts greater than or equal to 1.0 percent by weight (as the metal), would be considered a “material containing aluminum foundry HAP”. Any material that contains lead or nickel in amounts greater than or equal to 0.1 percent by weight (as the metal), or contains manganese in amounts greater than or equal to 1.0 percent by weight (as the metal) would be considered to be a “material containing copper foundry HAP.” Any material that contains chromium, lead, or nickel in amounts greater than or equal to 0.1 percent by weight (as the metal) would be considered to be a “material containing other nonferrous foundry HAP.” As explained in more detail in section V.A of this preamble, we are using elemental lead in the charge materials as a surrogate for lead compounds because the elemental lead is emitted from the melting furnace as lead compounds. Facilities could determine whether material contains the target HAP by using formulation data provided by the manufacturer or supplier, such as the material safety data sheet. The proposed definitions of these terms are consistent with the definitions used in standards developed for other area source categories such as Plating and Polishing (73 FR 37728, July 1, 2008), Metal Fabrication and Finishing (73 FR 42978, July 23, 2008) and as defined by OSHA at 29 CFR 1910.1200 (*i.e.*, a concentration of 0.1 percent or more for carcinogens and 1.0 percent or more for non-carcinogens).

The proposed standards would not apply to research and development facilities, as defined in section 112(c)(7) of the CAA, because these facilities were not part of the 1990 inventory.

B. When must I comply with the proposed standards?

The owner or operator of an existing source would be required to comply with the rule no later than 2 years after the date of publication of the final rule in the **Federal Register**. The owner or operator of a new source would be required to **Federal Register** or startup of the facility, whichever is later.

C. What are the proposed standards?

We are proposing that the following management practices are GACT for new and existing sources at aluminum,

⁵ As discussed in more detail later in this preamble, none of the 111 aluminum melting furnaces identified in our survey of nine companies

copper, and other nonferrous foundries: (1) Cover or enclose melting furnaces that are equipped with covers or enclosures during the melting process, to the extent practicable (e.g., except when access is needed, such as for charging, alloy addition, tapping); and (2) purchase and use only scrap material that has been depleted (to the extent practicable) of "aluminum foundry HAP," "copper foundry HAP", or "other nonferrous foundry HAP" (as applicable) in the materials charged to the melting furnace, excluding HAP metals that are required to be added for the production of alloyed castings. We are further proposing that facilities develop and retain and operate by a written management practices plan for minimizing emissions from melting operations that documents how the required management practices (and any other management practices in use) are to be implemented.

The owner or operator of a new or existing source at a copper foundry or other nonferrous foundry that melts at least 6,000 tpy of metal would be required to comply with emission limits as described below. In setting the proposed emission limits, we are using PM as a surrogate for the metal HAP emissions. We are proposing that GACT for existing affected sources is achieving a PM control efficiency of at least 95.0 percent or an outlet PM concentration of at most 0.015 grains per dry standard cubic feet (gr/dscf). We are proposing that GACT for new affected sources is achieving a PM control efficiency of at least 99.0 percent or an outlet PM concentration of at most of 0.010 gr/dscf.

D. What are the compliance requirements?

1. Performance Test

The owner or operator of any existing or new source subject to a PM emissions limit would be required to conduct a one-time initial performance test. The owner or operator would be required to test PM emissions from melting operations using EPA Method 5 (40 CFR part 60, appendix A-3) or EPA Method 17 (40 CFR part 60, appendix A-6).

A performance test is not required for an existing affected source if a prior performance test has been conducted within the past 5 years using the methods required by this proposed rule, which are the methods required in § 63.11151 of proposed subpart ZZZZZZ, and either no process changes had been made since the test, or the owner or operator can demonstrate to the satisfaction of the permitting authority that the results of the

performance test, with or without adjustments, reliably demonstrate compliance despite process changes.

2. Monitoring Requirements

The owner or operator of new or existing source would be required to record information to document conformance with the management practices plan. The proposed recordkeeping requirements are described in section IV.E of this preamble.

For existing sources where emissions are controlled by a fabric filter, the owner or operator would be required to conduct and record the results of daily observations of visible emissions (VE) from the monovent or fabric filter outlet stack(s) during melting operations. Should any of the daily observations reveal any VE, the owner or operator must initiate corrective action to determine the cause of the VE within 1 hour and alleviate the cause of the emissions within 3 hours of the observations by taking whatever corrective actions are necessary.

The foundry would have the option to decrease the frequency of observations from daily to weekly if the foundry collects at least 90 consecutive operating days of observations with no VE. If, after the foundry converts to a weekly schedule, any VE is observed, the foundry would be required to revert to a daily schedule until another consecutive 90 operating days of data are obtained that demonstrate there was no VE during the period observed. Then, the foundry may convert to a weekly observation schedule. We are requesting comment on whether the requirement for an initial period of 90 consecutive days of VE observations is appropriate and whether some other period of time would be adequate to establish consistent performance of the baghouse before reducing to weekly observations. As an alternative to the VE observations, an owner or operator of an existing source may elect to operate and maintain a bag leak detection system as described below for new sources.

The owner or operator of new source equipped with a fabric filter would be required to operate and maintain a bag leak detection system and prepare a site-specific monitoring plan. The owner or operator of existing sources would have the option of complying with the bag leak detection system requirements as an alternative to the daily (or weekly) visual inspections.

Our study of the industry indicates that fabric filters are used as the control device for melting furnaces; however, it is conceivable that there is an existing foundry that does or could use some

other type of control device to meet the PM emission standard. If a copper or other nonferrous foundry uses a control device other than a fabric filter for existing sources subject to the PM emissions limit, the owner or operator must prepare and submit a monitoring plan to the permitting authority for approval. The information requirements for the plan would include: (1) A description of the device, (2) test results collected according to the rule requirements that verify the performance of the device for reducing PM emissions, (3) an operation and maintenance plan for the control device, (4) a list of operating parameters to be monitored, and (5) operating limits for control device operating parameters based on monitoring data collected during the performance test.

E. What are the notification, recordkeeping, and reporting requirements?

The owner or operator of existing or new sources would be required to comply with certain requirements of the General Provisions (40 CFR part 63, subpart A), which are identified in Table 1 of the proposed rule. The General Provisions include specific requirements for notifications, recordkeeping, and reporting. We are proposing that the owner or operator of an affected foundry submit an Initial Notification according to the requirements § 63.9(a) through (d) and a Notification of Compliance Status according to the requirements in § 63.9(h) of the NESHAP General Provisions (40 CFR part 63, subpart A).

All aluminum, copper and other nonferrous foundries would be required to keep records to document compliance with the required management practices. For melting furnaces equipped with a cover or enclosure, these records would include the identity of each melting furnace equipped with a cover or enclosure, the date and time of each melting operation, and confirmation that the procedures in the management practices plan were followed. These records may be in the form of a checklist. The proposed rule also would require records of the purchase and use of only metal scrap that has been depleted of HAP metals prior to charging in a melting furnace.

Owners or operators of existing sources equipped with a fabric filter would be required to maintain records of all VE monitoring data including:

- Date, place, and time of the monitoring event;
- Person conducting the monitoring;
- Technique or method used;

- Operating conditions during the activity;
- Results, including the date, time, and duration of the period from the time the monitoring indicated a problem to the time that monitoring indicated proper operation.
- Maintenance or other corrective action.

Recordkeeping requirements also would apply to facilities that use bag leak detection systems. We are also proposing to require that copper foundries and other nonferrous foundries that are not subject to the PM emission limits keep records to demonstrate the total annual amount (*i.e.*, tpy) of metal melted at the facility is less than 6,000 tpy.

If a deviation from the rule requirements occurs, an affected foundry would be required to submit a compliance report for that reporting period. The proposed rule specifies the information requirements for such compliance reports.

V. Rationale for This Proposed Rule

A. How did we select the source categories?

As discussed in section II of this preamble, the inclusion of the "Secondary Aluminum Production" (renamed "Aluminum Foundries") area source category on the area source category list was based on data from the CAA section 112(k) inventory, which represents 1990 urban air information. The "Aluminum Foundries" area source category was listed as contributing a percentage of the total area source emissions for the following urban HAP: Beryllium, cadmium, lead compounds, manganese, and nickel.

The "Copper Foundries" and "Nonferrous Foundries nec" (renamed "Other Nonferrous Foundries") source categories were listed under CAA section 112(c)(3) on November 22, 2002 (67 FR 70427). The "Copper Foundries" area source category was listed based on emissions of lead compounds, manganese, and nickel. The "Other Nonferrous Foundries" area source category was listed based on emissions of chromium, lead compounds, and nickel.

For the Aluminum Foundries, Copper Foundries, and Other Nonferrous Foundries area source categories, we solicited information on the production operations, emission sources, and available controls using written facility surveys, reviews of published literature, and reviews of operating permits. We also held discussions with industry representatives and trade associations. This research confirmed that the

aluminum, copper, and other nonferrous foundry sources emit the urban HAP for which the source categories were listed, although we found that current emissions of such HAP are lower than the amounts estimated for 1990 in the section 112(k) inventory. The lower emissions can be attributed to the lower worker exposure standard for lead developed by the Occupational Safety and Health Administration (OSHA) in 1996, State permitting requirements, and actions taken to improve efficiency or reduce costs.

We are proposing that the rule apply only to those foundries that emit the metal HAP for which the source category was listed. The Aluminum Foundries, Copper Foundries, and Other Nonferrous Foundries source categories would include only those facilities that use materials that contain or have the potential to emit aluminum foundry HAP, copper foundry HAP, or other nonferrous foundry HAP from melting furnaces.

We are proposing to use elemental lead as a surrogate for lead compounds when determining the HAP metal content of materials charged to the furnace because elemental lead is a precursor to the formation of lead oxide (and other lead compounds), and lead compounds are a listed HAP for all three of the source categories that are the subject of this proposal. When elemental lead is used in furnace charge materials (*e.g.*, as an alloy), some lead volatilizes at the high temperatures of the melting furnace and reacts with oxygen in the air, forming lead compounds. The presence of elemental lead in materials charged to the melting furnaces is an indication of potential HAP emissions of lead compounds. As with the listed examples, we believe that emissions below the OSHA thresholds were not part of the 1990 inventory that established the basis for the listing. However, foundries melting copper-based alloys (such as alloys that contain elemental lead to make certain types of brass) emit lead compounds and were part of the 1990 inventory that established the basis for the listing.

