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Washington, DC 20002

RESERVATIONS: (202) 741–6008

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DEPARTMENT OF AGRICULTURE

Rural Utilities Service

7 CFR Part 1755

Telecommunications Policies on Specifications, Acceptable Materials, and Standard Contract Forms

AGENCY: Rural Utilities Service, USDA.

ACTION: Final rule.

SUMMARY: The Rural Utilities Service, an agency delivering the United States Department of Agriculture's (USDA) Rural Development Utilities Programs, hereinafter referred to as USDA Rural Development or the Agency, is revising its regulation: on fiber optic cable specifications used by borrowers, their consulting engineers, and cable manufacturers; updates the specifications to meet current industry standards; includes additional requirements in the specifications to meet the construction requirements of fiber-to-the-home construction; clarifies certain existing definitions; separates the regulation into two distinct specifications for cables covering backbone and distribution plant, as well as for service entrance cables covering subscribers' drops; and includes new definitions.

DATES: *Effective Date:* This final rule will become effective May 5, 2009

Incorporation by Reference: The incorporation by reference of certain publications listed in this rule is approved by the Director of the Federal Register as of May 5, 2009.

FOR FURTHER INFORMATION CONTACT: Norberto Esteves, Chair, Technical Standards Committee ''A'' (Telecommunications), Advanced Services Division, USDA Rural Development Telecommunications Program, STOP 1550, Washington, DC 20250–1550. *Telephone:* (202) 720–0699; *Fax:* (202) 205–2924; *e-mail: norberto.esteves@wdc.usda.gov.*

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This rule is exempt from the Office of Management and Budget (OMB) review for purposes of Executive Order 12866 and, therefore, has not been reviewed by OMB.

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. USDA Rural Development has determined that this final rule meets the applicable standards provided in section 3 of the Executive Order. In addition, all state and local laws and regulations that are in conflict with this proposed rule will be preempted; no retroactive effect will be given to the rule, and, per section 212(e) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. 6912(e)), administrative appeals procedures, if any are required, must be exhausted before an action against the Department or its agencies may be initiated.

Regulatory Flexibility Act Certification

USDA Rural Development has determined that this final rule will not have a significant economic impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The standard USDA Rural Development telecommunications loan documents contain provisions on procurement of products and construction of telecommunications facilities purchased with loan funds. This ensures that the telecommunications systems financed with loan funds are adequate to serve the purposes for which they are to be constructed and that loan funds are adequately secured. USDA Rural Development borrowers, as a result of obtaining Federal financing, receive economic benefits that exceed any direct cost associated with complying with USDA Rural Development regulations and requirements.

Information Collection and Recordkeeping Requirements

The information collection and recordkeeping requirements contained in this final rule are cleared under control number 0572–0059 pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

Executive Order 13132

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Under Executive Order 13132, this final rule does not have sufficient federalism implications requiring the preparation of a Federalism Assessment.

Catalog of Federal Domestic Assistance

The program described by this final rule is listed in the Catalog of Federal Domestic Assistance Programs under No. 10.851, Rural Telephone Loans and Loan Guarantees and No. 10.857, Rural Broadband Access Loans and Loan Guarantees. This catalog is available on a subscription basis from the Superintendent of Documents, the United States Government Printing Office, Washington, DC 20402 or at *http://www.cfda.gov. Telephone:* (202) 512–1800.

Executive Order 12372

This final rule is excluded from the scope of Executive Order 12372, Intergovernmental Consultation, which may require consultation with State and local officials. See the final rule-related notice titled ''Department Programs and Activities Excluded from Executive Order 12372'' (50 FR 47034), advising that USDA Rural Development Utilities Programs loans and loan guarantees are excluded from the scope of Executive Order 12372.

Unfunded Mandates

This final rule contains no Federal Mandates (under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. Chapter 25)) for State, local, and tribal governments or the private sector. Thus, this final rule is not subject to the requirements of sections 202 and 205 of the Unfunded Mandates Reform Act of 1995.

National Environmental Policy Act Certification

The Agency has determined that this final rule will not significantly affect the quality of the human environment as defined by the National Environmental

Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Therefore, this action does not require an environmental impact statement or assessment.

Background

On July 17, 2007, the Agency published a proposed rule [72 FR 39028] revising the current requirements for fiber optic cables of 7 CFR 1755.900 codified in 1995. The comment period ended on September 17, 2007. Comments were received from three companies by the due date. No changes in the regulations requirements have been made, except those in response to comments received.

This final rule revises the current requirements for fiber optic cables of 7 CFR 1755.900 codified in 1995 as well as minor editorial changes. The final rule sets the minimum performance requirements based on current industry standards. This revision was initiated to resolve problems the rural telecom industry is experiencing with cables manufactured under the existing specifications and reported by rural carriers and their consulting engineers. It addresses the buffer tube shrinkage caused by storage at low temperatures, which impairs fiber-to-the-home system performance, and sets new requirements for drop cables (cables with 12 or fewer fibers operating up to 100 meters (300 feet)).

Cables manufactured to these revised specifications will have lower average bi-directional loss at fusion splices, about 0.1 decibels (dB) instead of the 0.2 dB currently required. For fiber-to-the-home applications the specification requires a maximum mid-span length of 6.1 meters (20 feet) for cables used on mid-span applications with buffer tube storage. From a polarization mode dispersion standpoint, the maximum Statistical Parameter of Polarization Mode Dispersion (PMD_Q) of 0.20 Picosecond per nanometer times kilometer (ps/√km) specified will allow the deployment of higher-speed transmission systems at longer distances: 3,000 kilometers (km) (1,864 miles) for digital systems operating at 10 Gigabits per second (Gbps) and 80 km (50 miles) operating at 40 Gbps. These performance refinements are necessary because end-users deploying cable meeting this level of performance expect it to deliver high bit rate services during the useful economic life of these cables.

The comments, recommendations, and responses are summarized as follows:

The National Telecommunications Cooperative Association (NTCA) submitted one comment in support of the proposed rulemaking.

Response: Rural Development appreciates the recommendations given by NTCA to this proposed regulation.

Draka Comteq submitted one comment that addressed the following issues:

(1) *''To address proper field usage of optical fiber cable, we recommend adding the following statement in this specification: Installed cable must be properly terminated. This includes properly securing rigid strength members (i.e. central strength member) and clamping the cable and jacket. It is important that cable components be secured to prevent movement of the cable or components over the operating conditions. Positive stop central strength member (CSM) clamps must be used and the CSM must be routed as straight and as short as practical to prevent bowing or breaking of the CSM. The cable and jacket retention must be sufficient to prevent jacket slippage over the operating temperature range.''*

Response: The Agency agrees with this comment from Draka Comteq. The statement has been added to the specification under § 1755.900, (c)(1)(viii).

(2) ''Section 5, Fiber Optic Service Entrance Cable (1755.901): *Due to the product and application differences, Draka recommends that a separate specification be used for drop cable. We recommend using the Rural Development Utilities Programs Specification for Fiber Optic Service Entrance Cables that was finalized last year. Key drop specification differences include:*

—*Midspan tube storage should not be required*

—*Jacket thickness specifications are different: 0.5 mm minimum thickness, 0.30 mm over optional toning elements, 0.20 mm over any radial strength member not used as a primary strength member*

—*Reel wrap: applies to only reels weighing more than 75 lbs.*

—*Cable core: cylindrical core is not required (i.e. flat drop cable)*

—*Figure 8 drop will use a small messenger.''*

Response: The Agency agrees with Draka Comteq's comments. Section 1755.901 has been added to make the cable requirements for drop cables a stand alone section based on the Rural Development Utilities Programs Specification for Fiber Optic Service Entrance Cables draft specification.

TRW, Inc., submitted one comment which addressed the items as follows and expressed its support to the proposed regulation:

1. *''Reference § 1755.900(t)(15) Mid Span Test. Rural Fiber-to-the-Home systems in low density applications may include as many as 15 to 20 mid-span openings and in much of the USA are exposed to extreme temperature variations in the outside plant environment. Furthermore, an adequate length of fiber needs to be available to facilitate splicing in the confined space of pedestals and splice closures. It is also known that the various components of fiber cable are made of several types of materials and when such cables are opened at splice points the various materials are subject to differential expansion and contraction. It is essential that fiber optic cable be designed and proof tested to perform without degradation from temperature cycling throughout a service life of 20 to 30 years. Therefore, in order not to jeopardize service due to increased attenuation over the life other plant, the maximum increase in optical attenuation allowed after cycle testing should not exceed .1 dB pre mid-span opening as proposed by RUS.''*

Response: The Agency agrees with this comment. It is the Agency's viewpoint that the buffer tube needs to be designed so no attenuation losses occur due to micro-bending of the fibers caused by shrinking of the buffer tube in low temperature conditions that are within the cable operating temperatures range. The mid-span test has been revised and now calls for a maximum average loss of 0.05 dB.

2. *''Reference § 1755.900(t)(15)(iv)(c)—Mid-Span Test. For the reasons stated in the preceding paragraph, the mid-span lengths specified for testing should not be less than 16 feet as proposed by RUS.''*

Response: The Agency agrees with this comment. The 16-foot mid-span opening was set originally based on the maximum opening recommended for use in the Agency accepted pedestals. The Agency has received test data from various manufacturers that performed this mid-span test using a 20-foot mid-span opening. To allow a buffer, the specification has been changed to allow only a minimum mid-span opening of 20 feet.

3. *''Reference § 1755.900(t)(15)(iv)(E)—Mid-Span Test. For the reasons stated above the cable sample tested should be subjected to not less than 5 complete cycles as proposed by RUS.''*

Response: The Agency agrees. The Mid-Span Test now calls for 5 complete cycles.

4. *''Reference § 1755.900(b)(15)—Matched Cable: Should the wavelength 1310, 1550 nm or both be stated?''*

Response: No, by not stating the wavelength, the requirement applies to

both the 1310 nm MFD and 1550 nm MFD.

5. *''Reference § 1755.900(b)(15)—Matched Cable: Is the average bi-directional loss of .1 dB, expected at 1310 nm, 1550 nm, or both? This question will come up as actual splice data is evaluated in the field.''*

Response: At both wavelengths, however, the fiber normally is tested at the wavelength that will be used for transmission. For local loop applications splice loss measurements should be conducted at 1310 nm since losses measured at this wavelength are generally higher than losses measured at 1510 nm. For long haul application using non-zero-dispersion shifted fiber cable, such as ITU G.655 fiber, the splice loss measurement should be conducted at 1510 nm. The average bi-directional loss of a fusion splice to be ≤ 0.1 dB is a goal and not every splice needs to meet this goal as long as the total budget loss for the link is met.

6. *''Reference § 1755.900(c)(4)—ADSS cables. Per NESC C2–2007, Table 232–1, the typical minimum sagged ground clearance should be stated as 4.7 m (15.5 feet) rather than 4.3 m (14 feet) as proposed.''*

Response: The ''typical minimum sagged'' ground clearance has been changed to 4.7 m (15.5 feet).

7. *''Reference § 1755.900(g)(3)—Optical Fiber Ribbon: There appears to be a typographical error in the paragraph, ''manufactures'' should be ''manufacturer.''*

Response: A correction was made.

8. *Reference § 1755.900(o) —Armor. Typographical errors, ''mills'' should be ''mils.''*

Response: A correction was made.

9. *''Reference § 1755.900(s)(1)—Zero Dispersion Optical Fiber Cable. Typographical errors, should be ''Table2/G.652.B'' and ''Table4/G.652.D.''*

Response: A correction was made.

10. *Reference § 1755.900*(y)(1)—*Packaging * * * Typographical error, ''continues'' should be ''continuous.''*

Response: A correction was made.

11. *Clarification of definitions.*

Response: The Agency has added language to indicate reference materials available online and in a bulletin format on the Agency acceptance process and has added the definitions of the ''List of Acceptable Materials'' and ''Accept/Acceptance.'' Additionally, the definition of *''polarization mode dispersion''* was revised for clarity and the definition of *''birefringence''* has been defined separately, rather than being incorporated into the definition of *polarization mode dispersion.*

List of Subjects in 7 CFR Part 1755

Incorporation by reference, Loan programs—communications, Reporting and recordkeeping requirements, Rural areas, Telecommunications, Telephone.

■ For reasons set forth in the preamble, chapter XVII of title 7 of the Code of Federal Regulations, is amended as follows:

PART 1755—TELECOMMUNICATIONS POLICIES ON SPECIFICATIONS, ACCEPTABLE MATERIALS, AND STANDARD CONTRACT FORMS

■ 1. The heading of part 1755 is revised to read as set out above.

■ 2. The authority citation for part 1755 continues to read as follows:

Authority: 7 U.S.C. 901 *et seq.,* 1921 *et seq.,* 6941 *et seq.*

■ 3. Section 1755.900 is revised and §§ 1755.901, 1755.902, and 1755.903 are added to read as follows:

§ 1755.900 Abbreviations and Definitions.

The following abbreviations and definitions apply to §§ 1755.901 and 1755.902:

(a) *Abbreviations.*
(1) ADSS All dielectric self-supporting;
(2) ASTM American Society for Testing and Materials;
(3) °C Centigrade temperature scale;
(4) dB Decibel;
(5) CSM Central strength member;
(6) dB/km Decibels per 1 kilometer;
(7) ECCS Electrolytic chrome coated steel;
(8) EIA Electronic Industries Alliance;
(9) EIA/TIA Electronic Industries Alliance/Telecommunications Industry Association;
(10) FTTH Fiber-to-the-Home;
(11) Gbps Gigabit per second or Gbit/s;
(12) GE General Electric;
(13) HDPE High density polyethylene;
(14) ICEA Insulated Cable Engineers Association, Inc.;
(15) Km kilometer(s;)
(16) LDPE Low density polyethylene;
(17) m meter(s;)
(18) Max. Maximum;
(19) Mbit Megabits;
(20) MDPE Medium density polyethylene;
(21) MHz-km Megahertz-kilometer;
(22) Min. Minimum;
(23) MFD Mode-Field Diameter;
(24) nm Nanometer(s;)
(25) N Newton(s;)
(26) NA Numerical aperture;
(27) NESC National Electrical Safety Code;
(28) OC Optical cable;
(29) O.D. Outside Diameter;
(30) OF Optical fiber;
(31) OSHA Occupational Safety and Health Administration;
(32) OTDR Optical Time Domain Reflectometer;
(33) % Percent;
(34) ps/(nm · km) Picosecond per nanometer times kilometer;
(35) ps/(nm^2 · km) Picosecond per nanometer squared times kilometer;
(36) PMD Polarization Mode Dispersion;
(37) RUS Rural Utilities Service;
(38) s Second(s);
(39) SI International System (of Units) (From the French *Système international d'unités*); and
(40) µm Micrometer.

(b) *Definitions.*

(1) *Accept; Acceptance* means Agency action of providing the manufacturer of a product with a letter by mail or facsimile that the Agency has determined that the manufacturer's product meets its requirements. For information on how to obtain Agency product acceptance, refer to the procedures listed at *http://www.usda.gov/rus/telecom/listing_procedures/index_listing_procedures.htm,* as well as additional information in RUS Bulletin 345–3, *Acceptance of Standards, Specifications, Equipment Contract Forms, Manual Sections, Drawings, Materials and Equipment for the Telephone Program,* available for download at *http://www.usda.gov/rus/telecom/publications/bulletins.htm.*

(2) *Agency* means the Rural Utilities Service, an Agency which delivers the United States Department of Agriculture's Rural Development Utilities Programs.

(3) *Armor* means a metal tape installed under the outer jacket of the cable intended to provide mechanical protection during cable installation and environmental protection against rodents, termites, etc.

(4) *Attenuation* means the loss of power as the light travels in the fiber usually expressed in dB/km.

(5) *Bandwidth* means the range of signal frequencies that can be transmitted by a communications channel with defined maximum loss or distortion. Bandwidth indicates the information-carrying capacity of a channel.

(6) *Birefringence* means the decomposition of a pulse of light entering the fiber into ''two polarized pulses'' traveling at different velocities due to the different refractive indexes in the polarization axes in which the electric fields oscillate. Different refractive indexes in the fiber may be caused by an asymmetric fiber core, internal manufacturing stresses, or through external stresses from cabling and installation of the fiber optic cable, such as bending and twisting.

(7) *Cable cutoff wavelength* means the shortest wavelength at which only one mode light can be transmitted in any of the single mode fibers of an optical fiber cable.

(8) *Chromatic Dispersion* means the broadening of a light pulse as it travels down the length of an optical fiber, resulting in different spectral components of the light pulse traveling at different speeds, due to the fact that the index of refraction of the fiber core is different for different wavelengths.

(9) *Cladding* means the outer layer of an optical fiber made of glass or other transparent material that is fused to the fiber core. The cladding concentrically surrounds the fiber core. It has a lower refractive index than the core, so light travelling in the fiber is maintained in the core by internal reflection at the core-cladding interface.

(10) *Core* means the central region of an optical waveguide or fiber which has a higher refractive index than the cladding through which light is transmitted.

(11) *Cutoff Wavelength* means, in single mode fiber, the shortest wavelength at which only the fundamental mode of an optical wavelength can propagate.

(12) *Dielectric Cable* means a cable which has neither metallic members nor other electrically conductive materials or elements.

(13) *Differential Group Delay* means the arrival time differential of the two polarized light components of a light pulse traveling through the optical fiber due to birefringence.

(14) *Graded Refractive Index Profile* means the refractive index profile of an optical fiber that varies smoothly with radius from the center of the fiber to the outer boundary of the cladding.

(15) *List of Acceptable Materials* means the latest edition of RUS Informational Publication 344–2, *''List of Materials Acceptable for Use on Telecommunications Systems of RUS Borrowers.''* This document contains a convenient listing of products which have been determined to be acceptable by the Agency. The List of Acceptable Materials is available on the Internet at *http://www.usda.gov/rus/telecom/materials/lstomat.htm.*

(16) *Loose Tube Buffer* means the protective tube that loosely contains the optical fibers within the fiber optic cable, often filled with suitable water blocking material.

(17) *Matched Cable* means fiber optic cable manufactured to meet the requirement of this section for which the calculated splice loss using the formula below is ≤0.06 dB for any two cabled fibers to be spliced.

$$\text{LOSS (dB)} = -10\ \text{LOG}_{10}\ [4/(\text{MFD}_1/\text{MFD}_2 + \text{MFD}_2/\text{MFD}_1)^2],$$

where subscripts 1 and 2 refer to any two cabled fibers to be spliced.

(18) *Mil* means a measurement unit of length indicating one thousandth of an inch.

(19) *Minimum Bending Diameter* means the smallest diameter that must be maintained while bending a fiber optic cable to avoid degrading cable performance indicated as a multiple of the cable diameter (Bending Diameter/Cable Diameter).

(20) *Mode-Field Diameter* means the diameter of the cross-sectional area of an optical fiber which includes the core and portion of the cladding where the majority of the light travels in a single mode fiber.

(21) *Multimode Fiber* means an optical fiber in which light travels in more than one bound mode. A multimode fiber may either have a graded index or step index refractive index profile.

(22) *Numerical Aperture (NA)* means an optical fiber parameter that indicates the angle of acceptance of light into a fiber.

(23) *Optical Fiber* means any fiber made of dielectric material that guides light.

(24) *Optical Point Discontinuities* means the localized deviations of the optical fiber loss characteristic which location and magnitude may be determined by appropriate OTDR measurements of the fiber.

(25) *Optical Waveguide* means any structure capable of guiding optical power. In optical communications, the term generally refers to a fiber designed to transmit optical signals.

(26) *Polarization Mode Dispersion* means, for a particular length of fiber, the average of the differential group delays of the two polarized components of light pulses traveling in the fiber, when the light pulses are generated from a sufficient narrow band source. The differential group delay varies randomly with time and wavelength. The term PMD is used in the industry in the general sense to indicate the phenomenon of birefringence (polarized light having different group velocities), and used specifically to refer to the value of time delay expected in a specific length of fiber.

(27) PMD_Q means the statistical upper bound for the PMD coefficient of a fiber optic cable link composed of M number of randomly chosen concatenated fiber optic cable sections of the same length. The upper bound is defined in terms of a probability level Q, which is the probability that a concatenated PMD coefficient value exceeds PMD_Q. ITU G recommendations for fiber optic cables call for M = 20 and Q = 0.01%. This PMD_Q value is the one used in the design of fiber optic links.

(28) *Ribbon* means a planar array of parallel optical fibers.

(29) *Shield* means a conductive metal tape placed under the cable jacket to provide lightning protection, bonding, grounding, and electrical shielding.

(30) *Single Mode Fiber* means an optical fiber in which only one bound mode of light can propagate at the wavelength of interest.

(31) *Step Refractive Index Profile* means an index profile characterized by a uniform refractive index within the core, a sharp decrease in refractive index at the core-cladding interface, and a uniform refractive index within the cladding.

(32) *Tight Tube Buffer* means one or more layers of buffer material tightly surrounding a fiber that is in contact with the coating of the fiber.

§ 1755.901 Incorporation by Reference.

(a) *Incorporation by Reference:* The materials listed here are incorporated by reference where noted. These incorporations by reference were approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. These materials are incorporated as they exist on the date of the approval, and notice of any change in these materials will be published in the **Federal Register**. The materials are available for purchase at the corresponding addresses noted below. All are available for inspection at the Rural Development Utilities Programs, during normal business hours at room 2849–S, U.S. Department of Agriculture, Washington, DC 20250. Telephone (202) 720–0699, and e-mail *norberto.esteves@wdc.usda.gov.* The materials are also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of these materials at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(b) The American National Standards Institute/Institute of Electrical and Electronics Engineers, Inc. ANSI/IEEE C2–2007, *The National Electrical Safety Code,* 2007 edition, approved April 20, 2006, (''ANSI/IEEE C2–2007''), incorporation by reference approved for § 1755.902(a), § 1755.902(p), § 1755.903(a), § 1755.903(k) and § 1755.903(n). ANSI/IEEE C2–2007 is available for purchase from IEEE Service Center, 445 Hoes Lane, Piscataway, NJ 08854, telephone 1–800–678–4333 or online at *http://standards.ieee.org/nesc/index.html.*

(c) The following Insulated Cable Engineers Association standards are

available for purchase from the Insulated Cable Engineers, Inc. (ICEA), P.O. Box 1568, Carrollton, GA 30112 or from Global Engineering Documents, 15 Iverness Way East, Englewood, CO 80112, telephone 1–800–854–7179 (USA and Canada) or 303–792–2181 (International), or online at *http://global.ihs.com:*

(1) ICEA S–110–717–2003, *Standard for Optical Drop Cable,* 1st edition, September 2003 (''ICEA S–110–717''), incorporation by reference approved for § 1755.903(a), § 1755.903(b), § 1755.903(c), § 1755.903(d), § 1755.903(e), § 1755.903(f), § 1755.903(g), § 1755.903(l), § 1755.903(n), § 1755.903(p), § 1755.903(u); and

(2) ANSI/ICEA S–87–640–2006, *Standard for Optical Fiber Outside Plant Communications Cable,* 4th edition, December 2006 (''ANSI/ICEA S–87–640''), incorporation by reference approved for § 1755.902(a), § 1755.902(b), § 1755.902(c), § 1755.902(d), § 1755.902(e), § 1755.902(i), § 1755.902(l), § 1755.902(m), § 1755.902(n), § 1755.902(p), § 1755.902(q), § 1755.902(r), § 1755.902(u), § 1755.903(b), § 1755.903(g), § 1755.903(l), § 1755.903(o), § 1755.903(p), and § 1755.903(s).

(d) The following American Society for Testing and Materials (ASTM) standards are available for purchase from ASTM International, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428–2959. Telephone (610) 832–9585, Fax (610) 832–9555, by e-mail at *service@astm.org,* or online *at http://www.astm.org* or from ANSI, 1916 Race Street, Philadelphia, PA 19103, telephone (215) 299–5585, or online at *http://webstore.ansi.org/ansidocstore/default.asp:*

(1) ASTM A 640–97, (Reapproved 2002)$^{\varepsilon 1}$, *Standard Specification for Zinc-Coated Steel Strand for Messenger Support of Figure 8 Cable,* approved September 2002 (''ASTM A 640''), incorporation by reference approved for § 1755.902(n);

(2) ASTM B 736–00, *Standard Specification for Aluminum, Aluminum Alloy and Aluminum-Clad Steel Cable Shielding Stock,* approved May 10, 2000 (''ASTM B 736''), incorporation by reference approved for § 1755.902(m) and § 1755.903(j);

(3) ASTM D 4565–99, *Standard Test Methods for Physical and Environmental Performance Properties of Insulations and Jackets for Telecommunications Wire and Cable,* approved March 10, 1999 (''ASTM D 4565''), incorporation by reference approved for § 1755.902(c), § 1755.902(m), § 1755.903(c) and § 1755.903(j);

(4) ASTM D 4566–98, *Standard Test Methods for Electrical Performance Properties of Insulations and Jackets for Telecommunications Wire and Cable,* approved December 10, 1998 (''ASTM D 4566''), incorporation by reference approved for § 1755.902(f), § 1755.902(t) and § 1755.903(t); and

(5) ASTM D 4568–99, *Standard Test Methods for Evaluating Compatibility Between Cable Filling and Flooding Compounds and Polyolefin Wire and Cable Materials,* approved April 10, 1999 (''ASTM D 4568''), incorporation by reference approved for § 1755.902(h).

(e) The following Telecommunications Industry Association/Electronics Industries Association (TIA/EIA) standards are available from Electronic Industries Association, Engineering Department, 1722 Eye Street, NW., Washington, DC 20006; or from Global Engineering Documents, 15 Iverness Way East, Englewood, CO 80112, telephone 1–800–854–7179 (USA and Canada) or (303) 792–2181 (International), or online at *http://global.ihs.com;* or from TIA, 2500 Wilson Blvd, Suite 300, Arlington, VA 22201, telephone 1–800–854–7179 or online *http://www.tiaonline.org/standards/catalog:*

(1) TIA/EIA Standard 455–3A, *FOTP–3, Procedure to Measure Temperature Cycling on Optical Fibers, Optical Cable, and Other Passive Fiber Optic Components,* approved May 1989, (''TIA/EIA Standard 455–3A''), incorporation by reference approved for § 1755.902(r).

(2) [Reserved]

(f) The following International Telecommunication Union (ITU) recommendations may be obtained from ITU, Place des Nations, 1211 Geneva 20, Switzerland, telephone +41 22 730 6141 or online at *http://www.itu.int/ITU-T/publications/recs.html*:

(1) ITU–T Recommendation G.652, *Series G: Transmission Systems and Media, Digital Systems and Networks, Transmission media characteristics—Optical fibre cables, Characteristics of a single-mode optical fibre and cable,* approved June 2005 (''ITU–T Recommendation G.652''), incorporation by reference approved for § 1755.902(b), § 1755.902(q), § 1755.903(b) and § 1755.903(o);

(2) ITU–T Recommendation G.655, *Series G: Transmission Systems and Media, Digital Systems and Networks, Transmission media characteristics—Optical fibre cables, Characteristics of a non-zero dispersion-shifted single-mode optical fibre and cable,* approved March 2006 (''ITU–T Recommendation G.655''), incorporation by reference approved for § 1755.902(b) and § 1755.902(q);

(3) ITU–T Recommendation G.656, *Series G: Transmission Systems and Media, Digital Systems and Networks, Transmission media characteristics—Optical fibre cables, Characteristics of a fibre and cable with non-zero dispersion for wideband optical transport,* approved December 2006 (''ITU–T Recommendation G.656''), incorporation by reference approved for § 1755.902(b) and § 1755.902(q);

(4) ITU–T Recommendation G.657, *Series G: Transmission Systems and Media, Digital Systems and Networks, Transmission media characteristics—Optical fibre cables, Characteristics of a bending loss insensitive single mode optical fibre and cable for the access network,* approved December 2006 (''ITU–T Recommendation G.657''), incorporation by reference approved for § 1755.902(b) and § 1755.902(q); and

(5) ITU–T Recommendation L.58, *Series L: Construction, Installation and Protection of Cables and Other Elements of Outside Plant, Optical fibre cables: Special Needs for Access Network,* approved March 2004 (''ITU–T Recommendation L.58''), incorporation by reference approved for § 1755.902(a).

§ 1755.902 Minimum Performance Specification for Fiber Optic Cables.

(a) *Scope.* This section is intended for cable manufacturers, Agency borrowers, and consulting engineers. It covers the requirements for fiber optic cables intended for aerial installation either by attachment to a support strand or by an integrated self-supporting arrangement, for underground application by placement in a duct, or for buried installations by trenching, direct plowing, and directional or pneumatic boring.

(1) *General.*

(i) Specification requirements are given in SI units which are the controlling units in this part. Approximate English equivalent of units are given for information purposes only.

(ii) The optical waveguides are glass fibers having directly-applied protective coatings, and are called ''fibers,'' herein. These fibers may be assembled in either loose fiber bundles with a protective core tube, encased in several protective buffer tubes, in tight buffer tubes, or ribbon bundles with a protective core tube.

(iii) Fillers, strength members, core wraps, and bedding tapes may complete the cable core.

(iv) The core or buffer tubes containing the fibers and the interstices

between the buffer tubes, fillers, and strength members in the core structure are filled with a suitable material or water swellable elements to exclude water.

(v) The cable structure is completed by an extruded overall plastic jacket. A shield or armor or combination thereof may be included under the jacket. The jacket may have strength members embedded in it, in some designs.

(vi) Buried installation requires armor under the outer jacket.

(vii) For self-supporting cable, the outer jacket may be extruded over the support messenger and cable core.

(viii) Cables for mid-span applications for network access must be designed for easy mid-span access to the fibers. The manufacturer may use reversing oscillating stranding (SZ) described in section 6.4 of ITU–T Recommendation L.58, *Construction, Installation and Protection of Cables and Other Elements of Outside Plant*, 2004 (incorporated by reference at § 1755.901(f)). The cable end user is cautioned that installed cable must be properly terminated. This includes properly securing rigid strength members (*i.e.*, central strength member) and clamping the cable and jacket. It is important that cable components be secured to prevent movement of the cable or components over the operating conditions. Central strength member (CSM) clamps must prevent movement of the CSM; positive stop CSM clamps are recommended. The CSM must be routed as straight and as short as practical to prevent bowing or breaking of the CSM. The cable and jacket retention must be sufficient to prevent jacket slippage over the operating temperature range.

(2) The normal temperature ranges for cables must meet paragraph 1.1.3 of ANSI/ICEA S–87–640, *Standard for Optical Fiber Outside Plant Communications Cable* (incorporated by reference at § 1755.901(c)).

(3) *Tensile Rating*. The standard installation tensile rating for cables is 2670 N (600 1bf), unless installation involves micro type cables that utilize less stress related methods of installation, *i.e.*, blown micro-fiber cable or All-Dielectric Self-Supporting (ADSS) cables (see paragraph (c)(4) of this section).

(4) *ADSS and Other Self-Supporting Cables*. Based on the storm loading districts referenced in Section 25, Loading of Grades B and C, of ANSI/IEEE C2–2007, *National Electrical Safety Code*, 2007 (incorporated by reference at § 1755.901(b)) and the maximum span and location of cable installation provided by the end user, the manufacturer must provide a cable design with sag and tension tables showing the maximum span and sag information for that particular installation. The information included must be for Rule B, *Ice and Wind Loading*, and when applicable, information on Rule 250C, *Extreme Wind Loading*. Additionally, to ensure the proper ground clearance, typically a minimum of 4.7 m (15.5 feet), the end user should factor in the maximum sag under loaded conditions, as well as, height of attachment for each application.

(5) *Minimum Bend Diameter*. For cable under loaded and unloaded conditions, the cable must have the minimum bend diameters indicated in paragraph 1.1.5, *Minimum Bend Diameter*, of the ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)). For very small cables, manufacturers may specify fixed cable minimum bend diameters that are independent of the outside diameter. For cables having a non-circular cross-section, the bend diameter is to be determined using the thickness of the cable associated with the preferential bending axis.

(6) The cable is fully color coded so that each fiber is distinguishable from every other fiber. A basic color scheme of twelve colors allows individual fiber identification. Colored tubes, binders, threads, strippings, or markings provide fiber group identification.

(7) Cables must demonstrate compliance with the qualification testing requirements of this section to ensure satisfactory end-use performance characteristics for the intended applications.