We also queried the 1990 TRI to develop the list of plants and their emissions used to develop the CAA section 112(k) emissions inventory for the three source categories. This query was performed in the same manner (by standard industrial classification code for the source categories reporting for 1990) that was used to develop the 1990 inventory. Our review of the basis for the listing of the three source categories indicated that the 1990 inventory was based on a small number of the largest

foundries that met the TRI reporting thresholds. None of the very small foundries that are common in these source categories were included in the 1990 TRI or used as the basis for the CAA section 112(k) listing. From our analysis of the 1990 TRI reporting data, we concluded that emissions from foundries melting less than 600 tpy of metal were not included in the 1990 baseline inventory because they were not significant contributors to emissions of the listed metal HAP. Consequently, consistent with the listing, we are clarifying that the source category includes only those aluminum, copper, and other nonferrous foundries that melt 600 tpy or more of metal because only these foundries were the basis for the listing of the area source categories. We estimate that 318 of 966 aluminum, copper, and other nonferrous foundries would be subject to the proposed rule. These 318 facilities account for 90 percent of the production in the source categories and approximately 90 percent of the urban HAP emissions. Based on our experience with previous regulations involving foundry operations, there is a good correlation between the total amount of metal melted (production level) and resulting PM/metal HAP emissions.

B. How did we select the affected source?

Affected source means the collection of equipment and processes in the source category or subcategory to which the subpart applies. In selecting the affected source for this proposed rule, we identified foundry melting operations as the source of metal HAP emissions that was used for the 1990 inventory. In the melting operations, the melting furnaces (*e.g.*, induction, reverberatory, crucible, tower) are heated to high temperatures, primarily by natural gas or electricity, to melt solid ingot and scrap. Emissions from the molten metal include the primary metal being melted and its oxides, and to a lesser extent, trace quantities of HAP metals if they are present in the materials melted in the furnace. We concluded that designating foundry melting operations (including all of the various types of melting furnaces at an affected foundry) as the affected source was the most appropriate approach.

C. How are the aluminum foundry HAP, the copper foundry HAP, and the other nonferrous foundry HAP addressed by this proposed rule?

For this proposed rule, we decided that it was not practical to establish individual standards for each specific type of aluminum, copper, and other

nonferrous foundry metal HAP that could be present in the various processes. A sufficient correlation exists between PM and these metal HAP to rely on PM as a surrogate for both the presence of the HAP and for their control.⁶ When released, each of the metal HAP compounds behaves as PM. The control technologies used for the control of PM emissions achieve comparable levels of performance on the individual aluminum, copper, and other nonferrous foundry metal HAP emissions. Therefore, standards requiring good control of PM also achieve good control of aluminum, copper, and other nonferrous foundry metal HAP emissions. Furthermore, establishing separate standards for each individual metal HAP would impose costly and significantly more complex compliance and monitoring requirements and achieve little, if any, HAP emissions reductions beyond what would be achieved using the surrogate pollutant approach based on total PM. Based on these considerations, we are proposing standards for aluminum, copper, and other nonferrous foundries based on control of total PM as a surrogate pollutant for the individual aluminum, copper, and other nonferrous foundry metal HAP.

D. How did we determine GACT?

As provided in CAA section 112(d)(5), we are proposing standards representing GACT for the "Aluminum Foundries", "Copper Foundries", and "Other Nonferrous Foundries" area source categories. As noted in section III.A of this preamble, EPA has the discretion to establish standards for area sources listed pursuant to section 112(c) based on GACT. See CAA section 112(d)(5). The statute does not set any condition precedent for issuing standards under section 112(d)(5) other than that the area source category or subcategory at issue must be one that EPA listed pursuant to section 112(c), which is the case here.

Our data indicate that none of the facilities in the aluminum or other nonferrous foundries source categories are major sources. Consequently, we could not examine major sources in the same industrial sector to identify control technologies and management practices that may be transferable and generally available to area sources. However, we did consider technologies and practices at other major and area sources in similar categories. For example, we reviewed the management practices required by the area source

standards for iron and steel foundries (40 CFR part 63, subpart ZZZZZ).

All of the facilities in the three source categories at issue here for which we have obtained data have good operational controls in place. We evaluated the control technologies and management practices that are generally available for these foundry area source categories. We also considered costs and economic impacts in determining GACT. We believe the consideration of costs and economic impacts is especially important for determining GACT for the Aluminum Foundries, Copper Foundries, and Other Nonferrous Foundries area source categories because, given their relatively low level of HAP emissions, requiring additional controls would result in only marginal reductions in emissions at very high costs for modest incremental improvement in control. We explain our proposed GACT determinations in detail below.

1. Aluminum Foundries

We gathered background information on aluminum foundries from discussions with industry trade associations, an industry survey of area sources (no major sources were identified), and from a review of operating permits to identify the emission controls and management practices that are currently used to control PM and metal HAP emissions. We sent surveys to 9 companies with 10 aluminum foundries, and we received information from these 9 companies for 111 aluminum melting furnaces. EPA sent the survey to foundries ranging in size from 200 tpy of total metal processed and 11 to 12 employees per plant to 20,000 tpy and 350 to 650 employees per plant (including three large foundries operated by automobile manufacturing companies). We also obtained and reviewed operating permits for 36 foundries that operate 297 furnaces for melting aluminum. The survey results indicate that none of the 111 melting furnaces at the 10 plants have PM emission control devices on their melting furnaces. Ninety-six percent of the melting furnaces included in the permit information do not have PM emission control devices.⁷ The lack of PM controls for aluminum melting furnaces is not surprising because of their lower operating (melt) temperatures and corresponding low emission potential compared to furnaces melting other metals.

We also requested information in our survey on management practices to

control emissions, and we reviewed the operating permits for management practices that might be used. The most common management practice reported in the survey responses was the use of "clean charge" materials (primary ingot, internal recycled scrap), which was mentioned specifically by six plants. Four plants reported using covers on some of their furnaces to suppress emissions. In our review of management practices employed by similar area source categories, we found that a similar management practice has been applied and is required in other area source rules (*i.e.*, requiring that furnace charge materials be depleted of HAP metals to the extent practicable). (See 40 CFR part 63, subpart EEEEE and subpart YYYYY.)

Based on our review of the techniques used at aluminum foundries and other types of foundries, we are proposing that the management practices discussed above are GACT for both existing and new sources. These techniques are generally available and have been implemented by many of the aluminum foundries. To the best of our knowledge and based on the information we have available, the management practices are not costly to implement and would not result in any significant adverse economic impact on any foundry (*i.e.*, the cost would be much less than 0.1 percent of sales). Specifically, we are proposing as GACT that each aluminum foundry owner or operator would (1) cover or enclose melting furnaces, which are equipped with covers or enclosures during the melting process, to the extent practicable (*e.g.*, except when access is needed, such as for charging, alloy addition, tapping); and (2) purchase and use only aluminum scrap that has been depleted (to the extent practicable) of HAP metals in the materials charged to the melting furnace, excluding HAP metals that are required to be added for the production of alloyed castings. In addition, we are proposing that each aluminum foundry owner or operator prepare and operate pursuant to a written management practices plan that includes, but is not limited to, the requirements described above. The plan would also include all other procedures that are implemented at the facility to minimize emissions from melting furnaces. The exception for alloyed castings is appropriate because some foundries, especially those producing alloys in which lead is an essential component, purchase certain types of scrap specifically for their lead content. An owner or operator who uses this exception would be required to

⁶ *National Lime Association v. EPA*, 233 F.3d 625, 639–640 (D.C. Cir. 2000) and *Sierra Club v. EPA*, 353 F.3d 976 (D.C. Cir. 2004).

⁷ 285 of the 297 melting furnaces (96 percent) at 34 of the 36 plants.

maintain records to document that the HAP metal is included in the material specification for the cast metal product.

We also examined the feasibility of defining GACT to include an add-on control device (such as a fabric filter) to control metal HAP emissions from aluminum foundries. We had sufficient data on emissions and stack gas flow rates from an operating permit and an emissions inventory to perform an analysis for a medium-sized aluminum foundry (4,700 tpy of production) that had 51 crucible melting furnaces with melting rates that ranged from 9 to 68 tons per hour. The furnaces were in seven groups that exhausted through 16 different stacks. We estimated the total installed capital cost for a baghouse on each of the seven groups of furnaces as \$4.7 million, with a total annualized cost of \$1.0 million per year. The reduction in PM emissions was estimated as 6 tpy, with a reduction of 0.02 tpy of metal HAP emissions. The cost effectiveness was estimated as \$200,000 per ton for control of PM and \$50 million per ton for control of metal HAP. We are therefore proposing that add-on controls, such as a baghouse, should not represent GACT for aluminum foundries because of the high cost and low cost effectiveness for only a marginal reduction in HAP emissions.

2. Copper and Other Nonferrous Foundries

In identifying GACT for sources in the Copper Foundries and Other Nonferrous Foundries area source categories, we gathered background information from industry surveys and operating permits to identify the emission controls and management practices that are currently used to control PM and metal HAP emissions from these sources. We sent surveys to nine companies operating copper foundries and two companies operating nonferrous foundries. We found that many facilities have both copper and other nonferrous foundries co-located at the same site. Because of the significant overlap between foundry operations and the similarity in melting processes, we evaluated GACT for copper and other nonferrous foundries collectively. In addition to similar metal products being cast at many of the same facilities in the two source categories, we found that copper and other nonferrous foundries use the same types and sizes of furnaces to melt certified ingot and/or scrap metal. The survey sent to the nine companies included foundries ranging in size from 50 tpy of total metal processed and less than 5 employees per plant to 16,000 tpy and 350 to 500 employees per plant. We also received information from industry

trade associations and from operating permits for 15 additional copper and other nonferrous foundries. As part of the industry survey, we requested information on management practices to control emissions, and we reviewed the operating permits for management practices that might be used. We also reviewed the management practices used in similar source categories, such as Aluminum Foundries and Iron and Steel Foundries.

Based on our review of the techniques used at foundries, we are proposing the management practices discussed previously for aluminum foundries as GACT for both existing and new sources at copper and other nonferrous foundries. These techniques are generally available and have been widely implemented by many copper and other nonferrous foundries. In addition, these management practices are not costly to implement and would not result in any significant adverse economic impact on any foundry (*i.e.*, the cost would be much less than 0.1 percent of sales). The owner or operator of a copper and other nonferrous foundry subject to the area source standards would be required to (1) cover or enclose melting furnaces, which are equipped with covers or enclosures during the melting process, to the extent practicable (*e.g.*, except when access is needed, such as for charging, alloy addition, tapping); and (2) purchase and use only scrap that has been depleted (to the extent practicable) of HAP metals in the materials charged to the melting furnace, excluding HAP metals that are required to be added for the production of alloyed castings. In addition, we are proposing that each copper and other nonferrous foundry owner or operator prepare and operate by a written management practices plan that includes, but is not limited to, the requirements described above. The plan would also include all other procedures that are implemented at the facility to minimize emissions from melting furnaces. As discussed above, the exception for alloyed castings is appropriate because some foundries, especially those producing alloys in which lead is an essential component, purchase certain types of scrap specifically for their lead content. For example, certain grades of brass castings (a copper-based alloy) are required to have percent levels of lead in their product specification. As for aluminum foundries, an owner or operator who uses this exception would maintain records to document that the HAP metal is included in the material specification for the cast metal product.