(8) Optical cable designs not specifically addressed by this section may be allowed if accepted by the Agency. Justification for acceptance of a modified design must be provided to substantiate product utility and long term stability and endurance. For information on how to obtain Agency product acceptance, refer to the procedures listed at *http://www.usda.gov/rus/telecom/listing_procedures/index_listing_procedures.htm*, as well as additional information in RUS Bulletin 345–3, *Acceptance of Standards, Specifications, Equipment Contract Forms, Manual Sections, Drawings, Materials and Equipment for the Telephone Program* (hereinafter ''RUS Bulletin 345–3''), available for download at *http://www.usda.gov/rus/telecom/publications/bulletins.htm*.

(9) All cables sold to RUS telecommunications borrowers for projects involving RUS loan funds must be accepted by the Agency's Technical Standards Committee ''A'' (Telecommunications). Any design change to existing acceptable designs must be submitted to the Agency for acceptance. As stated in paragraph 8 above, refer to the procedures listed at *http://www.usda.gov/rus/telecom/listing_procedures/index_listing_procedures.htm* as well as RUS Bulletin 345–3.

(10) The Agency intends that the optical fibers contained in the cables meeting the requirements of this section have characteristics that will allow signals having a range of wavelengths to be carried simultaneously.

(b) *Optical Fibers*.

(1) The solid glass optical fibers must consist of a cylindrical core and cladding covered by either an ultraviolet-cured acrylate or other suitable coating. Each fiber must be continuous throughout its length.

(2) *Zero-dispersion*. Optical fibers must meet the fiber attributes of Table 2, *G.652.B attributes*, found in ITU–T Recommendation G.652 (incorporated by reference at § 1755.901(f)). However, when the end user stipulates a low water peak fiber, the optical fibers must meet the fiber attributes of Table 4, *G.652.D attributes*, found in ITU–T Recommendation G.652; or when the end user stipulates a low bending loss fiber, the optical fibers must meet the fiber attributes of Table 7–1, *G.657 class A attributes*, found in the ITU–T Recommendation G.657 (incorporated by reference at § 1755.901(f)).

(3) *Non-zero-dispersion*. Optical fibers must meet the fiber attributes of Table 1, *G.656 attributes*, found in ITU–T Recommendation G.656 (incorporated by reference at § 1755.901(f)). However, when the end user specifies Recommendation A, B, C, D, or E of ITU–T Recommendation G.655 (incorporated by reference at § 1755.901(f)), the optical fibers must meet the fiber attributes of ITU–T Recommendation G.655.

(4) *Multimode fibers*. Optical fibers must meet the requirements of paragraphs 2.1 and 2.3.1 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(5) *Matched cable*. Unless otherwise specified by the buyer, all single mode fiber cables delivered to a RUS-financed project must be manufactured to the same MFD specification. However, notwithstanding the requirements of paragraphs (d)(2) and (d)(3) of this section, the maximum MFD tolerance allowed for cable meeting the requirements of this section must be of a magnitude meeting the definition of ''matched cable,'' as defined in paragraph (b) of § 1755.900. With the

use of cables meeting this definition the user can reasonably expect that the average bi-directional loss of a fusion splice to be ≤0.1 dB.

(6) Buyers will normally specify the MFD for the fibers in the cable. When a buyer does not specify the MFD at 1310 nm, the fibers must be manufactured to an MFD of 9.2 μm with a maximum tolerance range of ±0.5 μm (362 ± 20 microinch), unless the end user agrees to accept cable with fibers specified to a different MFD. When the end user does specify a MFD and tolerance conflicting with the MFD maximum tolerance allowed by paragraph (d)(5) of this section, the requirements of paragraph (d)(5) must prevail.

(7) Factory splices are not allowed.

(8) *Coating.* The optical fiber must be coated with a suitable material to preserve the intrinsic strength of the glass having an outside diameter of 250 ± 15 micrometers (10 ± 0.6 mils). Dimensions must be measured per the methods of paragraph 7.13 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)). The protective coverings must be free from holes, splits, blisters, and other imperfections and must be as smooth and concentric as is consistent with the best commercial practice. The diameter of the fiber, as the fiber is used in the cable, includes any coloring thickness or the uncolored coating, as the case may be. The strip force required to remove 30 ± 3 millimeters (1.2 ± 0.1 inch) of protective fiber coating must be between 1.0 N (0.2 pound-force) and 9.0 N (2 pound-force).

(9) All optical fibers in any single length of cable must be of the same type, unless otherwise specified by end user.

(10) Optical fiber dimensions and data reporting must be as required by paragraph 7.13.1.1 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(c) *Buffers.*

(1) The optical fibers contained in a tube buffer (loose tube), an inner jacket (unit core), a channel, or otherwise loosely packaged must have a clearance between the fibers and the inside of the container sufficient to allow for thermal expansions of the tube buffer without constraining the fibers. The protective container must be manufactured from a material having a coefficient of friction sufficiently low to allow the fibers free movement. The loose tube must contain a suitable water blocking material. Loose tubes must be removable without damage to the fiber when following the manufacturer's recommended procedures.

(2) The tubes for single mode loose tube cables must be designed to allow a maximum mid-span buffer tube exposure of 6.096 meters (20 feet). The buyer should be aware that certain housing hardware may require cable designed for 6.096 meters of buffer tube storage.

(3) Optical fibers covered in near contact with an extrusion (tight tube) must have an intermediate soft buffer to allow for thermal expansions and minor pressures. The buffer tube dimension must be established by the manufacturer to meet the requirement of this section. Tight buffer tubes must be removable without damage to the fiber when following the manufacturer's recommended procedures. The tight buffered fiber must be strippable per paragraph 7.20 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(4) Both loose tube and tight tube coverings of each color and other fiber package types removed from the finished cable must meet the following shrinkback and cold bend performance requirements. The fibers may be left in the tube.

(i) *Shrinkback:* Testing must be conducted per paragraph 14.1 of ASTM D 4565 (incorporated by reference at § 1755.901(d)), using a talc bed at a temperature of 95 °C (203 °F). Shrinkback must not exceed 5 percent of the original 150 millimeter (6 inches) length of the specimen. The total shrinkage of the specimen must be measured. (Buffer tube material meeting this test may not meet the mid-span test in paragraph (t)(15) of this section).

(ii) *Cold Bend:* Testing must be conducted on at least one tube from each color in the cable. Stabilize the specimen to − 30 ± 1 °C (− 22 ± 2 °F) for a minimum of four hours. While holding the specimen and mandrel at the test temperature, wrap the tube in a tight helix ten times around a mandrel with a diameter to be greater than five times the tube diameter or 50 mm (2 inches). The tube must show no evidence of cracking when observed with normal or corrected-to-normal vision.

Note to paragraph (c)(4)(ii): Channel cores and similar slotted single component core designs do not need to be tested for cold bend.

(d) *Fiber Identification.*

(1) Each fiber within a unit and each unit within the cable must be identifiable per paragraphs 4.2.1 and 4.3.1 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(2) For the following items the colors designated for identification within the cable must comply with paragraphs 4.2.2 and 4.3.2 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)): loose buffer tubes, tight tube buffer fibers, individual fibers in multi-fiber tubes, slots, bundles or units of fibers, and the units in cables with more than one unit.

(e) *Optical Fiber Ribbon.*

(1) Each ribbon must be identified per paragraphs 3.4.1 and 3.4.2 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(2) Ribbon fiber count must be specified by the end user, *i.e.*, 2, 4, 6, 12, etc.

(3) Ribbon dimensions must be as agreed by the end user and manufacturer per paragraph 3.4.4.1 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(4) Ribbons must meet each of the following tests. These tests are included in the paragraphs of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)), indicated in parenthesis below.

(i) Ribbon Dimensions (ANSI/ICEA S–87–640 paragraphs 7.14 through 7.14.2)—measures ribbon dimension.

(ii) Ribbon Twist Test (ANSI/ICEA S–87–640 paragraphs 7.15 through 7.15.2)—evaluates the ability of the ribbon to resist splitting or other damage while undergoing dynamic cyclically twisting the ribbon under load.

(iii) Ribbon Residual Twist Test (ANSI/ICEA S–87–640 paragraphs 7.16 through 7.16.2)—evaluates the degree of permanent twist in a cabled optical ribbon.

(iv) Ribbon Separability Test (ANSI/ICEA S–87–640 paragraphs 7.17 through 7.17.2)—evaluates the ability to separate fibers.

(5) Ribbons must meet paragraph 3.4.4.6 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)), Ribbon Strippability.

(f) *Strength Members.*

(1) Strength members may be an integral part of the cable construction, but are not considered part of the support messenger for self-supporting optical cable.

(2) The strength members may be metallic or nonmetallic.

(3) The combined strength of all the strength members must be sufficient to support the stress of installation and to protect the cable in service.

(4) Strength members may be incorporated into the core as a central support member or filler, as fillers between the fiber packages, as an annular serving over the core, as an annular serving over the intermediate jacket, embedded in the outer jacket, or

as a combination of any of these methods.

(5) The central support member or filler must contain no more than one splice per kilometer of cable. Individual fillers placed between the fiber packages and placed as annular servings over the core must contain no more than one splice per kilometer of cable. Cable sections having central member or filler splices must meet the same physical requirements as un-spliced cable sections.

(6) In each length of completed cable having a metallic central member, the dielectric strength between the shield or armor, when present, and the metallic center member must withstand at least 15 kilovolts when tested per ASTM D 4566 (incorporated by reference at § 1755.901(d)). The voltage must be applied for 3 seconds minimum; no failures are allowed.

(g) *Cable Core.*

(1) Protected fibers may be assembled with the optional central support member, fillers and strength members in such a way as to form a cylindrical group.

(2) The standard cylindrical group or core designs commonly consist of 4, 6, 12, 18, or 24 fibers. Cylindrical groups or core designs larger than the sizes shown above must meet all the applicable requirements of this section.

(3) When threads or tapes are used in cables using water blocking elements as core binders, they must be a non-hygroscopic and non-wicking dielectric material or be rendered by the gel or water blocking material produced by the ingress of water.

(4) When threads or tapes are used as unit binders to define optical fiber units in loose tube, tight tube, slotted, or bundled cored designs, they must be non-hygroscopic and non-wicking dielectric material or be rendered by the filling compound or water blocking material contained in the binder. The colors of the binders must be per paragraphs (f)(2) and (f)(3) of this section.

(h) *Core Water Blocking.*

(1) To prevent the ingress of water into the core and water migration, a suitable filling compound or water blocking elements must be applied into the interior of the loose fiber tubes and into the interstices of the core. When a core wrap is used, the filling compound or water blocking elements, as the case may be, must also be applied to the core wrap, over the core wrap and between the core wrap and inner jacket when required.

(2) The materials or elements must be homogeneous and uniformly mixed; free from dirt, metallic particles and other foreign matter; easily removed; nontoxic and present no dermal hazards. The filling compound and water blocking elements must contain a suitable antioxidant or be of such composition as to provide long term stability.

(3) The individual cable manufacturer must satisfy the Agency that the filling compound or water blocking elements selected for use is suitable for its intended application by submitting test data showing compliance with ASTM D 4568 (incorporated by reference at § 1755.901(d)). The filling compound and water blocking elements must be compatible with the cable components when tested per ASTM D 4568 at a temperature of 80 °C (176 °F). The jacket must retain a minimum of 85% of its un-aged tensile and elongation values.

(i) *Water Blocking Material.*

(1) Sufficient flooding compound or water blocking elements must be applied between the inner jacket and armor and between the armor and outer jacket so that voids and air spaces in these areas are minimized. The use of flooding compound or water blocking elements between the armor and outer jacket is not required when uniform bonding, paragraph (o)(9) of this section, is achieved between the plastic-clad armor and the outer jacket.

(2) The flooding compound or water blocking elements must be compatible with the jacket when tested per paragraphs 7.19 and 7.19.1 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)). The aged jacket must retain a minimum of 85% of its un-aged tensile strength and elongation values when tested per paragraph 7.19.2.3. The flooding compound must exhibit adhesive properties sufficient to prevent jacket slip when tested per paragraph 7.30.1 of ANSI/ICEA S–87–640 and meets paragraph 7.30.2 of ANSI/ICEA S–87–640 for minimum sheath adherence of 14 N/mm for armored cables.

(3) The individual cable manufacturer must satisfy the Agency by submitting test data showing compliance with the appropriate cable performance testing requirements of this section that the flooding compound or water blocking elements selected for use is acceptable for the application.

(j) *Core Wrap.*

(1) At the option of the manufacturer, one or more layers of dielectric material may be applied over the core.

(2) The core wrap(s) can be used to provide a heat barrier to prevent deformation or adhesion between the fiber tubes or can be used to contain the core.

(k) *Inner Jackets.*

(1) For designs with more than one jacket, the inner jackets must be applied directly over the core or over the strength members when required by the end user. The jacket must be free from holes, splits, blisters, or other imperfections and must be as smooth and concentric as is consistent with the best commercial practice. The inner jacket must not adhere to other cable components such as fibers, buffer tubes, etc.

(2) For armored and unarmored cable, an inner jacket is optional. The inner jacket may absorb stresses in the cable core that may be introduced by armor application or by armored cable installation.

(3) The inner jacket material and test requirements must be the same as the outer jacket material, except that either black or natural polyethylene may be used and the thickness requirements are included in paragraph (m)(4) of this section. In the case of natural polyethylene, the requirements for absorption coefficient and the inclusion of furnace black are waived.

(4) The inner jacket thickness must be determined by the manufacturer, but must be no less than a nominal jacket thickness of 0.5 mm (0.02 inch) with a minimum jacket thickness of 0.35 mm (0.01 inch).

(l) *Outer Jacket.*

(1) The outer jacket must provide the cable with a tough, flexible, protective covering which can withstand exposure to sunlight, to atmosphere temperatures, and to stresses reasonably expected in normal installation and service.

(2) The jacket must be free from holes, splits, blisters, or other imperfections and must be as smooth and concentric as is consistent with the best commercial practice.

(3) The jacket must contain an antioxidant to provide long term stabilization and must contain a minimum of 2.35 percent concentration of furnace black to provide ultraviolet shielding measures as required by paragraph 5.4.2 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)), except that the concentration of furnace black does not necessarily need to be initially contained in the raw material and may be added later during the jacket making process.

(4) The raw material used for the outer jacket must be one of the types listed below.

(i) *Type L1.* Low density, polyethylene (LDPE) must conform to the requirements of paragraph 5.4.2 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(ii) *Type L2.* Linear low density, polyethylene (LLDPE) must conform to the requirements of paragraph 5.4.2 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(iii) *Type M.* Medium density polyethylene (MDPE) must conform to the requirements of paragraph 5.4.2 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(iv) *Type H.* High density polyethylene (HDPE) must conform to the requirements of paragraph 5.4.2 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(5) Particle size of the carbon selected for use must not average greater than 20 nm.

(6) The outer jacketing material removed from or tested on the cable must be capable of meeting the performance requirements of Table 5.1 found in ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(7) *Testing Procedures.* The procedures for testing the jacket specimens for compliance with paragraph (n)(5) of this section must be as follows:

(i) *Jacket Material Density Measurement.* Test per paragraphs 7.7.1 and 7.7.2 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(ii) *Tensile Strength, Yield Strength, and Ultimate Elongation.* Test per paragraphs 7.8.1 and 7.8.2 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(iii) *Jacket Material Absorption Coefficient Test.* Test per paragraphs 7.9.1 and 7.9.2 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(iv) *Environmental Stress Crack Resistance Test.* For large cables (outside diameter ≥ 30 mm (1.2 inch)), test per paragraphs 7.10.1 through 7.10.1.2 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)). For small cables (Diameter < 30 mm (1.2 inch)), test per paragraphs 7.10.2 through and 7.10.2.2 of ANSI/ICEA S–87–640. A crack or split in the jacket constitutes failure.

(v) *Jacket Shrinkage Test.* Test per paragraphs 7.11.1 and 7.11.2 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(8) *Jacket Thickness.* The outer jacket must meet the requirements of paragraphs 5.4.5.1 and 5.4.5.2 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(9) *Jacket Repairs.* Repairs are allowed per paragraph 5.5 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(m) *Armor.*

(1) A steel armor, plastic coated on both sides, is required for direct buried cable manufactured under this section. Armor is optional for duct and aerial cable, as required by the end user. The plastic coated steel armor must be applied longitudinally directly over the core wrap or the intermediate jacket and have a minimum overlap of 3.0 millimeters (118 mils), except for small diameter cables with diameters of less than 10 mm (394 mils) for which the minimum overlap must be 2 mm (79 mils). When a cable has a shield, the armor should normally be applied over the shielding tape.

(2) The uncoated steel tape must be electrolytic chrome coated steel (ECCS) and must meet the requirements of paragraph B.2.4 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(3) The reduction in thickness of the armoring material due to the corrugating or application process must be kept to a minimum and must not exceed 10 percent at any spot.

(4) The armor of each length of cable must be electrically continuous with no more than one joint or splice allowed in any length of one kilometer of cable. This requirement does not apply to a joint or splice made in the raw material by the raw material manufacturer.

(5) The breaking strength of any section of an armor tape, containing a factory splice joint, must not be less than 80 percent of the breaking strength of an adjacent section of the armor of equal length without a joint.

(6) For cables containing no flooding compound over the armor, the overlap portions of the armor tape must be bonded in cables having a flat, non-corrugated armor to meet the mechanical requirements of paragraphs (t)(1) through (t)(16)(ii) of this section. If the tape is corrugated, the overlap portions of the armor must be sufficiently bonded and the corrugations must be sufficiently in register to meet the requirements of paragraphs (t)(1) through (t)(16)(ii) of this section.

(7) The armor tape must be so applied as to enable the cable to pass the Cable Low (− 30 °C (− 22 °F)) and High (60 °C (140 °F)) Temperatures Bend Test, as required by paragraph (t)(3) of this section.

(8) The protective coating on the steel armor must meet the Bonding-to-Metal, Heat Sealability, Lap-Shear and Moisture Resistance requirements of Type I, Class 2 coated metals per ASTM B 736 (incorporated by reference in § 1755.901(d)).

(9) When the jacket is bonded to the plastic coated armor, the bond between the plastic coated armor and the outer jacket must not be less than 525 Newtons per meter (36 pound-force) over at least 90 percent of the cable circumference when tested per ASTM D 4565 (incorporated by reference at § 1755.901(d)). For cables with strength members embedded in the jacket, and residing directly over the armor, the area of the armor directly under the strength member is excluded from the 90 percent calculation.

(n) *Figure 8 Aerial Cables.*

(1) When self-supporting aerial cable containing an integrated support messenger is supplied, the support messenger must comply with the requirements specified in paragraphs D.2.1 through D.2.4 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)), with exceptions and additional provisions as follows:

(i) Any section of a completed strand containing a joint must have minimum tensile strength and elongation of 29,500 Newtons (6,632 pound-force) and 3.5 percent, respectively, when tested per the procedures specified in ASTM A 640 (incorporated by reference in § 1755.901(d)).

(ii) The individual wires from a completed strand which contains joints must not fracture when tested per the ''Ductility of Steel'' procedures specified in ASTM A 640 (incorporated by reference at § 1755.901(d)), except that the mandrel diameter must be equal to 5 times the nominal diameter of the individual wires.

(iii) The support strand must be completely covered with a flooding compound that offers corrosion protection. The flooding compound must be homogeneous and uniformly mixed.

(iv) The flooding compound must be nontoxic and present no dermal hazard.

(v) The flooding compound must be free from dirt, metallic particles, and other foreign matter that may interfere with the performance of the cable.

(2) Other methods of providing self-supporting cable specifically not addressed in this section may be allowed if accepted. Justification for acceptance of a modified design must be provided to substantiate product utility and long term stability and endurance. To obtain the Agency's acceptance of a modified design, refer to the product acceptance procedures available at *http://www.usda.gov/rus/telecom/listing_procedures/index_listing_procedures.htm,* as well as RUS Bulletin 345–3.

(3) *Jacket Thickness Requirements.* Jackets applied over an integral messenger must meet the following requirements:

(i) The minimum jacket thickness at any point over the support messenger must meet the requirements of paragraph D.3 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(ii) The web dimension for self-supporting aerial cable must meet the requirements of paragraph D.3 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(o) *Sheath Slitting Cord.*

(1) A sheath slitting cord or ripcord is optional.

(2) When a sheath slitting cord is used it must be capable of slitting the jacket or jacket and armor, at least one meter (3.3 feet) length without breaking the cord at a temperature of 23 ± 5 °C (73 ± 9 °F).

(3) The sheath slitting cord must meet the sheath slitting cord test described in paragraph (t)(1) of this section.

(p) *Identification Markers.*

(1) Each length of cable must be permanently identified. The method of marking must be by means of suitable surface markings producing a clear distinguishable contrasting marking meeting paragraph 6.1.1 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)), and must meet the durability requirements of paragraphs 7.5.2 through 7.5.2.2 of ANSI/ICEA S–87–640.

(2) The color of the initial marking must be white or silver. If the initial marking fails to meet the requirements of the preceding paragraphs, it will be permissible to either remove the defective marking and re-mark with the white or silver color or leave the defective marking on the cable and re-mark with yellow. No further re-marking is permitted. Any re-marking must be done on a different portion of the cable's circumference where the existing marking is found and have a numbering sequence differing from any other marking by at least 3,000. Any reel of cable that contains more than one set of sequential markings must be labeled to indicate the color and sequence of marking to be used. The labeling must be applied to the reel and also to the cable.

(3) Each length of cable must be permanently labeled OPTICAL CABLE, OC, OPTICAL FIBER CABLE, or OF on the outer jacket and identified as to manufacturer and year of manufacture.

(4) Each length of cable intended for direct burial installation must be marked with a telephone handset in compliance with requirements of the Rule 350G of the ANSI/IEEE C2–2007 (incorporated by reference at § 1755.901(b)).

(5) Each length of cable must be identified as to the manufacturer and year of manufacturing. The manufacturer and year of manufacturing may also be indicated by other means as indicated in paragraphs 6.1.2 through 6.1.4 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(6) The number of fibers on the jacket must be marked on the jacket.

(7) The completed cable must have sequentially numbered length markers in METERS or FEET at regular intervals of not more than 2 feet or not more than 1 meter along the outside of the jacket. Continuous sequential numbering must be employed in a single length of cable. The numbers must be dimensioned and spaced to produce good legibility and must be approximately 3 millimeters (118 mils) in height. An occasional illegible marking is permissible when it is located within 2 meters of a legible making for cables marked in meters or 4 feet for cables marked in feet.

(8) Agreement between the actual length of the cable and the length marking on the cable jacket must be within the limits of +1 percent and −0 percent.

(9) *Jacket Print Test.* Cables must meet the Jacket Print Test described in paragraphs 7.5.2.1 and 7.5.2.2 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(q) *Performance of a Finished Cable.*

(1) *Zero Dispersion Optical Fiber Cable.* Unless otherwise specified by the end user, the optical performance of a finished cable must comply with the attributes of Table 2, *G.652.B attributes,* found in ITU Recommendation G.652 (incorporated by reference at § 1755.901(f)). However, when the end user stipulates a low water peak fiber the finished cable must meet the attributes of Table 4, *G.652.D attributes,* found in ITU–T Recommendation G.652; or when the end user stipulates a low bending loss fiber, the finished cable must meet the attributes of Table 7–1, *G.657 class A attributes,* found in ITU–T Recommendation G.657 (incorporated by reference at § 1755.901(f)).

(i) The attenuation methods must be per Table 8.4, *Optical attenuation measurement methods,* of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(ii) The cable must have a maximum attenuation of 0.1 dB at a point of discontinuity (a localized deviation of the optical fiber loss). Per paragraphs 8.4 and 8.4.1 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)), measurements must be conducted at 1310 and 1550 nm, and at 1625 nm when specified by the end user.

(iii) The cable cutoff wavelength (γ_{cc}) must be reported per paragraph 8.5.1 of ANSI/ICEA S–87–640 (incorporated by reference in § 1755.901(c)).

(2) *Nonzero Dispersion Optical Fiber Cable.* Unless otherwise specified by the end user, the optical performance of the finished cable must comply with the attributes of Table 1, *G.656 attributes,* found in ITU–T Recommendation G.656 (incorporated by reference at § 1755.901(f)). When the buyer specifies Recommendation A, B, C, D or E of ITU–T Recommendation G.655 (incorporated by reference at § 1755.901(f)), the finished cable must comply with the attributes of ITU–T Recommendation G.655.

(i) The attenuation methods must be per Table 8.4, *Optical attenuation measurement methods* of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(ii) The cable must have a maximum attenuation of 0.1 dB at a point of discontinuity (a localized deviation of the optical fiber loss). Per paragraphs 8.4 and 8.4.1 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)), measurements must be conducted at 1310 and 1550 nm, and at 1625 nm when specified by the end user.

(iii) The cable cutoff wavelength (γ_{cc}) must be reported per paragraph 8.5.1 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(3) *Multimode Optical Fiber Cable.* Unless otherwise specified by the end user, the optical performance of the fibers in a finished cable must comply with Table 8.1, *Attenuation coefficient performance requirement (dB/k),* Table 8.2*, Multimode bandwidth coefficient performance requirements (MHz–km*) and Table 8.3*, Points discontinuity acceptance criteria (dB),* of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(4) Because the accuracy of attenuation measurements for single mode fibers becomes questionable when measured on short cable lengths, attenuation measurements are to be made utilizing characterization cable lengths. Master Cable reels must be tested and the attenuation values measured will be used for shorter ship lengths of cable.

(5) Because the accuracy of attenuation measurements for multimode fibers becomes questionable when measured on short cable lengths, attenuation measurements are to be made utilizing characterization cable lengths. If the ship length of cable is less than one kilometer, the attenuation

values measured on longer lengths of cable (characterization length of cable) before cutting to the ship lengths of cable may be applied to the ship lengths.

(6) Attenuation must be measured per Table 8.4, *Optical Attenuation Measurement Methods,* of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(7) The bandwidth of multimode fibers in a finished cable must be no less than the values specified in ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)), Table 8.2 per paragraphs 8.3.1 and 8.3.2.

(r) *Mechanical Requirements.* Fiber optic cables manufactured under the requirements of this section must be tested by the manufacturer to determine compliance with such requirements. Unless otherwise specified, testing must be performed at the standard conditions defined in paragraph 7.3.1 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)). The standard optical test wavelengths to be used are 1550 nm single mode and 1300 nm multi-mode, unless otherwise specified in the individual test.

(1) *Sheath Slitting Cord Test.* All cables manufactured under the requirements of this section must meet the Ripcord Functional Test described in paragraphs 7.18.1 and 7.18.2 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(2) *Material Compatibility and Cable Aging Test.* All cables manufactured under the requirements of this section must meet the Material Compatibility and Cable Aging Test described in paragraphs 7.19 through 7.19.2.4 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(3) *Cable Low and High Bend Test.* Cables manufactured under the requirements of this section must meet the Cable Low (−30 °C (−22 °F)) and High (60 °C (140 °F)) Temperatures Bend Test per paragraphs 7.21 and 7.21.2 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(4) *Compound Flow Test.* All cables manufactured under the requirements of this section must meet the test described in paragraphs 7.23, 7.23.1, and 7.23.2 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(5) *Cyclic Flexing Test.* All cables manufactured under the requirements of this section must meet the Flex Test described in paragraphs 7.27 through 7.27.2 of the ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(6) *Water Penetration Test.* All cables manufactured under the requirements of this section must meet paragraphs 7.28 through 7.28.2 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(7) *Cable Impact Test.* All cables manufactured under the requirements of this section must meet the Cable Impact Test described in paragraphs 7.29.1 and 7.29.2 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(8) *Cable Tensile Loading and Fiber Strain Test.* Cables manufactured under the requirements of this section must meet the Cable Loading and Fiber Strain Test described in paragraphs 7.30 through 7.30.2 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)). This test does not apply to aerial self-supporting cables.

(9) *Cable Compression Test.* All cables manufactured under requirements of this section must meet the Cable Compressive Loading Test described in paragraphs 7.31 through 7.31.2 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(10) *Cable Twist Test.* All cables manufactured under the requirements of this section must meet the Cable Twist Test described in paragraphs 7.32 through 7.32.2 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(11) *Cable Lighting Damage Susceptibility Test.* Cables manufactured under the requirements of this section must meet the Cable Lighting Damage Susceptibility Test described in paragraphs 7.33 and 7.33.1 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(12) *Cable External Freezing Test.* All cables manufactured under the requirements of this section must meet the Cable External Freezing Test described in paragraphs 7.22 and 7.22.1 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(13) *Cable Temperature Cycling Test.* All cables manufactured under the requirements of this section must meet the Cable Temperature Cycling Test described in paragraph 7.24.1 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(14) *Cable Sheath Adherence Test.* All cables manufactured under the requirements of this section must meet the Cable Sheath Adherence Test described in paragraphs 7.26.1 and 7.26.2 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(15) *Mid-Span Test.* This test is applicable only to cables of a loose tube design specified for mid-span applications with tube storage. Cable of specialty design may be exempted from this requirement when this requirement is not applicable to such design. All buried and underground loose tube single mode cables manufactured per the requirements in this section and intended for mid-span applications with tube storage must meet the following mid-span test without exhibiting an increase in fiber attenuation greater than 0.1 dB and a maximum average increase over all fibers of 0.05 dB.

(i) The specimen must be installed in a commercially available pedestal or closure or in a device that mimics their performance, as follows: A length of cable sheath, equal to the mid-span length, must be removed from the middle of the test specimen so as to allow access to the buffer tubes. All binders, tapes, strength members, etc. must be removed. The buffer tubes must be left intact. The cable ends defining the ends of the mid-span length must be properly secured in the closure to the more stringent of the cable or hardware manufacturer's recommendations. Strength members must be secured with an end stop type clamp and the outer jacket must be clamped to prevent slippage. A minimum of 6.096 meters (20 feet) of cable must extend from the entry and exit ports of the closure for the purpose of making optical measurements. If a device that mimics the performance of pedestals or closures is used, the buffer tubes must be wound in a coil with a minimum width of 3 inches and minimum length of 12 inches.

(ii) The expressed buffer tubes must be loosely constrained during the test.

(iii) The enclosure, with installed cable, must be placed in an environmental chamber for temperature cycling. It is acceptable for some or all of the two 20 feet (6.096 meters) cable segments to extend outside the environmental chamber.

(iv) Lids, pedestal enclosures, or closure covers must be removed if possible to allow for temperature equilibrium of the buffer tubes. If this is not possible, the manufacturer must demonstrate that the buffer tubes are at temperature equilibrium prior to beginning the soak time.

(v) Measure the attenuation of single mode fibers at 1550 ± 10 nm. The supplier must certify the performance of lower specified wavelengths comply with the mid-span performance requirements.

(vi) After measuring the attenuation of the optical fibers, test the cable sample per TIA/EIA Standard 455–3A (incorporated by reference at § 1755.901(e)). Temperature cycling, measurements, and data reporting must conform to TIA/EIA Standard 455–3A.

The test must be conducted for at least five complete cycles. The following detailed test conditions must apply:

(A) TIA/EIA Standard 455–3A (incorporated by reference at § 1755.901(e)), Section 4.1—Loose tube single mode optical cable sample must be tested.

(B) TIA/EIA Standard 455–3A (incorporated by reference at § 1755.901(e)), Section 4.2—An Agency accepted 8 to 12 inch diameter optical buried distribution pedestal or a device that mimics their performance must be tested.

(C) Mid-span opening for installation of loose tube single mode optical cable in pedestal must be 6.096 meters (20 feet).

(D) TIA/EIA Standard 455–3A (incorporated by reference at § 1755.901(e)), Section 5.1—3 hours soak time.

(E) TIA/EIA Standard 455–3A (incorporated by reference at § 1755.901(e)), Section 5.2—Test Condition C–2, minimum −40 °C (−40 °F) and maximum 70° Celsius (158 °F).

(F) TIA/EIA Standard 455–3A (incorporated by reference at § 1755.901(e)), Section 5.7.2—A statistically representative amount of transmitting fibers in all express buffer tubes passing through the pedestal and stored must be measured.

(G) The buffer tubes in the closure or pedestal must not be handled or moved during temperature cycling or attenuation measurements.

(vii) Fiber cable attenuation measured through the express buffer tubes during the last cycle at −40 °C (−40 °F) and +70 °C (158 °F) must not exceed a maximum increase of 0.1 dB and must not exceed a 0.05 dB average across all tested fibers from the initial baseline measurements. At the conclusion of the temperature cycling, the maximum attenuation increase at 23 °C from the initial baseline measurement must not exceed 0.05 dB which allows for measurement noise that may be encountered during the test. The cable must also be inspected at room temperature at the conclusion of all measurements; the cable must not show visible evidence of fracture of the buffer tubes nor show any degradation of all exposed cable assemblies.