As part of the GACT analysis, we also considered whether other control techniques or add-on controls (in addition to management practices) should be considered generally available for this industry and whether there are differences in processes, sizes, or other factors affecting emissions that would warrant subcategorization.⁸ In our review of the production and emissions data for all of the copper and other nonferrous foundries in the project database, we found significant differences among foundries based on their total melt rates. Smaller foundries were found to have smaller melting furnaces and lower emissions, and smaller foundries are more likely to have smaller scale (*e.g.*, crucible) furnaces and other low capacity furnaces. These differences in process equipment affect the feasibility and cost effectiveness of add-on controls such as baghouses to reduce metal HAP emissions. Based on these differences, we determined that subcategorization of copper and other nonferrous foundries by size was justified to evaluate the feasibility of add-on controls.

We evaluated the impacts of requiring all melting furnaces to operate with a baghouse control system. As part of that evaluation, we examined the feasibility of defining GACT for those facilities melting less than 6,000 tpy of total metal to include an add-on control device for PM and HAP metals (such as a baghouse) to control metal HAP emissions. For those facilities with annual melting rates less than 6,000 tpy of total metal, we had information showing that fewer than half (4 out of 10) of the foundries currently use add-on controls and that all of the facilities that responded to the survey use some type of management practice(s) to minimize PM and metal HAP emissions. Based on our analysis of costs for a typical facility melting less than 6,000 tpy, we estimated the cost effectiveness for applying a baghouse to the melting furnaces as \$50,000 per ton of PM and \$1 million per ton of metal HAP. We therefore concluded that add-on controls, such as a baghouse, should not represent GACT for copper and other nonferrous foundries with melting rates less than 6,000 tpy of total metal processed because of the high equipment and installation cost (compared to process equipment) and low cost effectiveness. For facilities melting less than 6,000 tpy, we

⁸ Under section 112(d)(1) of the CAA, EPA "may distinguish among classes, types, and sizes within a source category or subcategory in establishing such standards * * *".

concluded that GACT is the management practices discussed above.

We also examined the feasibility of add-on controls for metal HAP for melting furnaces melting 6,000 tpy or more. Our evaluation of the data and survey results showed that at least nine of the 10 foundries we identified with melting rates greater than or equal to 6,000 tpy use add-on controls for PM and HAP metals on their melting operations. Discussions with industry trade associations and foundry representatives indicated that all copper and other nonferrous foundries melting more than 6,000 tpy used add-on controls for emissions of PM and metal HAP. Consequently, to the best of our knowledge and based on the available information, there would be no significant costs or adverse economic impacts in determining that GACT for foundries melting 6,000 tpy or more of total metal should include (in addition to the management practices discussed above) an emission standard based on the level of control achieved by an add-on control device. If commenters can identify foundries not in our database that would be required to install add-on control devices as a result of this proposed rule, please provide supporting data (at a minimum, the name and location of the foundry and its melting capacity) in your comments.

In their survey responses, facilities that melted 6,000 tpy or more of total metal reported using fabric filters (*i.e.*, baghouses or cartridge filters) on furnace melting operations and that such fabric filters performed at a PM collection efficiency of at least 95 percent. Based on the same types of controls used on similar sources, an equivalent outlet PM concentration limit is 0.034 grams per dry standard cubic meter (g/dscm) (*i.e.*, 0.015 grains per dry standard cubic foot [gr/dscf]).

Based on the data we have collected, we are proposing the management practices discussed above and a PM standard as GACT for existing copper and other nonferrous foundries that melt 6,000 tpy or more of metal that would require achieving a reduction in the PM emissions from melting operations of at least 95 percent or an outlet concentration of no more than 0.034 g/dscm (0.015 gr/dscf), which is equivalent to a reduction of at least 95 percent. The proposed PM standard would be based on the performance that has been demonstrated for fabric filters applied to existing sources' melting operations in the Copper Foundries and Other Nonferrous Foundries source categories. For example, an equivalent outlet concentration limit of 0.034 g/dscm (0.015 gr/dscf) was determined to

be GACT for melting furnaces at secondary nonferrous metal processing area sources, and the melting furnaces, emissions, and level of control that can be achieved are similar to those at copper and other nonferrous foundries. An outlet concentration limit is necessary (in addition to a percent reduction standard) because the inlet flow rate and concentration (both needed to determine control efficiency) for some emission control systems cannot be accurately measured due to the configuration of duct work. In addition, some furnaces have an inlet mass rate that is so low that control efficiency is not a practical measure of performance. We determined that the GACT level of control is achievable by technology (*i.e.*, baghouse or cartridge filters) that is generally available and widely used, and the technology is effective for controlling emissions of PM, copper foundry HAP, and other nonferrous foundry HAP.

In identifying GACT for new affected sources in the Copper Foundries and Other Nonferrous Foundries area source categories, we considered the available data on the existing facilities and the levels of control achieved by the best performing sources, which is a level of control that can be designed into and achieved by new sources. The best performing facilities reported that each fabric filter used at their facilities performed at a PM collection efficiency of at least 99 percent.

We contacted baghouse manufacturers to gather information on design parameters and performance for new baghouse installations in the foundries industry. Furthermore, we also considered the performance of baghouses at similar sources (*e.g.*, melting furnaces used in other industries). Based on the available data from the existing facilities, a review of operating permits, contacts with baghouse manufacturers, and consideration of baghouse performance at similar sources, we are proposing that the management practices discussed above and a PM standard as GACT for new copper and other nonferrous foundries that melt 6,000 tpy or more of metal that would require achieving a reduction in the PM emissions from melting operations of at least 99 percent or an outlet concentration of no more than 0.023 g/dscm (0.010 gr/dscf), which is equivalent to a reduction of at least 99 percent.

E. How did we select the compliance requirements?

We are proposing testing, monitoring, notification, recordkeeping, and reporting requirements needed to assure

compliance with the rule as proposed. These proposed provisions are based, in part, on requirements that have been applied to several similar industries in other area source category rules and an understanding of how control devices perform and how control devices and management practices can be effectively monitored. In selecting these provisions, we identified the information necessary to ensure that emissions controls are maintained and operated properly on a continuing basis.

The proposed notification and recordkeeping requirements are primarily from the NESHAP General Provisions (40 CFR part 63, subpart A). Specifically, we are proposing that the owner or operator of an affected source submit Initial Notifications and a Notification of Compliance Status because these notifications provide the information needed to identify the affected sources subject to the proposed standards and to confirm the compliance status of the facilities. See 40 CFR 63.9(b) and (h). We are also proposing that foundry owners or operators keep records and, if a deviation occurs, submit a compliance report that describes the deviation and corrective action. We believe the proposed requirements would ensure compliance with the provisions of this proposed rule without posing a significant additional burden for the facilities that would implement them.

Aluminum, copper, and other nonferrous foundries that would be subject to this rule would be required to prepare and implement a written management practice plan to minimize emissions from melting furnaces and record certain information showing that the management practices are implemented. Copper or other nonferrous foundries that melt 6,000 tpy or greater of metal would be required to comply with a PM emission standard, conduct a performance test to demonstrate initial compliance, and conduct daily monitoring of control device operation to ensure that the fabric filter continues to operate efficiently. If an observation reveals the presence of visible emissions (VE), the owner or operator would be required to take corrective action. Records would be required to demonstrate conformance with the fabric filter monitoring requirements.

We are proposing to require bag leak detection systems for new sources because these systems can be incorporated into the design and operation of new sources without retrofitting, as would be the case if they were to be incorporated into existing sources. Bag leak detection systems are

typical requirements in our regulations of new sources that are of the size and complexity as copper and other nonferrous foundries. The proposed rule also offers bag leak detection systems as an alternative monitoring option for owners or operators of existing sources.

We are proposing that facilities with existing sources comply with the rule's requirements no later than 2 years after the date of publication of the final rule in the **Federal Register**. We are further proposing that facilities with new sources comply at startup. We are proposing 2 years for existing sources because of the time needed for facilities (most of which are small businesses that have never been regulated before) to understand the regulation and to plan, prepare, and implement compliance activities. These small businesses have limited resources and will need assistance; however, it will take time for small business assistance centers to provide the necessary outreach and assistance. We believe 2 years for compliance is "as expeditious as practicable" considering all of these factors. (See CAA section 112(i)(3).)

F. How did we decide to propose to exempt these source categories from title V permit requirements?

We are proposing exemptions from title V permitting requirements for affected facilities in the aluminum, copper, and other nonferrous foundries area source categories for the reasons described below. Section 502(a) of the CAA provides that the Administrator may exempt an area source category from title V if he determines that compliance with title V requirements is "impracticable, infeasible, or unnecessarily burdensome" on an area source category. See CAA section 502(a). In December 2005, in a national rulemaking, EPA interpreted the term "unnecessarily burdensome" in CAA section 502 and developed a four-factor balancing test for determining whether title V is unnecessarily burdensome for a particular area source category, such that an exemption from title V is appropriate. See 70 FR 75320, December 19, 2005 (Exemption Rule).

The four factors that EPA identified in the Exemption Rule for determining whether title V is unnecessarily burdensome on a particular area source category include (1) whether title V would result in significant improvements to the compliance requirements, including monitoring, recordkeeping, and reporting, that are proposed for an area source category (70 FR 75323); (2) whether title V permitting would impose significant burdens on the area source category and

whether the burdens would be aggravated by any difficulty the sources may have in obtaining assistance from permitting agencies (70 FR 75324); (3) whether the costs of title V permitting for the area source category would be justified, taking into consideration any potential gains in compliance likely to occur for such sources (70 FR 75325); and (4) whether there are implementation and enforcement programs in place that are sufficient to assure compliance with the NESHAP for the area source category, without relying on title V permits (70 FR 75326).

In discussing these factors in the Exemption Rule, we further explained that we considered on "a case-by-case basis the extent to which one or more of the four factors supported title V exemptions for a given source category, and then we assessed whether considered together those factors demonstrated that compliance with title V requirements would be 'unnecessarily burdensome' on the category, consistent with section 502(a) of the Act." See 70 FR 75323. Thus, in the Exemption Rule, we explained that not all of the four factors must weigh in favor of exemption for EPA to determine that title V is unnecessarily burdensome for a particular area source category. Instead, the factors are to be considered in combination, and EPA determines whether the factors, taken together, support an exemption from title V for a particular source category. As discussed in more detail below, our evaluation of these four factors weigh in favor of exemption of these source categories.

In the Exemption Rule, in addition to determining whether compliance with title V requirements would be unnecessarily burdensome on an area source category, we considered, consistent with the guidance provided by the legislative history of section 502(a), whether exempting the area source category would adversely affect public health, welfare, or the environment. See 70 FR 15254–15255, March 25, 2005. We believe that the proposed exemptions from title V would not adversely affect public health, welfare, and the environment. Our rationale for these decisions follows here.