(16) *Aerial Self-Supporting Cables.* The following tests apply to aerial cables only:

(i) *Static Tensile Testing of Aerial Self-Supporting Cables.* Aerial self-supporting cable must meet the test described in paragraphs D.4.1.1 through D.4.1.5 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(ii) *Cable Galloping Test.* Aerial self-supporting cable made to the requirements of this section must meet the test described in paragraphs D.4.2 through D.4.2.3 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(s) *Pre-connectorized Cable.*

(1) At the option of the manufacturer and upon request by the end user, the cable may be factory terminated with connectors.

(2) All connectors must be accepted by the Agency prior to their use. To obtain the Agency's acceptance of connectors, refer to product acceptance procedures available at *http://www.usda.gov/rus/telecom/listing_procedures/index_listing_procedures.htm* as well as RUS Bulletin 345–3.

(t) *Acceptance Testing.*

(1) The tests described in the Appendix to this section are intended for acceptance of cable designs and major modifications of accepted designs. What constitutes a major modification is at the discretion of the Agency. These tests are intended to show the inherent capability of the manufacturer to produce cable products that have satisfactory performance characteristics, long life, and long-term optical stability but are not intended as field tests. After initial Rural Development product acceptance is granted, the manufacturer will need to apply for continued product acceptance in January of the third year after the year of initial acceptance. For information on Agency acceptance, refer to the product acceptance procedures available at *http://www.usda.gov/rus/telecom/listing_procedures/index_listing_procedures.htm,* as well as RUS Bulletin 345–3.

(2) *Acceptance.* For initial acceptance, the manufacturer must submit:

(i) An original signature certification that the product fully complies with each paragraph of this section;

(ii) Qualification Test Data, per the Appendix to this section;

(iii) A set of instructions for handling the cable;

(iv) OSHA Material Safety Data Sheets for all components;

(v) Agree to periodic plant inspections;

(vi) A certification stating whether the cable, as sold to RUS Telecommunications borrowers, complies with the following two provisions:

(A) Final assembly or manufacture of the product, as the product would be used by an RUS Telecommunications borrower, is completed in the United States or eligible countries (currently, Mexico, Canada and Israel); and

(B) The cost of United States and eligible countries' components (in any combination) within the product is more than 50 percent of the total cost of all components utilized in the product. The cost of non-domestic components (components not manufactured within the United States or eligible countries) which are included in the finished product must include all duties, taxes, and delivery charges to the point of assembly or manufacture;

(vii) Written user testimonials concerning performance of the product; and

(viii) Other nonproprietary data deemed necessary.

(3) *Re-qualification acceptance.* For submission of a request for continued product acceptance after the initial acceptance, follow paragraph (v)(1) of this section and then, in January every three years, the manufacturer must submit an original signature certification stating that the product fully complies with each paragraph of this section, excluding the Qualification Section, and a certification that the products sold to RUS Telecommunications borrowers comply with paragraphs (v)(2)(vi) through (v)(2)(vi)(B) of this section. The tests of the Appendix to this section must be conducted and records kept for at least three years and the data must be made available to the Agency on request. The required data must have been gathered within 90 days of the submission. A certification must be submitted to the Agency stating that the cable manufactured to the requirements of this section has been tested per the Appendix of this section and that the cable meets the test requirements.

(4) *Initial and re-qualification acceptance requests should be addressed to:* Chairman, Technical Standards Committee ''A'' (Telecommunications), STOP 1550, Advanced Services Division, Rural Development Telecommunications Program, Washington, DC 20250–1500.

(5) *Tests on 100 Percent of Completed Cable.*

(i) The armor for each length of cable must be tested for continuity using the procedures of ASTM D 4566 (incorporated by reference at § 1755.901(d)).

(ii) Attenuation for each optical fiber in the cable must be measured.

(iii) Optical discontinuities greater than 0.1 dB must be isolated and their location and amplitude recorded.

(6) *Capability Tests.* The manufacturer must establish a quality assurance system. Tests on a quality assurance

basis must be made as frequently as is required for each manufacturer to determine and maintain compliance with all the mechanical requirements and the fiber and cable attributes required by this section, including:

(i) Numerical aperture and bandwidth of multimode fibers;

(ii) Cut off wavelength of single mode fibers;

(iii) Dispersion of single mode fibers;

(iv) Shrinkback and cold testing of loose tube and tight tube buffers, and mid-span testing of cables of a loose tube design with tube storage;

(v) Adhesion properties of the protective fiber coating;

(vi) Dielectric strength between the armor and the metallic central member;

(vii) Performance requirements for the fibers.

(viii) Performance requirements for the inner and outer jacketing materials;

(ix) Performance requirements for the filling and flooding compounds;

(x) Bonding properties of the coated armoring material;

(xi) Sequential marking and lettering; and

(xii) Mechanical tests described in paragraphs (t)(1) through (t)(16)(ii) of this section.

(u) *Records Tests.*

(1) Each manufacturer must maintain suitable summary records for a period of at least 3 years of all optical and physical tests required on completed cable by section as set forth in paragraphs (v)(5) and (v)(6) of this section. The test data for a particular reel must be in a form that it may be readily available to the Agency upon request. The optical data must be furnished to the end user on a suitable and easily readable form.

(2) Measurements and computed values must be rounded off to the number of places or figures specified for the requirement per paragraph 1.3 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(v) *Manufacturing Irregularities.*

(1) Under this section, repairs to the armor, when present, are not permitted in cable supplied to the end user.

(2) Minor defects in the inner and outer jacket (defects having a dimension of 3 millimeter or less in any direction) may be repaired by means of heat fusing per good commercial practices utilizing sheath grade compounds.

(w) *Packaging and Preparation for Shipment.*

(1) The cable must be shipped on reels containing one continuous length of cable. The diameter of the drum must be large enough to prevent damage to the cable from reeling and unreeling. The diameter must be at least equal to the minimum bending diameter of the cable. The reels must be substantial and so constructed as to prevent damage during shipment and handling.

(2) A circumferential thermal wrap or other means of protection must be secured between the outer edges of the reel flange to protect the cable against damage during storage and shipment. The thermal wrap must meet the requirements included in the *Thermal Reel Wrap Test,* described below. This test procedure is for qualification of initial and subsequent changes in thermal reel wraps.

(i) *Sample Selection.* All testing must be performed on two 450 millimeter (18 inches) lengths of cable removed sequentially from the same fiber jacketed cable. This cable must not have been exposed to temperatures in excess of 38 °C (100 °F) since its initial cool down after sheathing.

(ii) *Test Procedure.*

(A) Place the two samples on an insulating material such as wood.

(B) Tape thermocouples to the jackets of each sample to measure the jacket temperature.

(C) Cover one sample with the thermal reel wrap.

(D) Expose the samples to a radiant heat source capable of heating the uncovered sample to a minimum of 71 °C (160 °F). A GE 600 watt photoflood lamp or an equivalent lamp having the light spectrum approximately that of the sun must be used.

(E) The height of the lamp above the jacket must be 380 millimeters (15 inches) or an equivalent height that produces the 71 °C (160 °F) jacket temperature on the unwrapped sample must be used.

(F) After the samples have stabilized at the temperature, the jacket temperatures of the samples must be recorded after one hour of exposure to the heat source.

(G) Compute the temperature difference between jackets.

(H) The temperature difference between the jacket with the thermal reel wrap and the jacket without the reel wrap must be greater than or equal to 17 °C (63 °F).

(3) Cables must be sealed at the ends to prevent entrance of moisture.

(4) The end-of-pull (outer end) of the cable must be securely fastened to prevent the cable from coming loose during transit. The start-of-pull (inner end) of the cable must project through a slot in the flange of the reel, around an inner riser, or into a recess on the flange near the drum and fastened in such a way to prevent the cable from becoming loose during installation.

(5) Spikes, staples or other fastening devices must be used in a manner which will not result in penetration of the cable.

(6) The arbor hole must admit a spindle 63.5 millimeters (2.5 inches) in diameter without binding.

(7) Each reel must be plainly marked to indicate the direction in which it should be rolled to prevent loosening of the cable on the reel.

(8) Each reel must be stenciled or lettered with the name of the manufacturer.

(9) The following information must be either stenciled on the reel or on a tag firmly attached to the reel: Optical Cable, Type and Number of Fibers, Armored or Non-armored, Year of Manufacture, Name of Cable Manufacturer, Length of Cable, Reel Number, 7 CFR 1755.902, Minimum Bending Diameter for both Residual and Loaded Condition during installation.

Example: Optical Cable, G.657 class A, 4 fibers, Armored, XYZ Company, 1050 meters, Reel Number 3, 7 CFR 1755.902. Minimum Bending Diameter: Residual (Installed): 20 times Cable O.D., Loaded Condition: 40 times Cable O.D.

Appendix to § 1755.902

FIBER OPTIC CABLES

BULLETIN 1753F–601(PE–90) QUALIFICATIONS TEST DATA

[Initial qualification and three year re-qualification test data required for TELECOMMUNICATIONS PROGRAM product acceptance. Please note that some tests may apply only to a particular cable design.]

Paragraph	Test	Initial qualification	3 Year re-qualification
(e)(4)(i)	Shrinkback	X	
(e)(4)(ii)	Cold Bend	X	
(t)(1)	Sheath Slitting Cord	X	

FIBER OPTIC CABLES—Continued

BULLETIN 1753F–601(PE–90) QUALIFICATIONS TEST DATA

[Initial qualification and three year re-qualification test data required for TELECOMMUNICATIONS PROGRAM product acceptance. Please note that some tests may apply only to a particular cable design.]

Paragraph	Test	Initial qualification	3 Year re-qualification
(t)(2)	Material Compatibility	X	
(t)(3)	Cable Low & High Bend	X	X
(t)(4)	Compound Flow	X	
(t)(5)	Cyclic Flexing	X	X
(t)(6)	Water Penetration	X	X
(t)(7)	Cable Impact	X	X
(t)(8)	Cable Tensile Loading & Fiber Strain	X	X
(t)(9)	Cable Compression	X	
(t)(10)	Cable Twist	X	X
(t)(11)	Cable Lighting Damage Susceptibility	X	
(t)(12)	Cable External Freezing	X	
(t)(13)	Cable Temperature Cycling	X	X
(t)(14)	Cable Sheath Adherence	X	
(t)(15)	Mid-Span	X	X
(t)(16)(i)	Static Tensile Testing of Aerial Self-Supporting Cables	X	X
(t)(16)(ii)	Cable Galloping	X	
(y)(2)(i)	Thermal Reel Wrap test	X	

§ 1755.903 Fiber Optic Service Entrance Cables.

(a) *Scope.* This section covers Agency requirements for fiber optic service entrance cables intended for aerial installation either by attachment to a support strand or by an integrated self-supporting arrangement, for underground application by placement in a duct, or for buried installations by trenching, direct plowing, directional or pneumatic boring. Cable meeting this section is recommended for fiber optic service entrances having 12 or fewer fibers with distances less than 100 meters (300 feet).

(1) *General.*

(i) Specification requirements are given in SI units which are the controlling units in this part. Approximate English equivalent of units are given for information purposes only.

(ii) The optical waveguides are glass fibers having directly-applied protective coatings, and are called ''fibers,'' herein. These fibers may be assembled in either loose fiber bundles with a protective core tube, encased in several protective buffer tubes, in tight buffer tubes, or ribbon bundles with a protective core tube.

(iii) Fillers, strength members, core wraps, and bedding tapes may complete the cable core.

(iv) The core or buffer tubes containing the fibers and the interstices between the buffer tubes, fillers, and strength members in the core structure are filled with a suitable material or water swellable elements to exclude water.

(v) The cable structure is completed by an extruded overall plastic jacket. A shield or armor or combination thereof may be included under the jacket. This jacket may have strength members embedded in it, in some designs.

(vi) For rodent resistance or for additional protection with direct buried installations, it is recommended the use of armor under the outer jacket.

(vii) For self-supporting cable the outer jacket may be extruded over the support messenger and cable core.

(viii) For detection purposes, the cable may have toning elements embedded or extruded with the outer jacket.

(2) The cable is fully color coded so that each fiber is distinguishable from every other fiber. A basic color scheme of twelve colors allows individual fiber identification. Colored tubes, binders, threads, striping, or markings provide fiber group identification.

(3) Cables manufactured to the requirements of this section must demonstrate compliance with the qualification testing requirements to ensure satisfactory end-use performance characteristics for the intended applications.

(4) Optical cable designs not specifically addressed by this section may be allowed. Justification for acceptance of a modified design must be provided to substantiate product utility and long term stability and endurance. For information on how to obtain Agency's acceptance of such a modified design, refer to the product acceptance procedures available at *http://www.usda.gov/rus/telecom/listing_procedures/index_listing_procedures.htm* as well as RUS Bulletin 345–3.

(5) The cable must be designed for the temperatures ranges of Table 1–1, *Cable Normal Temperature Ranges*, of ICEA S–110–717 (incorporated by reference at § 1755.901(c)).

(6) *Tensile Rating:* The cable must have ratings that are no less than the tensile ratings indicated in paragraph 1.1.4, *Tensile Rating*, of Part 1 of the ICEA S–110–717 (incorporated by reference at § 1755.901(c)).

(7) *Self-Supporting Cables:* Based on the storm loading districts referenced in Section 25, Loading of Grades B and C, of ANSI/IEEE C2–2007 (incorporated by reference at § 1755.901(b)), and the maximum span and location of cable installation provided by the end user, the manufacturer must provide a cable design with sag and tension tables showing the maximum span and sag information for that particular installation. The information included must be for Rule B, *Ice and Wind Loading*, and when applicable, information on Rule 250C, *Extreme Wind Loading*. Additionally, to ensure the proper ground clearance, typically a minimum of 4.7 m (15.5 feet), the end user should factor in the maximum sag under loaded conditions as well as height of attachment for each application.

(8) *Minimum Bend Diameter:* For cable under loaded and unloaded conditions, the cable must have the minimum bend diameters indicated in paragraph 1.1.5, *Minimum Bend Diameter*, of Part 1 of ICEA S–110–717 (incorporated by reference at § 1755.901(c)). For very small cables, manufacturers may specify fixed cable

minimum bend diameters that are independent of the outside diameter.

(9) All cables sold to RUS Telecommunications borrowers must be accepted by the Agency's Technical Standards Committee ''A'' for projects involving RUS loan funds. All design changes to Agency acceptable designs must be submitted to the Agency for acceptance. Optical cable designs not specifically addressed by this section may be allowed, if accepted by the Agency. Justification for acceptance of a modified design must be provided to substantiate product utility and long term stability and endurance. For information on how to obtain the Agency's acceptance of cables, refer to the product acceptance procedures available at *http://www.usda.gov/rus/telecom/listing_procedures/index_listing_procedures.htm* as well as RUS Bulletin 345–3.

(10) The Agency intends that the optical fibers contained in the cables meeting the requirement of this section have characteristics that will allow signals, having a range of wavelengths, to be carried simultaneously.

(11) The manufacturer is responsible to establish a quality assurance system meeting industry standards described in paragraph 1.8 of ICEA S–110–717 (incorporated by reference at § 1755.901(c)).

(12) The cable made must meet paragraph 1.10 of ICEA S–110–717 (incorporated by reference at § 1755.901(c)).

(b) *Optical Fibers.*

(1) The solid glass optical fibers must consist of a cylindrical core and cladding covered by either an ultraviolet-cured acrylate or other suitable coating. Each fiber must be continuous throughout its length.

(2) Optical fibers must meet the fiber attributes of Table 2, *G.652.B attributes*, of ITU–T Recommendation G.652 (incorporated by reference at § 1755.901(f)), unless the end user specifically asks for another type of fiber. However, when the end user stipulates a low water peak fiber, the optical fibers must meet the fiber attributes of Table 4, *G.652.D attributes*, of ITU–T Recommendation G.652; or when the end user stipulates a low bending loss fiber, the optical fibers must meet the fiber attributes of Table 7–1, *G.657 class A attributes*, of ITU–T Recommendation G.657 (incorporated by reference at § 1755.901(f)).