In considering the proposed exemption from title V requirements for sources in the source categories affected by this proposed rule, we first compared the title V monitoring, recordkeeping, and reporting requirements (factor one) to the requirements in this proposed NESHAP for the Aluminum Foundries, Copper Foundries, and Other Nonferrous Foundries area source categories. EPA is proposing that a PM

emission limit based on the use of fabric filters is GACT for copper and other nonferrous foundries melting 6,000 tpy or more of metal, and that management practices currently used at most facilities is GACT for all foundries in each of the three source categories. This proposed rule would require daily (or weekly) VE determinations for existing sources, bag leak detection system for new sources, recordkeeping, and deviation reporting to assure compliance with this NESHAP. The monitoring component of the first factor favors title V exemption because this proposed standard would provide for monitoring that assures compliance with the requirements of the proposed rule. For existing sources located at copper or other nonferrous foundries processing 6,000 tpy or more of total metal, this proposed NESHAP would set an emission limit that would require the use of a PM control system (*i.e.*, fabric filter) with daily VE determinations. For new and existing sources located at aluminum, copper, or nonferrous foundries, the proposed NESHAP would require management practices to control emissions from melting furnaces. For the management practices, recordkeeping would be required to assure that the management practices are implemented, such as the use of covers or enclosures during melting and the purchase and use of materials that have been depleted (to the extent practicable) of aluminum foundry HAP, copper foundry HAP, and other nonferrous foundry HAP.

As part of the first factor, we have considered the extent to which title V could potentially enhance compliance for area sources covered by this proposed rule through monitoring, recordkeeping, or reporting requirements. We have considered the various title V recordkeeping and reporting requirements, including requirements for a 6-month monitoring report, deviation reports, and an annual certification in 40 CFR 70.6 and 71.6. For any affected aluminum, copper, or other nonferrous foundry area source facility, this proposed NESHAP would require Initial Notifications and a Notification of Compliance Status. The proposed aluminum, copper, and other nonferrous foundries NESHAP would also require affected facilities to maintain records showing compliance with the proposed monitoring requirements and management practices and to submit a compliance report to the permitting authority if any deviation occurs. The information that would be required in the notifications, records, and reports is similar to the information

that would be provided in the deviation reports required under 40 CFR 70.6(a)(3) and 40 CFR 71.6(a)(3). We acknowledge that title V might impose additional compliance requirements on this category, but we believe that the monitoring, recordkeeping, and reporting requirements of this proposed NESHAP for aluminum, copper, and other nonferrous foundries would be sufficient to assure compliance with the provisions of this NESHAP, and that title V would not significantly improve those compliance requirements.

For the second factor, we determined whether title V permitting would impose a significant burden on the area sources in the category and whether that burden would be aggravated by any difficulty the source may have in obtaining assistance from the permitting agency. Subjecting any source to title V permitting imposes certain burdens and costs that do not exist outside of the title V program. EPA estimated that the average cost of obtaining and complying with a title V permit was \$65,700 per source for a 5-year permit period, including fees. See Information Collection Request for Part 70 Operating Permit Regulations, June 2007, EPA ICR Number 1587.07. EPA does not have specific estimates for the burdens and costs of permitting aluminum, copper, and other nonferrous foundry sources; however, there are certain activities associated with the part 70 and 71 rules. These activities are mandatory and impose burdens on the facility. They include reading and understanding permit program guidance and regulations; obtaining and understanding permit application forms; answering follow-up questions from permitting authorities after the application is submitted; reviewing and understanding the permit; collecting records; preparing and submitting monitoring reports on a 6-month or more frequent basis; preparing and submitting prompt deviation reports, as defined by the State, which may include a combination of written, verbal, and other communications methods; collecting information, preparing, and submitting the annual compliance certification; preparing applications for permit revisions every 5 years; and, as needed, preparing and submitting applications for permit revisions. In addition, although not required by the permit rules, many sources obtain the contractual services of consultants to help them understand and meet the permitting program's requirements. The ICR for part 70 provides additional information on the overall burdens and costs, as well as the relative burdens of

each activity. Also, for a more comprehensive list of requirements imposed on part 70 sources (hence, burden on sources), see the requirements of 40 CFR 70.3, 70.5, 70.6, and 70.7.

In assessing the second factor for aluminum, copper, and other nonferrous foundries, we found that approximately 98 percent of the plants that would be affected by the proposed rule are small businesses, most with fewer than 50 employees and about 25 percent or more with only one to four employees. These small sources lack the technical resources to comply with permitting requirements and the financial resources needed to hire the necessary staff or outside consultants. As discussed previously, title V permitting would impose significant costs on these area sources, and, accordingly, we believe that title V would be a significant burden for sources in this category. Most are small businesses with limited resources, and under title V, they would be subject to numerous mandatory activities with which they would have difficulty complying, whether they were issued a standard or a general permit. Furthermore, given the number of sources in the category and the relatively small size of most of those sources, it would likely be difficult for them to obtain assistance from the permitting authority. Thus, we believe that the second factor strongly supports title V exemption for aluminum, copper, and other nonferrous foundries.

The third factor, which is closely related to the second factor, is whether the costs of title V permitting for these area sources would be justified, taking into consideration any potential gains in compliance likely to occur for such sources. We explained above for the second factor that the costs of compliance with title V would impose a significant burden on nearly all of the 300 or more aluminum, copper, and other nonferrous foundries that would be affected by the proposed rule. Although title V might impose additional requirements, we believe that in considering the first factor, the monitoring, recordkeeping and reporting requirements in the proposed NESHAP would assure compliance with the controls and management practices imposed in the NESHAP as proposed. Because the costs of compliance with title V are so high, and the potential for gains in compliance is low, we are proposing that title V permitting is not justified for these source categories. Accordingly, the third factor supports the proposed title V exemptions for

aluminum, copper, and other nonferrous foundries area sources.

The fourth factor we considered in determining if title V is unnecessarily burdensome is whether there are implementation and enforcement programs in place that are sufficient to assure compliance with the NESHAP without relying on title V permits. States to which EPA delegates authority to implement and enforce this NESHAP will have programs in place to enforce the rule, and we believe that these programs will be sufficient to assure compliance. We also note that EPA retains authority to enforce this NESHAP anytime under CAA sections 112, 113, and 114. We further note that small business assistance programs required by CAA section 507 may be used to assist area sources that have been exempted from title V permitting. Also, States and EPA often conduct voluntary compliance assistance, outreach, and education programs (compliance assistance programs), which are not required by statute. These additional programs would supplement and enhance the success of compliance with this area source NESHAP. We believe that the statutory requirements for implementation and enforcement of this NESHAP by the delegated States and EPA and the additional assistance programs described above together are sufficient to assure compliance with this area source NESHAP without relying on title V permits.

In applying the fourth factor in the Exemption Rule, where EPA had deferred action on the title V exemption for several years, we had enforcement data available to demonstrate that States were not only enforcing the provisions of the area source NESHAP that we exempted, but that the States were also providing compliance assistance to assure that the area sources were in the best position to comply with the NESHAP. See 70 FR 75325–75326. In proposing this rule, we do not have similar data available on the specific enforcement as in the Exemption Rule, but we have no reason to think that States which are delegated to implement and enforce this NESHAP will be less diligent in their enforcement responsibilities. See 70 FR 75326. In fact, States must have adequate programs to enforce the section 112 regulations and provide assurances that they will enforce all NESHAP before EPA will delegate the program. See 40 CFR part 63, subpart E.

In light of all the information presented here, we believe that there are implementation and enforcement programs in place that are sufficient to assure compliance with the aluminum,

copper, and other nonferrous foundries NESHAP without relying on title V permitting.

Balancing the four factors for these area source categories strongly supports the proposed finding that title V is unnecessarily burdensome. Although title V might add additional compliance requirements, if imposed, we believe that there would not be significant improvements to the proposed compliance requirements in the NESHAP because the proposed requirements are specifically designed to assure compliance with the emission standards that would be imposed on these area source categories.

We also believe that the costs of compliance with title V would impose a significant burden on the sources. In addition, the high relative costs would not be justified given that there is likely to be little or no potential gain in compliance if title V were required. And, finally, for delegated States, we believe there are adequate implementation and enforcement programs in place to assure compliance with the NESHAP. Thus, we propose that title V permitting is unnecessarily burdensome for the Aluminum Foundries, Copper Foundries, and Other Nonferrous Foundries area source categories.

In addition to evaluating whether compliance with title V requirements is unnecessarily burdensome, EPA also considered, consistent with guidance provided by the legislative history of section 502(a), whether exempting the aluminum, copper, and other nonferrous foundries area source categories from title V requirements would adversely affect public health, welfare, or the environment. Exemption of the aluminum, copper, and other nonferrous foundries area source categories from title V requirements would not adversely affect public health, welfare, or the environment because the level of control would remain the same if a permit were required. The title V permit program does not generally impose new substantive air quality control requirements on sources, but instead requires that certain procedural measures be followed, particularly with respect to determining compliance with applicable requirements. As stated in our consideration of the first factor for this category, we do not believe title V would lead to significant improvements in the compliance requirements applicable to existing or new area sources.

Furthermore, one of the primary purposes of the title V permitting program is to clarify, in a single

document, the various and sometimes complex regulations that apply to sources in order to improve understanding of these requirements and to help sources achieve compliance with the requirements. In this case, however, we do not believe that a title V permit is necessary to understand the requirements that would be applicable to these area sources because the requirements of the rule are not difficult to implement. We also have no reason to think that new sources would be substantially different from the existing sources. In addition, we explained in the Exemption Rule that requiring permits for the large number of area sources could, at least in the first few years of implementation, potentially adversely affect public health, welfare, or the environment by shifting State agency resources away from assuring compliance for major sources with existing permits to issuing new permits for these area sources, potentially reducing overall air program effectiveness. Based on this analysis, we believe that title V exemptions for the aluminum, copper, and other nonferrous foundries area sources would not adversely affect public health, welfare, or the environment for all of the reasons previously explained.

For the reasons stated here, we are proposing to exempt the aluminum, copper, and other nonferrous foundries area source categories from title V permitting requirements.

VI. Summary of the Impacts of the Proposed Standards

Existing aluminum, copper, and other nonferrous foundries are currently well-controlled, and our proposed GACT determination reflects such controls. Compared to 1990, when the baseline emissions were established, these sources have improved their level of control and reduced emissions due to State permitting requirements, OSHA regulations (particularly for lead), and actions taken to improve efficiency and reduce costs. We estimate that the only impacts associated with the proposed rule are the compliance requirements (*i.e.*, monitoring, reporting, recordkeeping, and testing).

Approximately 318 aluminum, copper, and other nonferrous foundries would be subject to the proposed rule and would incur initial one-time costs of \$656,000 and a total annualized cost of \$645,000/yr (an average of \$2,000/yr per plant). The one-time ("first" costs) are for initial notifications; preparing the management practices plan and startup, shutdown, and malfunction plan; and initial performance tests. Recurring annual costs include those for

maintaining records and daily visual inspections of fabric filters.

VII. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

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

B. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR No. 2332.01.