(i) Additionally, optical ribbon fibers must meet paragraph 3.3, *Optical Fiber Ribbons*, of Part 3 of ICEA S–110–717 (incorporated by reference at § 1755.901(c)).

(ii) [Reserved]

(3) *Multimode fibers.* Optical fibers must meet the requirements of paragraphs 2.1 and 2.3.1 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(4) *Matched Cable.* Unless otherwise specified by the buyer, all single mode fiber cables delivered to an Agency-financed project must be manufactured to the same MFD specification. However, notwithstanding the requirements indicated in paragraphs (d)(2) and (d)(3) of this section, the maximum MFD tolerance allowed for cables meeting the requirements of this section must be of a magnitude meeting the definition of ''matched cable,'' as defined in paragraph (b) of § 1755.900. With the use of cables meeting this definition the user can reasonably expect that the average bi-directional loss of a fusion splice to be ≤0.1 dB.

(5) Buyers will normally specify the MFD for the fibers in the cable. When a buyer does not specify the MFD at 1310 nm, the fibers must be manufactured to an MFD of 9.2 μm with a maximum tolerance range of ±0.5 μm (362 ± 20 microinch), unless the buyer agrees to accept cable with fibers specified to a different MFD. When the buyer does specify a MFD and tolerance conflicting with the MFD maximum tolerance allowed by paragraph (d)(4) of this section, the requirements of paragraph (d)(4) must prevail.

(6) Factory splices are not allowed.

(7) All optical fibers in any single length of cable must be of the same type unless otherwise specified by end user.

(8) Optical fiber dimensions and data reporting must be as required by paragraph 7.13.1.1 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(c) *Buffers/Coating.*

(1) The optical fibers contained in a buffer tube (loose tube) loosely packaged must have a clearance between the fibers and the inside of the container sufficient to allow for thermal expansions without constraining the fibers. The protective container must be manufactured from a material having a coefficient of friction sufficiently low to allow the fibers free movement. The design may contain more than one tube. Loose buffer tubes must meet the requirements of Paragraph 3.2.1, *Loose Buffer Tube Dimensions*, of Part 3 of ICEA S–110–717 (incorporated by reference at § 1755.901(c)).

(2) The loose tube coverings of each color and other fiber package types removed from the finished cable must meet the following shrinkback and cold bend performance requirements. The fibers may be left in the tube.

(i) *Shrinkback:* Testing must be conducted per ASTM D 4565 (incorporated by reference at § 1755.901(d)), paragraph 14.1, using a talc bed at a temperature of 95 °C. Shrinkback must not exceed 5 percent of the original 150 millimeter length of the specimen. The total shrinkage of the specimen must be measured.

(ii) *Cold Bend:* Testing must be conducted on at least one tube from each color in the cable. Stabilize the specimen to -20 ± 1 °C for a minimum of four hours. While holding the specimen and mandrel at the test temperature, wrap the tube in a tight helix ten times around a mandrel with a diameter the greater of five times the tube diameter or 50 mm. The tube must show no evidence of cracking when observed with normal or corrected-to-normal vision.

(3) Optical fiber coating must meet the requirements of paragraph 2.4, *Optical Fiber Coatings and Requirements*, of Part 2 of ICEA S–110–717 (incorporated by reference at § 1755.901(c)).

(i) All protective coverings in any single length of cable must be continuous and be of the same material except at splice locations.

(ii) The protective coverings must be free from holes, splits, blisters, and other imperfections and must be as smooth and concentric as is consistent with the best commercial practice.

(iii) Repairs to the fiber coatings are not allowed.

(d) *Fiber and Buffer Tube Identification.* Fibers within a unit and the units within a cable must be identified as indicated in paragraphs 4.2 and 4.3 of Part 4 of ICEA S–110–717 (incorporated by reference at § 1755.901(c)), respectively.

(e) *Strength Members.*

(1) Combined strength of all the strength members must be sufficient to support the stress of installation and to protect the cable in service. Strength members must meet paragraph 4.4, *Strength Members*, of ICEA S–110–717 (incorporated by reference at § 1755.901(c)). Self supporting aerial cables using the strength members as an integral part of the cable strength must comply with paragraph C.4, *Static Tensile Testing of Aerial Self-Supporting Cables*, of ANNEX C of ICEA S–110–717.

(2) Strength members may be incorporated into the core as a central support member or filler, as fillers between the fiber packages, as an annular serving over the core, as an annular serving over the intermediate jacket, embedded in the outer jacket or as a combination of any of these methods.

(3) The central support member or filler must contain no more than one splice per kilometer of cable. Individual fillers placed between the fiber packages and placed as annular servings over the core must contain no more than one splice per kilometer of cable. Cable sections having central member or filler splices must meet the same physical requirements as un-spliced cable sections.

(4) Notwithstanding what has been indicated in other parts of this document, in each length of completed cable having a metallic central member, the dielectric strength between the optional armor and the metallic center member must withstand at least 15 kilovolts direct current for 3 seconds.

(f) *Forming the Cable Core*.

(1) Protected fibers must be assembled with the optional central support member and strength members in such a way as to form a cylindrical group or other acceptable core constructions and must meet Section 4.5, Assembly of Cables, of Part 4 of ICEA S–110–717 (incorporated by reference at 1755.901(c)). Other acceptable cable cores include round, figure 8, flat or oval designs.

(2) The standard cylindrical group or core designs must consist of 12 fibers or less.

(3) When threads or tapes are used as core binders, they must be colored either white or natural and must be a non-hygroscopic and non-wicking dielectric material. Water swell-able threads and tapes are permitted.

(g) *Filling/Flooding Compounds and Water Blocking Elements*.

(1) To prevent the ingress and migration of water through the cable and core, filling/flooding compounds or water blocking elements must be used.

(i) Filling compounds must be applied into the interior of the loose fiber tubes and into the interstices of the core. When a core wrap is used, the filling compound must also be applied to the core wrap, over the core wrap and between the core wrap and inner jacket when required.

(ii) Flooding compounds must be sufficiently applied between the optional inner jacket and armor and between the armor and outer jacket so that voids and air spaces in these areas are minimized. The use of floodant between the armor and outer jacket is not required when uniform bonding, per paragraph l(9) of this section, is achieved between the plastic-clad armor and the outer jacket. Floodant must exhibit adhesive properties sufficient to prevent jacket slip when tested per the requirements of paragraphs 7.26 through 7.26.2 of Part 7, *Testing, Test Methods, and Requirements*, of ANSI/ICEA S–87–640 (incorporated by reference at 1755.901(c)).

(iii) Water blocking elements must achieve equal or better performance in preventing the ingress and migration of water as compared to filling and flooding compounds. In lieu of a flooding compound, water blocking elements may be applied between the optional inner jacket and armor and between the armor and outer jacket to prevent water migration. The use of the water blocking elements between the armor and outer jacket is not required when uniform bonding, per paragraph (l)(10) of this section, is achieved between the plastic-clad armor and the outer jacket.

(2) The materials must be homogeneous and uniformly mixed; free from dirt, metallic particles and other foreign matter; easily removed; nontoxic and present no dermal hazards.

(3) The individual cable manufacturer must satisfy the Agency that the filling compound or water blocking elements selected for use is suitable for its intended application.

(i) Filling/Flooding compound materials must be compatible with the cable components when tested per paragraph 7.16, *Material Compatibility and Cable Aging Test*, of Part 7 of ICEA S–110–717 (incorporated by reference at § 1755.901(c)).

(ii) Water blocking elements must be compatible with the cable components when tested per paragraph 7.16, *Material Compatibility and Cable Aging Test*, of Part 7 of ICEA S–110–717 (incorporated by reference at § 1755.901(c)).

(h) *Core Wrap (Optional)*.

(1) At the option of the manufacturer, one or more layers of non-hygroscopic and non-wicking dielectric material may be applied with an overlap over the core.

(2) The core wrap(s) can be used to provide a heat barrier to prevent deformation or adhesion between the fiber tubes or can be used to contain the core.

(3) When core wraps are used, sufficient filling compound must be applied to the core wraps so that voids or air spaces existing between the core wraps and between the core and the inner side of the core wrap are minimized.

(i) *Inner Jacket (Optional)*.

(1) Inner jackets may be applied directly over the core or over the strength members. Inner jackets are optional.

(2) The inner jacket material and test requirements must be the same as for the outer jacket material per paragraph (n) of this section, except that either black or natural polyethylene may be used. In the case of natural polyethylene, the requirements for absorption coefficient and the inclusion of furnace black are waived.

(j) *Armor (Optional)*.

(1) A steel armor, plastic coated on both sides, is recommended for direct buried service entrance cable in gopher areas. Armor is also optional for duct and aerial cable as required by the end user. The plastic coated steel armor must be applied longitudinally directly over the core wrap or the intermediate jacket and must have an overlapping edge.

(2) The uncoated steel tape must be electrolytic chrome coated steel (ECCS) with a thickness of 0.155 ± 0.015 millimeters.

(3) The reduction in thickness of the armoring material due to the corrugating or application process must be kept to a minimum and must not exceed 10 percent at any spot.

(4) The armor of each length of cable must be electrically continuous with no more than one joint or splice allowed per kilometer of cable. This requirement does not apply to a joint or splice made in the raw material by the raw material manufacturer.

(5) The breaking strength of any section of an armor tape, containing a factory splice joint, must not be less than 80 percent of the breaking strength of an adjacent section of the armor of equal length without a joint.

(6) For cables containing no floodant over the armor, the overlap portions of the armor tape must be bonded in cables having a flat, non-corrugated armor to meet the requirements of paragraphs (r)(1) and (r)(2) of this section. If the tape is corrugated, the overlap portions of the armor must be sufficiently bonded and the corrugations must be sufficiently in register to meet the requirements of paragraphs (r)(1) and (r)(2) of this section.

(7) The armor tape must be so applied as to enable the cable to meet the testing requirements of paragraphs (r)(1) and (r)(2) of this section.

(8) The protective coating on the steel armor must meet the Bonding-to-Metal, Heat Sealability, Lap-Shear and Moisture Resistance requirements of Type I, Class 2 coated metals per ASTM B 736 (incorporated by reference at § 1755.901(d)).

(9) When the jacket is bonded to the plastic coated armor, the bond between the plastic coated armor and the outer jacket must not be less than 525 Newtons per meter over at least 90 percent of the cable circumference when tested per ASTM D 4565 (incorporated

by reference at § 1755.901(d)). For cables with strength members embedded in the jacket, and residing directly over the armor, the area of the armor directly under the strength member is excluded from the 90 percent calculation.

(k) *Optional Support Messenger (Aerial Cable).*

(1) Integrated messenger(s) for self-supporting cable must provide adequate strength to operate under the appropriate weather loading conditions over the maximum specified span.

(2) Based on the storm loading districts referenced in Section 25, Loading of Grades B and C, of ANSI/IEEE C2–2007 (incorporated by reference at § 1755.901(b)), and the maximum span and location of cable installation provided by the end user, the manufacturer must provide a cable design with sag and tension tables showing the maximum span and sag information for that particular installation. The information included must be for Rule B, *Ice and Wind Loading*, and when applicable, information on Rule 250C, *Extreme Wind Loading.* Additionally, to ensure the proper ground clearance, typically a minimum of 4.7 m (15.5 feet) the end user should factor in the maximum sag under loaded conditions as well as height of attachment for each application.

(l) *Outer Jacket.*

(1) The outer jacket must provide the cable with a tough, flexible, protective covering which can withstand exposure to sunlight, to atmosphere temperatures and to stresses reasonably expected in normal installation and service.

(2) The jacket must be free from holes, splits, blisters, or other imperfections, and must be as smooth and concentric as is consistent with the best commercial practice.

(3) Jacket materials must meet the stipulations of paragraph 5.4 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)), except that the concentration of furnace black does not necessarily need to be initially contained in the raw material and may be added later during the jacket making process. Jacket thickness must have a 0.50 mm minimum thickness over the core or over any radial strength member used as the primary strength element(s), 0.20 mm when not used as the primary strength member, and 0.30 mm over any optional toning elements.

(4) Jacket Repairs must meet the stipulations of paragraph 5.5, *Jacket Repairs*, of ICEA S–110–717 (incorporated by reference at § 1755.901(c)).

(5) *Jacket Testing:* The jacket must be tested to determine compliance with requirements of this section. The specific tests for the jacket are described in paragraphs 7.6 through 7.11.2 of Part 7, *Testing, Test Methods, and Requirements*, of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(m) *Sheath Slitting Cord (Optional).*

(1) A sheath slitting cord is optional.

(2) When a sheath slitting cord is used it must be non-hygroscopic and non-wicking, or be rendered such by the filling or flooding compound, continuous throughout a length of cable and of sufficient strength to open the sheath over at least a one meter length without breaking the cord at a temperature of 23 ± 5 °C.

(n) *Identification and Length Markers.*

(1) Each length of cable must be permanently labeled OPTICAL CABLE, OC, OPTICAL FIBER CABLE, or OF on the outer jacket and identified as to manufacturer and year of manufacture.

(2) Each length of cable intended for direct burial installation must be marked with a telephone handset in compliance with the requirements of the Rule 350G of ANSI/IEEE C2–2007 (incorporated by reference at § 1755.901(b)).

(3) Mark the number of fibers on the jacket.

(4) The identification and date marking must conform to paragraph 6.1, Identification and Date Marking, of ICEA S–110–717 (incorporated by reference at § 1755.901(c)).

(5) The length marking must conform to paragraph 6.3, Length Marking, of ICEA S–110–717 (incorporated by reference at § 1755.901(c)).

(o) *Optical Performance of a Finished Cable.*

(1) Unless otherwise specified by the end user, the optical performance of a finished cable must comply with the attributes of Table 2, *G.652.B attributes,* found in ITU Recommendation G.652 (incorporated by reference at § 1755.901(f)). However, when the end user stipulates a low water peak fiber the finished cable must meet the attributes of Table 4, *G.652.D attributes,* found in ITU–T Recommendation G.652; or when the end user stipulates a low bending loss fiber, the finished cable must meet the attributes of Table 7–1, *class A attributes,* of ITU–T Recommendation G.657 (incorporated by reference at § 1755.901(f)).

(i) The attenuation methods must be per Table 8.4, *Optical attenuation measurement methods,* of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(ii) The cable must have a maximum attenuation of 0.1 dB at a point of discontinuity (a localized deviation of the optical fiber loss). Per paragraphs 8.4 and 8.4.1 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)), measurements must be conducted at 1310 and 1550 nm, and at 1625 nm when specified by the end user.

(iii) The cable cutoff wavelength (γ_{cc}) must be reported per paragraph 8.5.1 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(2) *Multimode Optical Fiber Cable.* Unless otherwise specified by the end user, the optical performance of the fibers in a finished cable must comply with Table 8.1, *Attenuation coefficient performance requirement (dB/km),* Table 8.2*, Multimode bandwidth coefficient performance requirements (MHz-km*), and Table 8.3*, Points discontinuity acceptance criteria (d),* of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(3) Because the accuracy of attenuation measurements for single mode fibers becomes questionable when measured on short cable lengths, attenuation measurements are to be made utilizing characterization cable lengths. Master Cable reels must be tested and the attenuation values measured will be used for shorter ship lengths of cable.

(4) Because the accuracy of attenuation measurements for multimode fibers becomes questionable when measured on short cable lengths, attenuation measurements are to be made utilizing characterization cable lengths. If the ship length of cable is less than one kilometer, the attenuation values measured on longer lengths of cable (characterization length of cable) before cutting to the ship lengths of cable may be applied to the ship lengths.

(5) Attenuation must be measured per Table 8.4, *Optical Attenuation Measurement Methods,* ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(6) The bandwidth of multimode fibers in a finished cable must be no less than the values specified in Table 8.2 per paragraph 8.3.1 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(p) *Mechanical Requirements.*

(1) *Cable Testing:* Cable designs must meet the requirements of Part 7, Testing and Test Methods, of ICEA S–110–717 (incorporated by reference at § 1755.901(c)), except for paragraph 7.15 applicable to tight tube fibers.

(2) *Bend Test:* All cables manufactured must meet the ''Cable

Low and High Temperature Bend Test'' described in Section 7.21 (paragraphs 7.21, 7.21.1, and 7.21.2) of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(q) *Pre-connectorized Cable (Optional).*

(1) At the option of the manufacturer and upon request by the end user, the cable may be factory terminated with connectors.