The recordkeeping and reporting requirements in the proposed rule would be based on the information collection requirements in EPA's NESHAP General Provisions (40 CFR part 63, subpart A). The recordkeeping and reporting requirements in the General Provisions are mandatory pursuant to section 114 of the CAA (42 U.S.C. 7414). All information other than emissions data submitted to EPA pursuant to the information collection requirements for which a claim of confidentiality is made is safeguarded according to CAA section 114(c) and EPA's implementing regulations at 40 CFR part 2, subpart B.

The proposed NESHAP would require applicable one-time notifications according to the NESHAP General Provisions. Plant owners or operators would be required to prepare and operate by written management practice plans and include compliance certifications for the management practices in their Notifications of Compliance Status. Foundries subject to the emission standards would be required to conduct daily VE observations with a reduction to weekly VE observations if VE are not detected after 90 consecutive days of daily observations. Recordkeeping would be required to demonstrate compliance with management practices, monitoring, and applicability provisions. The affected facilities are expected to already have the necessary control and monitoring equipment in place and to already conduct much of the required monitoring and recordkeeping activities. Foundries subject to the rule also would be required to comply with the requirements for startup, shutdown, and malfunction plans/reports and to submit

a compliance report if a deviation occurred during the semiannual reporting period.

The average annual burden for this information collection averaged over the first 3 years of this ICR is estimated to total 7,202 labor hours per year at a cost of approximately \$411,278 for the 318 facilities that would be subject to the proposed rule, or approximately 68 hours per year per facility. No capital/startup costs or operation and maintenance costs are associated with the proposed information collection requirements. No costs or burden hours are estimated for new area source foundries because none are projected for the next 3 years. 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 the collection displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR part 63 are listed in 40 CFR part 9.

To comment on EPA's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including the use of automated collection techniques, EPA has established a public docket for this action, which includes this ICR, under Docket ID number EPA-HQ-OAR-2008-0236. Please submit any comments related to the ICR for the proposed rule to EPA and OMB. See the **ADDRESSES** section at the beginning of this preamble for where to submit comments to EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Office for EPA. Because OMB is required to make a decision concerning the ICR between 30 and 60 days after February 9, 2009, a comment to OMB is best assured of having its full effect if OMB receives it by March 11, 2009. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act 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 would not have a significant economic impact on a substantial number of small entities. Small entities include small businesses,

small not-for-profit enterprises, and small governmental jurisdictions.

For the purposes of assessing the impacts of the proposed area source NESHAP on small entities, a small entity is defined as: (1) A small business whose parent company meets the Small Business Administration size standards for small businesses found at 13 CFR 121.201 (less than 500 for aluminum, copper, and other nonferrous foundries); (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 that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. There would be no significant impacts on new or existing aluminum, copper, or nonferrous foundries because this proposed rule would not create any new requirements or burdens other than minimal compliance requirements. This proposed rule is estimated to impact 318 (of more than 962) area source facilities, 307 of which are small entities. The analysis shows that none of the small entities would incur economic impacts exceeding 3 percent of its revenue. We have determined that small entity compliance costs are expected to be less than 0.05 percent of company sales revenue for all affected plants. Although this proposed rule would contain requirements for new area sources, EPA does not expect any new aluminum, copper, or other nonferrous foundries to be constructed in the foreseeable future; therefore, EPA did not estimate the impacts for new affected sources.

Although this proposed rule would not have a significant economic impact on a substantial number of small entities, EPA nonetheless has tried to reduce the impact of this proposed rule on small entities. The standards represent practices and controls that are common throughout the industry. The standards would also require only the essential monitoring, recordkeeping, and reporting needed to verify compliance. The proposed standards were developed based on information obtained from small businesses in our surveys, consultation with small business representatives, and consultation with industry representatives that are affiliated with small businesses. We continue to be interested in the potential impacts of the proposed action on small entities and

welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This proposed rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and tribal governments, in the aggregate, or to the private sector in any one year. This proposed rule is not expected to impact State, local, or tribal governments. The nationwide annualized cost of this proposed rule for affected industrial sources is \$645,000/yr. Thus, this proposed rule would not be subject to the requirements of sections 202 and 205 of the Unfunded Mandates Reform Act (UMRA).

This proposed rule would also not be subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. The proposed rule would not apply to such governments and would impose no obligations upon them.

E. Executive Order 13132: Federalism

Executive Order 13132 (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" are defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This proposed rule does not have federalism implications. It would 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 proposed rule would not impose any requirements on State and local governments. Thus, Executive Order 13132 does not apply to this proposed 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 solicits comments on this proposed rule from State and local officials.

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). This proposed rule would not impose any requirements on tribal governments; thus, Executive Order 13175 does not apply to this action. EPA specifically solicits additional comment on this proposed action from tribal officials.

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

Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), applies to any rule that (1) is determined to be "economically significant," as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, EPA must evaluate the environmental health or safety effects of the planned rule on children and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5-501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it is based solely on technology performance.

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 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. We have concluded that this proposed rule would not likely have any significant adverse energy effects because no additional pollution controls or other equipment that consume energy would be required.

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law No. 104-113 (15 U.S.C. 272 note), directs

EPA to use voluntary consensus standards (VCS) in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. VCS are technical standards (e.g., materials specifications, test methods, sampling procedures, 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 VCS.

This rulemaking involves technical standards. EPA has decided to use ASME PTC 19.10-1981, "Flue and Exhaust Gas Analyses," for its manual methods of measuring the oxygen or carbon dioxide content of the exhaust gas. These parts of ASME PTC 19.10-1981 are acceptable alternatives to EPA Method 3B. This standard is available from the American Society of Mechanical Engineers (ASME), Three Park Avenue, New York, NY 10016-5990.

EPA has also decided to use EPA Methods 1, 1A, 2, 2A, 2C, 2D, 2F, 2G, 3, 3A, 3B, 4, 5, 5D, and 17. Although the Agency has identified 11 VCS as being potentially applicable to these methods cited in this rule, we have decided not to use these standards in this rulemaking. The use of these VCS would have been impractical because they do not meet the objectives of the standards cited in this rule. The search and review results are in the docket for this rule.

EPA welcomes comments on this aspect of the proposed rulemaking and, specifically, invites the public to identify potentially applicable VCS and to explain why such standards should be used in this regulation. Under § 63.7(f) and § 63.8(f) of Subpart A of the General Provisions, a source may apply to EPA for permission to use alternative test methods or alternative monitoring requirements in place of any required testing methods, performance specifications, or procedures in the final rule and amendments.

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

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or

environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this proposed rule would not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it would not affect the level of protection provided to human health or the environment.

List of Subjects in 40 CFR Part 63

Environmental protection, Air pollution control, Hazardous substances, Incorporations by reference, Reporting and recordkeeping requirements.

Dated: January 15, 2009.

Stephen L. Johnson,
Administrator.

For the reasons stated in the preamble, title 40, chapter I, of the Code of Federal Regulations is proposed to be amended as follows:

PART 63—[AMENDED]

1. The authority citation for part 63 continues to read as follows:

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

Subpart A—[Amended]

2. Section 63.14 is amended by revising paragraph (i)(1) to read as follows:

§ 63.14 Incorporations by reference.

* * * * *

(i) * * *
(1) ANSI/ASME PTC 19.10-1981, "Flue and Exhaust Gas Analyses [Part 10, Instruments and Apparatus]," IBR approved for §§ 63.309(k)(1)(iii), 63.865(b), 63.3166(a)(3), 63.3360(e)(1)(iii), 63.3545(a)(3), 63.3555(a)(3), 63.4166(a)(3), 63.4362(a)(3), 63.4766(a)(3), 63.4965(a)(3), 63.5160(d)(1)(iii), 63.9307(c)(2), 63.9323(a)(3), 63.11148(e)(3)(iii), 63.11155(e)(3), 63.11162(f)(3)(iii) and (f)(4), 63.11163(g)(1)(iii) and (g)(2), 63.11410(j)(1)(iii), 63.11551(a)(2)(i)(C), table 5 to subpart DDDDD of this part, and table 1 to subpart ZZZZZ of this part.

* * * * *

3. Part 63 is amended by adding subpart ZZZZZZ to read as follows:

Subpart ZZZZZZ—National Emission Standards for Hazardous Air Pollutants: Area Source Standards for Aluminum, Copper, and Other Nonferrous Foundries

Applicability and Compliance Dates
Sec.

- 63.11544 Am I subject to this subpart?
63.11545 What are my compliance dates?

Standards and Compliance Requirements

- 63.11550 What are my standards and management practices?
63.11551 What are my initial compliance requirements?
63.11552 What are my monitoring requirements?
63.11553 What are my notification, reporting, and recordkeeping requirements?

Other Requirements and Information

- 63.11555 What General Provisions apply to this subpart?
63.11556 What definitions apply to this subpart?
63.11557 Who implements and enforces this subpart?
63.11558 [Reserved]

Tables to Subpart ZZZZZZ of Part 63

Table 1 to Subpart ZZZZZZ of Part 63—
Applicability of General Provisions to
Aluminum, Copper, and Other
Nonferrous Foundries Area Sources

Subpart ZZZZZZ—National Emission Standards for Hazardous Air Pollutants: Area Source Standards for Aluminum, Copper, and Other Nonferrous Foundries

Applicability and Compliance Dates

§ 63.11544 Am I subject to this subpart?

(a) You are subject to this subpart if you own or operate an aluminum foundry, copper foundry, or other nonferrous foundry as defined in § 63.11556, “What definitions apply to this subpart?” that is an area source of hazardous air pollutant (HAP) emissions and meets the criteria specified in paragraphs (a)(1) and (2) of this section.

(1) Your aluminum foundry, copper foundry, or other nonferrous foundry uses materials that contain or have the potential to emit one or more aluminum foundry HAP, copper foundry HAP, or other nonferrous foundry HAP, as defined in § 63.11556, “What definitions apply to this subpart?”; and
(2) Your aluminum foundry, copper foundry, or other nonferrous foundry melts at least 600 tons per year (tpy) of metal.

(b) This subpart applies to each new or existing affected source located at an aluminum, copper, or other nonferrous foundry subject to this subpart, as specified in paragraphs (b)(1) through (3) of this section.

(1) Aluminum foundry sources that melt materials that contain or have the potential to emit one or more aluminum foundry HAP as defined in § 63.11556, “What definitions apply to this subpart?”

(2) Copper foundry melting operations that melt materials that contain or have

the potential to emit one or more copper foundry HAP as defined in § 63.11556, “What definitions apply to this subpart?”

(3) Other nonferrous foundry melting operations that melt materials that contain or have the potential to emit one or more other nonferrous foundry HAP as defined in § 63.11556, “What definitions apply to this subpart?”

(c) An affected source is an existing source if you commenced construction or reconstruction of the affected source on or before February 9, 2009.

(d) An affected source is a new source if you commenced construction or reconstruction of the affected source after February 9, 2009.

(e) This subpart does not apply to research and development facilities, as defined in section 112(c)(7) of the Clean Air Act.

(f) You are exempt from the obligation to obtain a permit under 40 CFR part 70 or 40 CFR part 71, provided you are not otherwise required to obtain a permit under 40 CFR 70.3(a) or 40 CFR 71.3(a) for a reason other than your status as an area source under this subpart. Notwithstanding the previous sentence, you must continue to comply with the provisions of this subpart applicable to area sources.

§ 63.11545 What are my compliance dates?

(a) If you own or operate an existing affected source, you must achieve compliance with the applicable provisions of this subpart no later than [2 years after the date of publication of the final rule in the **Federal Register**].

(b) If you start up a new affected source on or before [the date of publication of the final rule in the **Federal Register**], you must achieve compliance with the provisions of this subpart no later than [the date of publication of the final rule in the **Federal Register**].

(c) If you start up a new affected source after [the date of publication of the final rule in the **Federal Register**], you must achieve compliance with the provisions of this subpart upon startup of your affected source.

Standards and Compliance Requirements

§ 63.11550 What are my standards and management practices?

(a) If you own or operate new or existing sources at an aluminum foundry, copper foundry, or other nonferrous foundry that is subject to this subpart, you must comply with the requirements in paragraphs (a)(1) through (3) of this section.

(1) Cover or enclose each melting furnace that is equipped with a cover or enclosure during the melting operation to the extent practicable (e.g., except where access is needed, such as for charging, alloy addition, tapping).

(2) Purchase only metal scrap that has been depleted (to the extent practicable) of aluminum foundry HAP, copper foundry HAP, or nonferrous foundry HAP (as applicable) in the materials charged to the melting furnace, except metal scrap that is purchased specifically for its HAP metal content for use in alloying;

(3) Prepare and operate pursuant to a written management practices plan. The management practices plan must include the required management practices in paragraphs (a)(1) and (2) of this section and any other management practices that are implemented at the facility to minimize emissions from melting furnaces. You may use your standard operating procedures as the management practices plan provided the standard operating procedures include the required management practices in paragraphs (a)(1) and (2) of this section.

(b) If you own or operate new or existing sources at a copper foundry or other nonferrous foundry that melts 6,000 tpy or greater of metal:

(1) For existing sources, you must achieve a particulate matter (PM) control efficiency of at least 95.0 percent or an outlet PM concentration limit of at most 0.034 grams per dry standard cubic meter (g/dscm) (0.015 grains per dry standard cubic foot (gr/dscf)).

(2) For new sources, you must achieve a PM control efficiency of at least 99.0 percent or an outlet PM concentration limit of at most 0.023 g/dscm (0.010 gr/dscf).

§ 63.11551 What are my initial compliance requirements?

(a) Except as specified in paragraph (b) of this section, you must conduct a performance test for existing and new sources at a copper or other nonferrous foundry that is subject to § 63.11550(b). You must conduct the test within 180 days of your compliance date and report the results in your Notification of Compliance Status according to § 63.9(h).

(b) If you own or operate existing sources at a copper or other nonferrous foundry that is subject to § 63.11550(b), you are not required to conduct a performance test if a prior performance test was conducted within the past 5 years of the compliance date using the same methods specified in paragraph (c) of this section and you meet either of the following two conditions:

(1) No process changes have been made since the test; or

(2) You demonstrate to the satisfaction of the permitting authority that the results of the performance test, with or without adjustments, reliably demonstrate compliance despite process changes.

(c) You must conduct each test according to the requirements in § 63.7 and the requirements in paragraphs (c)(1) and (2) of this section.

(1) You must determine the concentration of PM (for the concentration standard) or the mass rate of PM (for the percent reduction standard) according to the following test methods:

(i) Method 1 or 1A (40 CFR part 60, appendix A-1) to select sampling port locations and the number of traverse points in each stack or duct. If you are complying with the concentration provision in § 63.11550(b), sampling sites must be located at the outlet of the control device and prior to any releases to the atmosphere. If you are complying with the percent reduction provision in § 63.11550(b), sampling sites must be located at the inlet and outlet of the control device and prior to any releases to the atmosphere.

(ii) Method 2, 2A, 2C, 2D, 2F (40 CFR part 60, appendix A-1), or Method 2G (40 CFR part 60, appendix A-2) to determine the volumetric flow rate of the stack gas.

(iii) Method 3, 3A, or 3B (40 CFR part 60, appendix A-2) to determine the dry molecular weight of the stack gas. You may use ANSI/ASME PTC 19.10-1981, "Flue and Exhaust Gas Analyses" (incorporated by reference-see § 63.14) as an alternative to EPA Method 3B.

(iv) Method 4 (40 CFR part 60, appendix A-3) to determine the moisture content of the stack gas.

(v) Method 5 or 5D (40 CFR part 60, appendix A-3) or Method 17 (40 CFR part 60, appendix A-6) to determine the concentration of PM or mass rate of PM (front half filterable catch only). If you are subject to the percent reduction PM standard, you must determine the mass rate of PM at the inlet and outlet in pounds per hour and calculate the percent reduction in PM.

(2) Three valid test runs are needed to comprise a performance test. Each run must cover at least one production cycle (charging, melting, and tapping).

(3) During the test, you must operate each melting furnace within ± 10 percent of its normal process rate. You must monitor and record the process rate during the test.

§ 63.11552 What are the monitoring requirements?

(a) You must record the information specified in § 63.11553(c)(2) to document conformance with the management practices plan required in § 63.11550(a).

(b) Except as specified in paragraph (b)(3) of this section, if you own or operate existing sources, you must conduct visible emissions (VE) monitoring according to the requirements in paragraphs (b)(1) and (2) of this section.

(1) You must conduct visual monitoring of the monovent or fabric filter outlet stack(s) for any visible emissions (VE) according to the schedule specified in paragraphs (b)(1)(i) and (ii) of this section.

(i) You must perform a visual determination of fugitive emissions once per day, on each day the process is in operation, during melting operations.

(ii) If no visible fugitive emissions are detected in consecutive daily visual monitoring performed in accordance with paragraph (b)(1)(i) of this section for 90 days of operation of the process, you may decrease the frequency of visual monitoring to once per calendar week of time the process is in operation, during operation of the process. If visible fugitive emissions are detected during these inspections, you must resume daily visual monitoring of that operation during each day that the process is in operation, in accordance with paragraph (b)(1)(i) of this section until you satisfy the criteria of this section to resume conducting weekly visual monitoring.

(2) If the visual monitoring reveals the presence of any VE, you must initiate procedures to determine the cause of the emissions within 1 hour of the observations and alleviate the cause of the emissions within 3 hours by taking whatever corrective action(s) are necessary.

(3) As an alternative to the monitoring requirements in paragraphs (b)(1) and (2) of this section, you may install, operate, and maintain a bag leak detection system for each fabric filter according to the requirements in paragraph (c) of this section.

(c) If you own or operate new sources equipped with a fabric filter, you must install, operate, and maintain a bag leak detection system for each fabric filter according to paragraphs (c)(1) through (3) of this section.

(1) Each bag leak detection system must meet the specifications and requirements in paragraphs (c)(1)(i) through (viii) of this section.

(i) The bag leak detection system must be certified by the manufacturer to be capable of detecting PM emissions at concentrations of 1 milligram per actual cubic meter (0.00044 grains per actual cubic foot) or less.

(ii) The bag leak detection system sensor must provide output of relative PM loadings. You must continuously record the output from the bag leak detection system using electronic or other means (*e.g.*, using a strip chart recorder or a data logger).

(iii) The bag leak detection system must be equipped with an alarm system that will sound when the system detects an increase in relative particulate loading over the alarm set point established according to paragraph (c)(1)(iv) of this section, and the alarm must be located such that it can be heard by the appropriate plant personnel.

(iv) In the initial adjustment of the bag leak detection system, you must establish, at a minimum, the baseline output by adjusting the sensitivity (range) and the averaging period of the device, the alarm set points, and the alarm delay time.

(v) Following initial adjustment, you must not adjust the averaging period, alarm set point, or alarm delay time without approval from the Administrator or delegated authority, except as provided in paragraph (c)(1)(vi) of this section.

(vi) Once per quarter, you may adjust the sensitivity of the bag leak detection system to account for seasonal effects, including temperature and humidity, according to the procedures identified in the site-specific monitoring plan required by paragraph (c)(2) of this section.

(vii) You must install the bag leak detection sensor downstream of the fabric filter.

(viii) Where multiple detectors are required, the system's instrumentation and alarm may be shared among detectors.

(2) You must prepare a site-specific monitoring plan for each bag leak detection system. You must operate and maintain each bag leak detection system according to the plan at all times. Each monitoring plan must describe the items in paragraphs (c)(2)(i) through (vi) of this section.

(i) Installation of the bag leak detection system;

(ii) Initial and periodic adjustment of the bag leak detection system, including how the alarm set-point and alarm delay time will be established;

(iii) Operation of the bag leak detection system, including quality assurance procedures;

(iv) How the bag leak detection system will be maintained, including a routine maintenance schedule and spare parts inventory list;

(v) How the bag leak detection system output will be recorded and stored; and

(vi) Corrective action procedures as specified in paragraph (c)(3) of this section.

(3) Except as provided in paragraph (c)(4) of this section, you must initiate procedures to determine the cause of every alarm from a bag leak detection system within 1 hour of the alarm and alleviate the cause of the alarm within 3 hours of the alarm by taking whatever corrective action(s) are necessary. Corrective actions may include, but are not limited to, the following:

(i) Inspecting the fabric filter for air leaks, torn or broken bags or filter media, or any other condition that may cause an increase in PM emissions;

(ii) Sealing off defective bags or filter media;

(iii) Replacing defective bags or filter media, or otherwise repairing the control device;

(iv) Sealing off a defective fabric filter compartment;

(v) Cleaning the bag leak detection system probe, or otherwise repairing the bag leak detection system; or

(4) You may take more than 3 hours to alleviate a specific condition that causes an alarm if you identify in the monitoring plan this specific condition as one that could lead to an alarm, adequately explain why it is not feasible to alleviate this condition within 3 hours of the time the alarm occurs, and demonstrate that the requested time will ensure alleviation of this condition as expeditiously as practicable.

(d) If you use a control device other than a fabric filter for existing sources subject to § 63.11551(b), you must prepare and submit a monitoring plan to the permitting authority for approval. Each plan must contain the information in paragraphs (d)(1) through (5) of this section.

(1) A description of the device;

(2) Test results collected in accordance with § 63.11551(c) verifying the performance of the device for reducing PM emissions to the levels required by this subpart;

(3) Operation and maintenance plan for the control device (including a preventive maintenance schedule consistent with the manufacturer's instructions for routine and long-term maintenance);

(4) A list of operating parameters that will be monitored to maintain continuous compliance with the applicable emission limit; and

(5) Operating parameter limits based on monitoring data collected during the performance test.

§ 63.11553 What are my notification, reporting, and recordkeeping, requirements?