(2) All connectors must be accepted by the Agency prior to their use. For information on how to obtain the Agency's acceptance, refer to the product acceptance procedures available at *http://www.usda.gov/rus/telecom/listing_procedures/index_listing_procedures.htm* as well as RUS Bulletin 345–3.

(r) *Acceptance Testing and Extent of Testing.*

(1) The tests described in this section are intended for acceptance of cable designs and major modifications of accepted designs. What constitutes a major modification is at the discretion of the Agency. These tests are intended to show the inherent capability of the manufacturer to produce cable products that have satisfactory performance characteristics, long life, and long-term optical stability, but are not intended as field tests. For information on how to obtain the Agency's acceptance, refer to the product acceptance procedures available at *http://www.usda.gov/rus/telecom/listing_procedures/index_listing_procedures.htm* as well as RUS Bulletin 345–3.

(2) For initial acceptance, the manufacturer must submit:

(i) An original signature certification that the product fully complies with each paragraph of this section;

(ii) Qualification Test Data for demonstrating that the cable meets the requirements of this section;

(iii) A set of instructions for handling the cable;

(iv) OSHA Material Safety Data Sheets for all components;

(v) Agree to periodic plant inspections;

(vi) Agency's ''Buy American'' Requirements. For each cable for which the Agency acceptance is requested, the manufacturer must include a certification stating whether the cable complies with the following two domestic origin manufacturing provisions:

(A) Final assembly or manufacture of the product, as the product would be used by an Agency's borrower, is completed in the United States or eligible countries. For a list of eligible countries, see *http://www.usda.gov/rus/telecom/publications/eligible.htm;* and

(B) The cost of United States and eligible countries' components (in any combination) within the product is more than 50 percent of the total cost of all components utilized in the product. The cost of non-domestic components (components not manufactured within the United States or eligible countries) which are included in the finished product must include all duties, taxes, and delivery charges to the point of assembly or manufacture;

(vii) Written user testimonials concerning performance of the product; and

(viii) Other nonproprietary data deemed necessary by the Chief, Technical Support Branch (Telecommunications).

(3) For continued Agency product acceptance, the manufacturer must submit an original signature certification that the product fully complies with each paragraph of this section and a certification stating whether the cable meets the two domestic provisions of paragraph (t)(2)(vi) above for acceptance by January every three years. The certification must be based on test data showing compliance with the requirements of this section. The test data must have been gathered within 90 days of the submission and must be kept on files per paragraph (u)(1).

(4) Initial and re-qualification acceptance requests should be addressed to: Chairman, Technical Standards Committee ''A'' (Telecommunications), STOP 1550, Advanced Services Division, Rural Development Utilities Program, Washington, DC 20250–1550.

(s) *Records of Optical and Physical Tests.*

(1) Each manufacturer must maintain suitable summary records for a period of at least 3 years of all optical and physical tests required on completed cable manufactured under the requirement of this section. The test data for a particular reel must be in a form that it may be readily available to the Agency upon request. The optical data must be furnished to the end user on a suitable and easily readable form.

(2) Measurements and computed values must be rounded off to the number of places or figures specified for the requirement per paragraph 1.3 of ANSI/ICEA S–87–640 (incorporated by reference at § 1755.901(c)).

(t) *Manufacturing Irregularities.*

(1) Repairs to the armor, when present, are not permitted in cable supplied to the end user under the requirement of this section. The armor for each length of cable must be tested for continuity using the procedures of ASTM D 4566 (incorporated by reference at § 1755.901(d)).

(2) Minor defects in the inner and outer jacket (defects having a dimension of 3 millimeter or less in any direction) may be repaired by means of heat fusing per good commercial practices utilizing sheath grade compounds.

(3) Buffer tube repair is permitted only in conjunction with fiber splicing.

(u) *Packaging and Preparation for Shipment.*

(1) All cables must comply with paragraph 6.5, *Packaging and Marking,* of ICEA S–110–717 (incorporated by reference at § 1755.901(c)).

(2) For cables shipped on reels a circumferential thermal wrap or other means of protection complying with section (w)(3) of this section must be secured between the outer edges of the reel flange to protect the cable against damage during storage and shipment. This requirement applies to reels weighing more that 75 lbs. The thermal wrap is optional for reels weighing 75 lbs or less.

(3) The thermal wrap must meet the requirements included in the *Thermal Reel Wrap Test,* described below in paragraphs (w)(3)(i) and (w)(3)(ii) of this section. This test procedure is for qualification of initial and subsequent changes in thermal reel wraps.

(i) *Sample Selection.* All testing must be performed on two 450 millimeter (18 inches) lengths of cable removed sequentially from the same fiber jacketed cable. This cable must not have been exposed to temperatures in excess of 38 °C (100 °F) since its initial cool down after sheathing.

(ii) *Test Procedure.*

(A) Place the two samples on an insulating material such as wood.

(B) Tape thermocouples to the jackets of each sample to measure the jacket temperature.

(C) Cover one sample with the thermal reel wrap.

(D) Expose the samples to a radiant heat source capable of heating the uncovered sample to a minimum of 71 °C (160 °F). A GE 600 watt photoflood lamp or an equivalent lamp having the light spectrum approximately that of the sun must be used.

(E) The height of the lamp above the jacket must be 380 millimeters (15 inches) or an equivalent height that produces the 71 °C (160 °F) jacket temperature on the unwrapped sample must be used.

(F) After the samples have stabilized at the temperature, the jacket temperatures of the samples must be recorded after one hour of exposure to the heat source.

(G) Compute the temperature difference between jackets.

(H) The temperature difference between the jacket with the thermal reel wrap and the jacket without the reel wrap must be greater than or equal to 17 °C (63 °F).

(4) Cable must be sealed at the ends to prevent entrance of moisture.

(5) The end-of-pull (outer end) of the cable must be securely fastened to prevent the cable from coming loose during transit. The start-of-pull (inner end) of the cable must project through a slot in the flange of the reel, around an inner riser, or into a recess on the flange near the drum and fastened in such a way to prevent the cable from becoming loose during installation.

(6) Spikes, staples or other fastening devices must be used in a manner which will not result in penetration of the cable.

(7) The minimum size arbor hole must be 44.5 mm (1.75 inch) and must admit a spindle without binding.

(8) Each reel must be plainly marked to indicate the direction in which it should be rolled to prevent loosening of the cable on the reel.

(9) Each reel must be stenciled or lettered with the name of the manufacturer.

(10) The following information must be either stenciled on the reel or on a tag firmly attached to the reel: Optical Cable, Type and Number of Fibers, Armored or Nonarmored, Year of Manufacture, Name of Cable Manufacturer, Length of Cable, Reel Number, REA 7 CFR 1755.903.

Example: Optical Cable, G.657 class A, 4 fibers, Armored. XYZ Company, 1050 meters, Reel Number 3, REA 7 CFR 1755.903.

(11) When pre-connectorized cable is shipped, the splicing modules must be protected to prevent damage during shipment and handling.

Dated: March 27, 2009.

James R. Newby,

Acting Administrator, Rural Utilities Service.

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SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

RIN 3245–AF96

Small Business Size Standards; Temporary Alternative Size Standards for 7(a) Business Loan Program

AGENCY: Small Business Administration (SBA).

ACTION: Interim final rule with request for comments.

SUMMARY: The U.S. Small Business Administration (SBA) is temporarily amending the size eligibility criteria for loan assistance provided under its 7(a) Business Loan Program. This rule temporarily establishes the same alternative small business size standard that applies to SBA's Certified Development Company (CDC) Program. The U.S. Congress passed and the President signed the American Recovery and Reinvestment Act of 2009 (Recovery Act). The purposes and goals of the Recovery Act are to promote economic recovery and to preserve and create jobs. SBA prepared this rule as an interim final rule, effective immediately, because it will help alleviate the pressing needs of many small businesses for financial assistance in the current economic environment.

DATES: *Effective Dates:* This rule is effective on May 5, 2009.

Comment Date: Comments on the interim final rule must be received on or before August 3, 2009.

Applicability Dates: This rule applies to all 7(a) loan applications approved from May 5, 2009 through September 30, 2010.

ADDRESSES: You may submit comments, identified by [RIN number 3245–[INSERT] by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Mail:* Carl J. Jordan, Acting Division Chief for Size Standards, U.S. Small Business Administration, 409 3rd Street, SW., 8th floor, Washington, DC 20416.
- *Hand Delivery/Courier:* Carl J. Jordan, Acting Division Chief for Size Standards, U.S. Small Business Administration, 409 3rd Street, SW., 8th Floor, Washington, DC 20416.

All comments will be posted on *http://www.Regulations.gov*. If you wish to include within your comment confidential business information (CBI) as defined in the Privacy and Use Notice/User Notice at *http://www.Regulations.gov* and you do not want that information disclosed, you must submit the comment by either mail or hand delivery, and you must address the comment to the attention of Carl J. Jordan, Acting Division Chief for Size Standards. In the submission, you must highlight the information that you consider is CBI and explain why you believe this information should be held confidential. SBA will make the final determination, in its discretion, of whether the information is CBI and, therefore, will not be published.

FOR FURTHER INFORMATION CONTACT: For size standard questions please contact Carl J. Jordan, Acting Division Chief for Size Standards, (202) 205–6093, *carl.jordan@sba.gov*. For finance questions please contact Grady Hedgespeth, Director, Office of Financial Assistance, (202) 205–7562, *grady.hedgespeth@sba.gov*.

SUPPLEMENTARY INFORMATION:

I. Background Information

The American Recovery and Reinvestment Act of 2009 (Recovery Act), Public Law 111–05 was enacted on February 17, 2009, to among other things, promote economic recovery by preserving and creating jobs, and to assist those most impacted by the severe economic conditions facing the nation. SBA is one of several agencies that are intended to play a role in achieving these goals. SBA received funding and authority through the Recovery Act to modify its existing loan programs or establish new loan programs to help re-invigorate small business lending. SBA's actions will increase access to affordable credit for small businesses through the agency's 7(a) and 504 loan programs, unfreeze the secondary market for SBA guaranteed loans, help small businesses struggling with existing debt, and allow greater investment in high-growth small businesses. The changes to SBA's programs by the Recovery Act include the following: (1) Temporary reduction or elimination of fees in the 7(a) and 504 loan guarantee programs; (2) temporary authorization of up to a 90 percent guarantee on most 7(a) loans; (3) creation of a temporary Secondary Market Guarantee Authority to provide a Federal guarantee for pools of first lien 504 loans that are to be sold to third-party investors; (4) new authority for refinancing community development loans under the 504 program; (5) revision of the job creation goals of the 504 program; (6) simplification of the maximum leverage limits and aggregate investment limits required of Small Business Investment Companies; (7) temporary authority to provide loans on a deferred basis to viable small business concerns that have a qualifying small business loan and are experiencing immediate financial hardship; (8) temporary increase in the surety bond maximum amount; and (9) establishment of a Secondary Market Lending Authority to make loans to systemically important broker dealers in SBA's 7(a) secondary market.

To achieve its mandate under the Recovery Act and maximize credit available through its programs to

America's small businesses, SBA is issuing this rule. SBA believes that in the current economic environment, many businesses that are slightly outside of traditional size standards to qualify for SBA guaranteed 7(a) loans are shut out of conventional lending markets and unable to obtain credit. As a result of the recent disruptions in credit markets, commercial borrowers are on average less creditworthy than in previous years. Lenders have also significantly tightened credit standards for borrowers. These trends are evidenced by Quarterly Senior Loan Officer Opinion Surveys released by the Federal Reserve Board (available at *http://www.federalreserve.gov/BoardDocs/SnLoanSurvey/default.htm*) in July 2008, October 2008 and January 2009 and are expected to continue given the unprecedented disruptions in the financial system.

Under SBA's CDC program, a business concern must meet either the size eligibility criteria of the 7(a) Business Loan Program, or have tangible net worth not in excess of $8.5 million and average net income after Federal income taxes (excluding any carry-over losses) for the preceding two completed fiscal years not in excess of $3.0 million (13 CFR 120.301(b)). This interim final rule temporarily extends eligibility for 7(a) loans to businesses that meet the alternate size criteria for the CDC Program. SBA estimates that this will qualify an additional 70,000 businesses for the 7(a) Business Loan program and immediately help make capital available to these small businesses which may be affected by diminished credit opportunities as a result of the economy. This temporary size standard will be available from the Effective Date of this rule though the end of Federal Fiscal Year 2010, September 30, 2010.

SBA has at least twice before taken similar measures to provide assistance to additional small businesses in times of economic uncertainty. SBA temporarily applied the CDC size standards to the 7(a) Business Loan Program from December 31, 1992 to March 4, 1993. SBA also applied the CDC size standards to 7(a) loans made through its Gulf Opportunity Loan Pilot program because of the urgent need for Federal financial assistance as a result of Hurricanes Katrina and Rita in 2005. 70 FR 69045, November 14, 2005.

Small businesses are critical to the nation's economy and are responsible for most new private sector jobs created and roughly 50% of the non-farm employment base. Access to capital at affordable rates and attractive terms is the lifeblood of a healthy small business sector. Today, many small business concerns, including those which may not qualify for 7(a) loans under the existing framework, are experiencing financial hardship as a result of economy. SBA believes that temporarily applying the CDC size standards to the 7(a) program will provide an effective mechanism for the Federal Government to extend crucial financial assistance to small businesses that cannot obtain financial assistance in the current economic environment. This will also help achieve the purposes and goals of the Recovery Act to promote economic recovery, create and preserve jobs, and make small business credit more available.

II. Analysis of Changes to Section 121

Section 121.301(a). This section is revised to clarify that the alternative 7(a) business loan size standard is temporary and applies only for a period that coincides with two Federal Fiscal Years (FY 2009 and FY 2010). This date also coincides with SBA Recovery Act funding and several new Recovery Act SBA Programs, which are available through September 30, 2010.

Section 121.301(b). This section is revised to extend temporarily the alternate size standards currently in use for SBA's CDC program to small businesses seeking financial assistance under the Agency's 7(a) program.

Currently, as stated above, to be eligible for assistance under the CDC program, a business concern must meet either the size eligibility criteria of the 7(a) Business Loan Program, or have tangible net worth not in excess of $8.5 million and average net income after Federal income taxes (excluding any carry-over losses) for the preceding two completed fiscal years not in excess of $3.0 million. Size standards based on the CDC net worth and net income size standard make assistance available to some small businesses that may be larger in size than business concerns that qualify for the 7(a) Business Loan Program.

SBA recognizes that small business concerns are experiencing difficulty accessing credit in the current economic environment. Many businesses that previously qualified for conventional credit programs, without government assistance, are now less able to access the financing they need. The broader CDC alternate size standards will make more small businesses eligible for 7(a) loans.

Applying the alternate net worth and net income size standards to the 7(a) loan program on a temporary basis during the current downturn in the economy provides an effective mechanism for the Federal Government to extend crucial financial assistance that would otherwise be unavailable to this segment of the small business community.

III. Justification for Publication as Interim Final Rule

In general, SBA publishes a rule for public comment before issuing a final rule in accordance with the Administrative Procedure Act (APA) and SBA regulations. 5 U.S.C. 553 and 13 CFR 101.108. Section 553(b)(3)(B) of the APA provides an exception to this standard rulemaking process, however, where an agency finds good cause to adopt a rule without prior public participation. The good cause requirement is satisfied when prior public participation is impracticable, unnecessary, or contrary to the public interest. Under such circumstances, an agency may publish an interim final rule without soliciting public comment.

In enacting the good cause exception to standard rulemaking procedures, Congress recognized that emergency situations arise where an agency must issue a rule without public participation.

The Recovery Act was enacted in response to pronounced turmoil in the financial markets. It promotes economic recovery by preserving and creating jobs and assisting those most impacted by the severe economic conditions facing the nation. SBA received funding and authority through the Recovery Act to modify existing loan programs and establish new loan programs to significantly stimulate small business lending. SBA expects these actions will increase access to affordable credit for small businesses through the Agency's 7(a) loan programs, unfreeze the secondary market for SBA guaranteed loans, help small businesses struggling with existing debt, and allow greater investment in high-growth small businesses.

To achieve the purposes and spirit of the Recovery Act, SBA's temporary application of the broader alternate size standards of the CDC Program to businesses seeking 7(a) loans will provide them with additional choices for obtaining financial assistance. This temporary alternative 7(a) loan size standard will enable businesses currently sharing many characteristics of existing small businesses to have access to SBA's flagship credit program in this time of tight credit.