(a) You must submit the Initial Notification required by § 63.9(b)(2) no later than 120 calendar days after [the date of publication of the final rule in the **Federal Register**] or within 120 days after the source becomes subject to the standard. The Initial Notification must include the information specified in paragraphs (a)(1) through (3) of this section and may be combined with the Notification of Compliance Status required in paragraph (b) of this section.

(1) The name and address of the owner or operator;

(2) The address (*i.e.*, physical location) of the affected source; and

(3) An identification of the relevant standard, or other requirement, that is the basis of the notification and source's compliance date.

(b) You must submit the Notification of Compliance Status required by § 63.9(h) no later than 120 days after the applicable compliance date specified in § 63.11546 unless you must conduct a performance test. If you must conduct a performance test, you must submit the Notification of Compliance Status within 60 days of completing the performance test. In addition to the information required in § 63.9(h)(2) and § 63.11551, your notification must include the following certification(s) of compliance, as applicable, and signed by a responsible official:

(1) "This facility complies with the requirements in § 63.11550(a)(1) to cover or enclose each melting furnace that is equipped with a cover or enclosure during the melting operation to the extent practicable".

(2) "This facility complies with the requirement in § 63.11550(a)(2) to purchase and use only metal scrap that has been depleted (to the extent practicable) of aluminum foundry HAP, copper foundry HAP, or other nonferrous foundries HAP (as applicable) in the materials charged to the melting furnace, except for metal scrap that is purchased specifically for its HAP metal content for use in alloying".

(3) "This facility has prepared and will operate by a written management practices plan according to § 63.11550(a)(3)."

(4) If the owner or operator of an existing affected source is certifying compliance based on the results of a previous performance test: "This facility complies with § 63.11550(b) based on a

previous performance test in accordance with § 63.11551(b)."

(4) This certification of compliance by the owner or operator that installs bag leak detection systems: "This facility has prepared a bag leak detection system monitoring plan in accordance with § 63.11552(c) and will operate each bag leak detection system according to the plan."

(c) You must keep the records specified in paragraphs (c)(1) through (5) of this section.

(1) As required in § 63.10(b)(2)(xiv), you must keep a copy of each notification that you submitted to comply with this subpart and all documentation supporting any Initial Notification or Notification of Compliance Status that you submitted.

(2) You must keep records to document conformance with the management practice plan required by § 63.11550 as specified in paragraphs (c)(2)(i) through (iv) of this section.

(i) For melting furnaces equipped with a cover or enclosure, records must identify each melting furnace equipped with a cover or enclosure, the date and time of each melting operation, and that the procedures in the management practices plan were followed for each melting operation. These records may be in the form of a checklist.

(ii) Records documenting your purchase and use of only metal scrap that has been depleted of HAP metals (to the extent practicable) charged to the melting furnace. If you purchase scrap metal specifically for the HAP metal content for use in alloying, records must show that the HAP metal is included in the material specifications for the cast metal product.

(3) You must keep the records of all inspection and monitoring data required by §§ 63.11551 and 63.11552, and the information identified in paragraphs (c)(3)(i) through (v) of this section for each required inspection or monitoring.

(i) The date, place, and time of the monitoring event;

(ii) Person conducting the monitoring;

(iii) Technique or method used;

(iv) Operating conditions during the activity;

(v) Results, including the date, time, and duration of the period from the time the monitoring indicated a problem (e.g., VE) to the time that monitoring indicated proper operation; and

(v) Maintenance or corrective action taken (if applicable).

(4) If you own or operate new or existing sources at a copper foundry or other nonferrous foundry that is not subject to § 63.11550(b), you must maintain records to document that your

facility melts less than 6,000 tpy of metal.

(5) If you use a bag leak detection system, you must keep the records specified in paragraphs (c)(5)(i) through (iii) of this section.

(i) Records of the bag leak detection system output.

(ii) Records of bag leak detection system adjustments, including the date and time of the adjustment, the initial bag leak detection system settings, and the final bag leak detection system settings.

(iii) The date and time of all bag leak detection system alarms, and for each valid alarm, the time you initiated corrective action, the corrective action taken, and the date on which corrective action was completed.

(d) Your records must be in a form suitable and readily available for expeditious review, according to § 63.10(b)(1). As specified in § 63.10(b)(1), you must keep each record for 5 years following the date of each recorded action. You must keep each record onsite for at least 2 years after the date of each recorded action according to § 63.10(b)(1). You may keep the records offsite for the remaining 3 years.

(e) If a deviation occurs during a semiannual reporting period, you must submit a compliance report to your permitting authority according to the requirements in paragraphs (e)(1) and (2) of this section.

(1) The first reporting period covers the period beginning on the compliance date specified in § 63.11546 and ending on June 30 or December 31, whichever date comes first after your compliance date. Each subsequent reporting period covers the semiannual period from January 1 through June 30 or from July 1 through December 31. Your compliance report must be postmarked or delivered no later than July 31 or January 31, whichever date comes first after the end of the semiannual reporting period.

(2) A compliance report must include the information in paragraphs (e)(2)(i) through (iv) of this section.

(i) Company name and address.

(ii) Statement by a responsible official, with the official's name, title, and signature, certifying the truth, accuracy and completeness of the content of the report.

(iii) Date of the report and beginning and ending dates of the reporting period.

(iv) Identification of the affected source, the pollutant being monitored, applicable requirement, description of deviation, and corrective action taken.

Other Requirements and Information

§ 63.11555 What General Provisions apply to this subpart?

Table 1 to this subpart shows which parts of the General Provisions in § 63.1 through 63.16 apply to you.

§ 63.11556 What definitions apply to this subpart?

Terms used in this subpart are defined in the Clean Air Act, in § 63.2, and in this section as follows:

Aluminum foundry means a facility that melts aluminum and pours molten aluminum into molds to manufacture aluminum castings (except die casting).

Aluminum foundry HAP means any compound of the following metals: beryllium, cadmium, lead, manganese, or nickel, or any of these metals in the elemental form.

Bag leak detection system means a system that is capable of continuously monitoring relative particulate matter (i.e., dust) loadings in the exhaust of a baghouse to detect bag leaks and other upset conditions. A bag leak detection system includes, but is not limited to, an instrument that operates on triboelectric, light scattering, light transmittance, or other effect to continuously monitor relative particulate matter loadings.

Copper foundry means a facility that melts copper or copper-based alloys and pours molten copper or copper-based alloys into molds to manufacture copper or copper-based alloy castings (excluding die casting).

Copper foundry HAP means any compound of any of the following metals: Lead, manganese, or nickel, or any of these metals in the elemental form.

Material containing aluminum foundry HAP means a material containing one or more aluminum foundry HAP. Any material that contains beryllium, cadmium, lead, or nickel in amounts greater than or equal to 0.1 percent by weight (as the metal), or contains manganese in amounts greater than or equal to 1.0 percent by weight (as the metal), as shown in formulation data provided by the manufacturer or supplier, such as the Material Safety Data Sheet for the material, is considered to be a material containing aluminum foundry HAP.

Material containing copper foundry HAP means a material containing one or more copper foundry HAP. Any material that contains lead or nickel in amounts greater than or equal to 0.1 percent by weight (as the metal), or contains manganese in amounts greater than or equal to 1.0 percent by weight (as the metal), as shown in formulation

data provided by the manufacturer or supplier, such as the Material Safety Data Sheet for the material, is considered to be a material containing copper foundry HAP.

Material containing other nonferrous foundry HAP means a material containing one or more other nonferrous foundry HAP. Any material that contains chromium, lead, or nickel in amounts greater than or equal to 0.1 percent by weight (as the metal), as shown in formulation data provided by the manufacturer or supplier, such as the Material Safety Data Sheet for the material, is considered to be a material containing other nonferrous foundry HAP.

Melting operations means the collection of furnaces (e.g., induction, reverberatory, crucible, tower, dry hearth) used to melt metal ingot, alloyed ingot and/or metal scrap to produce molten metal that is poured into molds to make castings.

Other nonferrous foundry means a facility that melts nonferrous metals other than aluminum, copper, or copper-based alloys and pours the nonferrous metals into molds to manufacture nonferrous metal castings (excluding die casting).

Other nonferrous foundry HAP means any compound of the following metals: Chromium, lead, and nickel, or any of these metals in the elemental form.

§ 63.11557 Who implements and enforces this subpart?

(a) This subpart can be implemented and enforced by the U.S. EPA or a delegated authority, such as your State, local, or tribal agency. If the U.S. EPA Administrator has delegated authority to your State, local, or tribal agency, then that agency has the authority to implement and enforce this subpart. You should contact your U.S. EPA Regional Office to find out if this subpart is delegated to your State, local, or tribal agency.

(b) In delegating implementation and enforcement authority of this subpart to a State, local, or tribal agency under 40 CFR part 63, subpart E, the authorities contained in paragraph (c) of this section are retained by the Administrator of the U.S. EPA and are not transferred to the State, local, or tribal agency.

(c) The authorities that will not be delegated to State, local, or tribal agencies are listed in paragraphs (c)(1) through (4) of this section.

(1) Approval of alternatives to the applicability requirements in § 63.11544, the compliance date requirements in § 63.11545, and the applicable standards in § 63.11550.

(2) Approval of an alternative nonopacity emissions standard under § 63.6(g).

(3) Approval of a major change to a test method under § 63.7(e)(2)(ii) and (f). A “major change to test method” is defined in § 63.90(a).

(4) Approval of a major change to monitoring under § 63.8(f). A “major change to monitoring” is defined in § 63.90(a).

(5) Approval of a waiver of recordkeeping or reporting requirements under § 63.10(f), or another major

change to recordkeeping/reporting. A “major change to recordkeeping/reporting” is defined in § 63.90(a).

§ 63.11558 [Reserved]

Tables to Subpart ZZZZZZ of Part 63

TABLE 1 TO SUBPART ZZZZZZ OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO ALUMINUM, COPPER, AND OTHER NONFERROUS FOUNDRIES AREA SOURCES

As required in § 63.11555, “What General Provisions apply to this subpart?” you must comply with each requirement in the following table that applies to you.

Citation	Subject	Applies to subpart ZZZZZZ?	Explanation
§ 63.1(a)(1), (a)(2), (a)(3), (a)(4), (a)(6), (a)(10)–(a)(12), (b)(1), (b)(3), (c)(1), (c)(2), (c)(5), (e).	Applicability	Yes	§ 63.11544(f) exempts affected sources from the obligation to obtain a title V operating permit.
§ 63.1(a)(5), (a)(7)–(a)(9), (b)(2), (c)(3), (c)(4), (d).	Reserved	No.	
§ 63.2	Definitions	Yes.	Subpart ZZZZZZ requires continuous compliance with all requirements in this subpart.
§ 63.3	Units and Abbreviations	Yes.	
§ 63.4	Prohibited Activities and Circumvention	Yes.	
§ 63.5	Preconstruction Review and Notification Requirements	Yes.	
§ 63.6(a), (b)(1)–(b)(5), (b)(7), (c)(1), (c)(2), (c)(5), (e)(1), (e)(3)(i), (e)(3)(iii)–(e)(3)(ix), (f)(2), (f)(3), (g), (i), (j).	Compliance with Standards and Maintenance Requirements	Yes.	
§ 63.6(f)(1)	Compliance with Nonopacity Emission Standards	No	
§ 63.6(h)(1), (h)(2), (h)(5)–(h)(9)	Compliance with Opacity and Visible Emission Limits	No	
§ 63.6(b)(6), (c)(3), (c)(4), (d), (e)(2), (e)(3)(ii), (h)(3), (h)(5)(iv).	Reserved	No.	
§ 63.7	Applicability and Performance Test Dates	Yes.	
§ 63.8(a)(1), (b)(1), (f)(1)–(5), (g)	Monitoring Requirements	Yes.	
§ 63.8(a)(2), (a)(4), (b)(2)–(3), (c), (d), (e), (f)(6), (g).	Continuous Monitoring Systems	No	Subpart ZZZZZZ does not require a flare or CPMS, COMS or CEMS.
§ 63.8(a)(3)	[Reserved]	No.	
§ 63.9(a), (b)(1), (b)(2)(i)–(iii), (b)(5), (c), (d), (e), (h)(1)–(h)(3), (h)(5), (h)(6), (j).	Notification Requirements	Yes	Subpart ZZZZZZ requires submission of Notification of Compliance Status within 120 days of compliance date unless a performance test is required.
§ 63.9(b)(2)(iv)–(v), (b)(4), (f), (g), (i)	No.	
§ 63.9(b)(3), (h)(4)	Reserved	No.	
§ 63.10(a), (b)(1), (b)(2)(i)–(v), (vii), (vii)(C), (viii), (ix), (b)(3), (d)(1)–(2), (d)(4), (d)(5), (f).	Recordkeeping and Reporting Requirements	Yes.	Subpart ZZZZZZ does not require a CPMS, COMS, CEMS, or opacity or visible emissions limit.
§ 63.10(b)(2)(vi), (b)(2)(vii)(A)–(B), (c), (d)(3), (e).	No	
§ 63.10(c)(2)–(c)(4), (c)(9)	Reserved	No.	
§ 63.11	Control Device Requirements	No.	Subpart ZZZZZZ does not require a CPMS, COMS, CEMS, or opacity or visible emissions limit.
§ 63.12	State Authority and Delegations	Yes.	
§§ 63.13–63.16	Addresses, Incorporations by Reference, Availability of Information, Performance Track Provisions	Yes.	



Federal Register

**Monday,
February 9, 2009**

Part IV

The President

**Executive Order 13498—Amendments to
Executive Order 13199 and Establishment
of the President’s Advisory Council for
Faith-Based and Neighborhood
Partnerships**

**Memorandum of February 5, 2009—
Appliance Efficiency Standards**

Presidential Documents

Title3—

Executive Order 13498 of February 5, 2009

The President

Amendments to Executive Order 13199 and Establishment of the President's Advisory Council for Faith-Based and Neighborhood Partnerships

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to strengthen the ability of faith-based and other neighborhood organizations to deliver services effectively in partnership with Federal, State, and local governments and with other private organizations, while preserving our fundamental constitutional commitments, it is hereby ordered:

Section 1. *Amendments to Executive Order.* Executive Order 13199 of January 29, 2001 (Establishment of White House Office of Faith-Based and Community Initiatives), is hereby amended:

(a) by striking section 1, and inserting in lieu thereof the following:

“**Section 1. Policy.** Faith-based and other neighborhood organizations are vital to our Nation’s ability to address the needs of low-income and other underserved persons and communities. The American people are key drivers of fundamental change in our country, and few institutions are closer to the people than our faith-based and other neighborhood organizations. It is critical that the Federal Government strengthen the ability of such organizations and other nonprofit providers in our neighborhoods to deliver services effectively in partnership with Federal, State, and local governments and with other private organizations, while preserving our fundamental constitutional commitments guaranteeing the equal protection of the laws and the free exercise of religion and forbidding the establishment of religion. The Federal Government can preserve these fundamental commitments while empowering faith-based and neighborhood organizations to deliver vital services in our communities, from providing mentors and tutors to school children to giving ex-offenders a second chance at work and a responsible life to ensuring that families are fed. The Federal Government must also ensure that any organization receiving taxpayers’ dollars must be held accountable for its performance. Through rigorous evaluation, and by offering technical assistance, the Federal Government must ensure that organizations receiving Federal funds achieve measurable results in furtherance of valid public purposes.”

(b) by substituting “White House Office of Faith-Based and Neighborhood Partnerships” for “White House Office of Faith-Based and Community Initiatives” each time it appears in the order; and by substituting “Office” for “White House OFBCI” each time it appears in the order.

(c) in section 3, by inserting after subsection (b) the following new subsections:

“(c) to ensure that services paid for with Federal Government funds are provided in a manner consistent with fundamental constitutional commitments guaranteeing the equal protection of the laws and the free exercise of religion and prohibiting laws respecting an establishment of religion;

(d) to promote effective training for persons providing federally funded social services in faith-based and neighborhood organizations;

(e) to promote the better use of program evaluation and research, in order to ensure that organizations deliver services as specified in grant

agreements, contracts, memoranda of understanding, and other arrangements;”

and renumbering the subsequent subsections of section 3 accordingly.

(d) in section 4, by striking the first sentence of subsection (b), and inserting in lieu thereof the following: ≥The Office shall have a staff to be headed by the Special Assistant to the President and Executive Director of the White House Office of Faith-Based and Neighborhood Partnerships (Executive Director).≥

Sec. 2. President's Advisory Council on Faith-Based and Neighborhood Partnerships. (a) *Establishment.* There is established within the Executive Office of the President the President's Advisory Council on Faith-Based and Neighborhood Partnerships (Council).

(b) *Mission.* The Council shall bring together leaders and experts in fields related to the work of faith-based and neighborhood organizations in order to: identify best practices and successful modes of delivering social services; evaluate the need for improvements in the implementation and coordination of public policies relating to faith-based and other neighborhood organizations; and make recommendations to the President, through the Executive Director, for changes in policies, programs, and practices that affect the delivery of services by such organizations and the needs of low-income and other underserved persons in communities at home and around the world.

(c) *Membership.* (1) The Council shall be composed of not more than 25 members appointed by the President from among individuals who are not officers or employees of the Federal Government. The members shall be persons with experience and expertise in fields related to the provision of social services by faith-based and other neighborhood organizations.

(2) Members of the Council shall serve for terms of 1 year, and may continue to serve after the expiration of their terms until the President appoints a successor. Members shall be eligible for reappointment and serve at the pleasure of the President during their terms.

(3) The President shall designate a member of the Council to serve as Chair for a term of 1 year at the pleasure of the President. The Chair may continue to serve after the expiration of the Chair's term and shall be eligible for redesignation by the President.

(4) The Executive Director of the White House Office of Faith-Based and Neighborhood Partnerships shall also serve as Executive Director of the Council.

(5) The Council shall have a staff headed by the Executive Director.

(d) *Administration.* (1) Upon the request of the Chair, with the approval of the Executive Director, the heads of executive departments and agencies shall, to the extent permitted by law, provide the Council with information it needs for purposes of carrying out its mission.

(2) With the approval of the Executive Director, the Council may request and collect information, hold hearings, establish subcommittees, and establish task forces consisting of members of the Council or other individuals who are not officers or employees of the Federal Government, as necessary to carry out its mission.

(3) With the approval of the Executive Director, the Council may conduct analyses and develop reports or other materials as necessary to perform its mission.

(4) Members of the Council shall serve without compensation, but shall be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law for persons serving intermittently in Government service (5 U.S.C. 5701B5707) to the extent funds are available.

(5) To the extent permitted by law, and subject to the availability of appropriations, the Department of Health and Human Services shall provide the Council with administrative support and with such funds as may be necessary for the performance of the Council's functions.

(e) *General Provisions.* (1) Insofar as the Federal Advisory Committee Act, as amended (5 U.S.C. App.) (Act), may apply to the Council, any functions of the President under that Act, except for those in section 6 of the Act, shall be performed by the Secretary of Health and Human Services in accordance with guidelines issued by the Administrator of General Services.

(2) The Council shall terminate 2 years from the date of this order unless extended by the President.

Sec. 3. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(1) authority granted by law to a department, agency, or the head thereof; or

(2) functions of the Director of the Office of Management and Budget relating to budget, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) In order to ensure that Federal programs and practices involving grants or contracts to faith-based organizations are consistent with law, the Executive Director, acting through the Counsel to the President, may seek the opinion of the Attorney General on any constitutional and statutory questions involving existing or prospective programs and practices.

(d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
February 5, 2009.

Presidential Documents

Memorandum of February 5, 2009

Appliance Efficiency Standards

Memorandum for the Secretary of Energy

Under the Energy Policy and Conservation Act of 1975 (EPCA), the Department of Energy (DOE) is required to establish by certain dates energy efficiency standards for a broad class of residential and commercial products. These products are appliances and other equipment used in consumers' homes and in commercial establishments. In the Energy Policy Act of 2005 (EPACT), the Congress directed the DOE to develop a plan to issue expeditiously efficiency standards for those products with respect to which the Department had not yet met the deadlines specified in the EPCA.

In 2005, 14 States and various other entities brought suit alleging that the DOE had failed to comply with deadlines and other requirements in the EPCA. In November 2006, the DOE entered into a consent decree under which the DOE agreed to publish final rules regarding 22 product categories by specific deadlines, the latest of which is June 30, 2011. The consent decree includes target dates for the rulemaking processes and sets deadlines for issuance of final rules with respect to each product category. The Energy Independence and Security Act of 2007 (EISA) directed the DOE to establish energy standards for additional product categories.

The DOE remains subject to outstanding deadlines with respect to 15 of the 22 product categories covered by the consent decree, as well as statutory deadlines for a number of additional product categories. These efficiency standards, once implemented, will result in significant energy savings for the American people.

Therefore, I request that:

(a) the DOE take all necessary steps, consistent with the consent decree, EPACT, and EISA, to finalize legally required efficiency standards as expeditiously as possible and consistent with all applicable judicial and statutory deadlines. Such standards include, most immediately, those covered by the five energy efficiency rules with deadlines prior to and including August 8, 2009;

(b) with respect to standards subject to judicial and statutory deadlines later than August 8, 2009, the DOE work to complete prior to the applicable deadline those standards that will result in the greatest energy savings. To undertake this task, the DOE should quantify, to the extent feasible and consistent with statutory requirements, the expected annual energy savings from the relevant standards. The DOE must, however, ensure that it meets applicable deadlines for all standards.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

You are hereby authorized and directed to publish this memorandum in the *Federal Register*.

A handwritten signature in black ink, appearing to be Barack Obama's signature, consisting of a large, stylized 'B' followed by a circle and a horizontal line.

THE WHITE HOUSE,
Washington, February 5, 2009

Reader Aids

Federal Register

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Monday, February 9, 2009

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