Accordingly, SBA finds that good cause exists to publish this rule as an interim final rule in light of the urgent need. Advance solicitation of comments for this rulemaking would be impracticable and contrary to the public

interest, as it would harm those small businesses that need immediate access to capital. Any such delay would be extremely prejudicial to the affected businesses.

IV. Justification for Immediate Effective Date of Interim Final Rule

The Administrative Procedure Act requires that ''publication or service of a substantive rule shall be made not less than 30 days before its effective date, except * * * as otherwise provided by the agency for good cause found and published with the rule.'' 5 U.S.C. 553(d)(3). SBA finds that good cause exists to make this final rule effective the same day it is published in the **Federal Register**.

The purpose of the APA provision is to provide interested and affected members of the public sufficient time to adjust their behavior before the rule takes effect. For the reasons set forth above in the section on Justification for Publication as Interim Final Rule, SBA finds that good cause exists for making this interim final rule effective immediately, instead of observing the 30-day period between publication and effective date. Small businesses can receive assistance without delay by the immediate adoption of this rule, and no postponement of effective date is necessary for the public to adjust its behavior. The changes adopted in this rule temporarily extend the 7(a) program to an additional group of small businesses; however, current programs and practices remain in place.

V. Comments Request

Although this rule is being published as an interim final rule, SBA is soliciting comments from interested members of the public on all aspects of this rule, including the underlying policies. In particular, SBA would appreciate comments addressing the duration of the regulatory change and whether SBA should consider making the change permanent.

Compliance With Executive Orders 12866, 12988, and 13132, the Paperwork Reduction Act (44 U.S.C., Ch. 35) and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this proposed rule is a ''significant'' regulatory action for purposes of Executive Order 12866. Accordingly, the next section contains SBA's Regulatory Impact Analysis. This is not a major rule, however, under the Congressional Review Act, 5 U.S.C. 800.

Regulatory Impact Analysis

1. Is there a need for the regulatory action?

As discussed in the supplementary information, the current economic conditions warrant applying the alternate size standards of the CDC Program to the 7(a) Business Loan Program as a mechanism for addressing diminished sources of credit for the small business community. SBA's mission is to aid and assist small businesses through a variety of financial, procurement, business development, and advocacy programs. To assist effectively the intended beneficiaries of these programs, SBA must establish distinct definitions of which businesses are deemed small businesses. The Small Business Act (15 U.S.C. 632(a)) delegates to SBA's Administrator the responsibility for establishing small business definitions.

For two of SBA's financial assistance programs (*i.e.*, the CDC Program and the Small Business Investment Company Program), a business may qualify for assistance if it does not exceed the industry size standard for its primary industry (13 CFR 121.201) or alternate size standards based on net worth and net income. For certain industries, the alternate size standards qualify businesses larger in size than under the industry size standard levels.

This regulatory action promotes the Administration's objectives. One of SBA's goals in support of the Administration's objectives is to help individual small businesses succeed through fair and equitable access to capital and credit. Reviewing and modifying size standards, when appropriate, ensures that intended beneficiaries have access to small business programs designed to assist them.

2. What are the potential benefits and costs of this regulatory action?

The benefit to businesses obtaining small business status as a result of this interim final rule is eligibility for SBA's 7(a) Business Loan Program. The alternate CDC net worth and net income size standards do not affect other SBA programs, Federal procurement preference programs for small businesses, or regulatory and other programs of other Federal agencies that use SBA size standards. Under this interim final rule, approximately 70,000 additional businesses (primarily engaged in construction, retail trade, and services) will become eligible for the 7(a) Business Loan Program. The assistance available under the 7(a) Business Loan Program will enable newly eligible businesses to access credit they need to maintain or expand their operations during the current economic conditions.

SBA estimates that approximately 900 additional 7(a) loans per year totaling $450 million could be made to these newly defined small businesses. Extending the 7(a) Business Loan Program to additional businesses is not expected to crowd-out other small businesses since the estimated additional loans represent approximately 3.5 percent of the total loan volume in fiscal year 2008 of approximately $13 billion and is well within the SBA authorized loan ceiling for fiscal year 2009.

SBA does not anticipate any significant costs to the Program as a result of this interim final rule. The Program is self-financing and existing resources are in place to sufficiently process the additional loans.

Executive Order 12988: For the purposes of Executive Order 12988, Civil Justice Reform, SBA has determined that this rule is crafted, to the extent practicable, in accordance with the standards set forth in §§ 3(a) and 3(b)(2), to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13132: For the purposes of Executive Order 13132, SBA determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act: This interim final rule does not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 USC Chapter 35.

Regulatory Flexibility Act: Because the rule is an interim final rule, there is no requirement for SBA to prepare an Initial Regulatory Flexibility Act (IRFA) analysis. The Regulatory Flexibility Act (RFA), 5 U.S.C. 601, requires administrative agencies to consider the effect of their actions on small entities, small non-profit businesses, and small local governments. Pursuant to the RFA, when an agency issues a rule, the agency must prepare an IRFA which describes whether the impact of the rule will have a significant economic impact on a substantial number of small entities. However, the RFA requires analysis of a rule only where notice and comment rulemaking are required. Rules are exempt from Administrative Procedure Act (APA) notice and comment requirements and therefore from the RFA requirements when the agency for good cause finds that notice and public procedure thereon is impracticable, unnecessary, or contrary to the public interest.

List of Subjects in 13 CFR Part 121

Loan programs—business, Disaster assistance loans, Reporting and recordkeeping requirements, Small business.

■ For reasons set forth in the preamble, amend part 121 of title 13 Code of Federal Regulations as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

■ 1. The authority citation for part 121 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 636(b), 637, 644, and 662(5); and Pub. L. 105–135, sec. 401 *et seq.,* 111 Stat. 2592.

■ 2. Amend § 121.301 by revising paragraphs (a) introductory text and (b) to read as follows:

§ 121.301 What size standards are applicable to financial assistance programs?

(a) For Business Loans (other than for 7(a) Business Loans for the period beginning May 5, 2009 and ending on September 30, 2010) and for Disaster Loans (other than physical disaster loans), an applicant business concern must satisfy two criteria:

* * * * *

(b) For Development Company programs and, for the period beginning May 5, 2009 and ending on September 30, 2010, for 7(a) Business Loans, an applicant must meet one of the following standards:

(1) The same standards applicable under paragraph (a) of this section; or

(2) Including its affiliates, tangible net worth not in excess of $8.5 million, and average net income after Federal income taxes (excluding any carry-over losses) for the preceding two completed fiscal years not in excess of $3.0 million. If the applicant is not required by law to pay Federal income taxes at the enterprise level, but is required to pass income through to its shareholders, partners, beneficiaries, or other equitable owners, the applicant's ''net income after Federal income taxes'' will be its net income reduced by an amount computed as follows:

(i) If the applicant is not required by law to pay State (and local, if any) income taxes at the enterprise level, multiply its net income by the marginal State income tax rate (or by the combined State and local income tax rates, as applicable) that would have applied if it were a taxable corporation.

(ii) Multiply the applicant's net income, less any deduction for State and local income taxes calculated under paragraph (b)(2)(i) of this section, by the marginal Federal income tax rate that would have applied if the applicant were a taxable corporation.

(iii) Sum the results obtained in paragraphs (b)(2)(i) and (b)(2)(ii) of this section.

* * * * *

Dated: April 15, 2009.

Karen G. Mills,

Administrator.

[FR Doc. E9–10359 Filed 5–1–09; 11:15 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2006–23742; Directorate Identifier 2005–NE–53–AD; Amendment 39–15896; AD 2009–10–06]

RIN 2120–AA64

Airworthiness Directives; Pratt & Whitney (PW) JT9D–7R4 Series Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is superseding an existing airworthiness directive (AD) for PW JT9D–7R4 series turbofan engines. That AD currently requires removing certain reduced cooling flow 2nd stage high-pressure turbine (HPT) vane assemblies installed in certain 2nd stage HPT vane cluster assemblies. It also requires a visual and a fluorescent penetrant inspection (FPI) of the 2nd stage HPT air seal assembly, part number (P/N) 815097. This AD requires a visual and FPI of all P/N 2nd stage HPT air seal assemblies that were used with reduced cooling flow 2nd stage HPT vane assemblies. This AD results from PW identifying additional P/N air seal assemblies that are affected by the unsafe condition. We are issuing this AD to prevent uncontained failure of the 2nd stage HPT air seal assembly, leading to engine in-flight shutdown and damage to the airplane.

DATES: This AD becomes effective June 9, 2009.

ADDRESSES: You can get the service information identified in this AD from Pratt & Whitney, 400 Main St., East Hartford, CT 06108; telephone (860) 565–8770; fax (860) 565–4503.

The Docket Operations office is located at Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.

FOR FURTHER INFORMATION CONTACT: Mark Riley, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; *e-mail: mark.riley@faa.gov;* telephone (781) 238–7758; fax (781) 238–7199.

SUPPLEMENTARY INFORMATION: The FAA proposed to amend 14 CFR part 39 by superseding AD 2007–17–21, Amendment 39–15180 (72 FR 48549, August 24, 2007), with a proposed AD. The proposed AD applies to PW JT9D–7R4 series turbofan engines. We published the proposed AD in the **Federal Register** on November 9, 2007 (72 FR 63510). That action proposed to require at the next HPT module exposure:

- Removing the reduced cooling flow 2nd stage HPT vane assemblies.
- Visual and fluorescent penetrant inspections of the 2nd stage HPT air seal assemblies that have operated in an engine with reduced cooling flow 2nd stage HPT vane assemblies.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is provided in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

Comments

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

Difficulty Determining Reduced Cooling Flow 2nd Stage HPT Vane Assemblies

One commenter, FedEx Express, states since FedEx Express does not track 2nd stage NGVs, it will be difficult to determine if the 2nd stage air seal operated in an engine with reduced cooling flow HPT vane assemblies installed.

We don't agree. There is no requirement to identify 2nd stage air seals which may have operated in the past with reduced cooling flow 2nd stage HPT vane assemblies. This AD requires inspections of 2nd stage air seals if at disassembly, the air seals are found with reduced cooling flow 2nd stage HPT vanes installed. HPT 2nd stage air seals that pass inspection requirements per the engine manual

may be reinstalled. We changed the AD to make this clear.

Request to Remove PW Alert Service Bulletin JT9D–7R4–A72–596 From the AD

The same commenter states that the NPRM contains a paragraph titled ''Relevant Service Information.'' The paragraph provides the instructions for modifying the reduced cooling flow vane assemblies. FedEx Express asks ''What is the purpose of the subject paragraph?'' They ask if the AD will include a reference to PW ASB JT9D–7R4–A72–96 as a requirement to modify 2nd stage HPT vane assemblies. They ask us to remove the paragraph since it may not be pertinent to the action required by this AD.

We partially agree. We agree that incorporating the requirements of PW ASB JT9D–7R4–A72–596, dated September 15, 2005, isn't a requirement of the AD. However, we include this information in the AD as relevant information to inform operators that a rework procedure for the 2nd stage vanes is available and that parts don't have to be replaced with new parts. We didn't change the AD.

Conclusion

We have carefully reviewed the available data, including the comments received, and determined that air safety and the public interest require adopting the AD as proposed.

Costs of Compliance

We estimate that this AD will affect 85 PW JT9D–7R4 series turbofan engines installed on airplanes U.S. registry. We also estimate that it would take about 65.5 work-hours per engine to perform the required actions, and that the average labor rate is $80 per work-hour. Required parts will cost about $5,400 per engine. Based on these figures, we estimate the total cost of the AD to U.S. operators to be $904,400.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

We prepared a summary of the costs to comply with this AD and placed it in the AD Docket. You may get a copy of this summary at the address listed under **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Amendment 39–15180 (72 FR 48549, August 24, 2007), and by adding a new airworthiness directive, Amendment 39–15896, to read as follows:

2009–10–01 Pratt & Whitney: Amendment 39–15896. Docket No. FAA–2006–23742; Directorate Identifier 2005–NE–53–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective June 9, 2009.

Affected ADs

(b) This AD supersedes AD 2007–17–21, Amendment 39–15180.

Applicability

(c) This AD applies to Pratt & Whitney (PW) JT9D–7R4G2, –7R4E1, –7R4E4, and –7R4H1 series turbofan engines. These engines are installed on, but not limited to, Boeing 747–200, –300, 767–200, and Airbus A300–600 and A310–300 series airplanes.

Unsafe Condition

(d) This AD results from the manufacturer identifying additional part number (P/N) air seal assemblies that are affected by the unsafe condition. We are issuing this AD to prevent uncontained failure of the 2nd stage high-pressure turbine (HPT) air seal assembly, leading to engine in-flight shutdown and damage to the airplane.

Compliance

(e) You are responsible for having the actions required by this AD performed at the next HPT module exposure after the effective date of this AD, unless the actions have already been done.

(f) At the next HPT module exposure, remove reduced cooling flow 2nd stage HPT vane assemblies P/Ns: 797282, 796972, 800082, 800072, 803182, 803282, and 822582, installed in 2nd stage HPT vane cluster assemblies: P/Ns 797592, 797372, 799872, 799782, and 822572.

(g) For 2nd stage HPT air seals that are installed in engines that had a reduced cooling flow HPT vane assembly removed as specified in (f) of this AD, do the following:

(1) Perform a onetime visual inspection of the 2nd stage HPT air seal assembly. Information on the visual inspection can be found in the JT9D–7R4 engine manual, Section 72–51–22, Inspection/Check–01, paragraphs 1.D.(1), 1.D.(4), and 1.D.(6). (2) Perform a fluorescent penetrant inspection (FPI) of the 2nd stage HPT air seal assembly for cracks. Information on the FPI can be found in the JT9D–7R4 engine manual, Section 72–51–00, Inspection/Check–03.

Definition

(h) For the purpose of this AD, we define an HPT module exposure as removing the 1st stage HPT rotor or the 2nd stage HPT rotor from the HPT case.

Alternative Methods of Compliance

(i) The Manager, Engine Certification Office, has the authority to approve alternative methods of compliance for this AD if requested using the procedures found in 14 CFR 39.19.

Related Information

(j) Pratt & Whitney Alert Service Bulletin JT9D–7R4–A72–596, dated September 15, 2005, contains information for modifying the reduced cooling flow 2nd stage HPT vane assemblies. Contact Pratt & Whitney, 400 Main St., East Hartford, CT 06108; telephone (860) 565–8770; fax (860) 565–4503, for a copy of this service information.

(k) Contact Mark Riley, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA

01803; e-mail: *mark.riley@faa.gov;* telephone (781) 238–7758; fax (781) 238–7199, for more information about this AD.

Material Incorporated by Reference

(l) None.

Issued in Burlington, Massachusetts, on April 23, 2009.

Peter A. White,

Assistant Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. E9–10145 Filed 5–4–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 510

[Docket No. FDA–2009–N–0665]

New Animal Drugs; Change of Sponsor's Name

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect a change of sponsor's name from IVX Animal Health, Inc., to Teva Animal Health, Inc.

DATES: This rule is effective May 5, 2009.

FOR FURTHER INFORMATION CONTACT: David R. Newkirk, Center for Veterinary Medicine (HFV–100), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–276–8307, e-mail: *david.newkirk@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: IVX Animal Health, Inc., 3915 South 48th Street Ter., St. Joseph, MO 64503, has informed FDA that it has changed its name to Teva Animal Health, Inc. Accordingly, the agency is amending the regulations in 21 CFR 510.600(c) to reflect this change.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects in 21 CFR Part 510

Administrative practice and procedure, Animal drugs, Labeling, Reporting and recordkeeping requirements.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 510 is amended as follows:

PART 510—NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 510 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 360b, 371, 379e.

■ 2. In § 510.600 in the table in paragraph (c)(1), remove the entry for ''IVX Animal Health, Inc.'' and alphabetically add a new entry for ''Teva Animal Health, Inc.''; and in the table in paragraph (c)(2), revise the entry for ''059130'' to read as follows:

§ 510.600 Names, addresses, and drug labeler codes of sponsors of approved applications.

* * * * *

(c) * * *

(1) * * *

Firm name and address	Drug labeler code
* * *	* *
Teva Animal Health, Inc., 3915 South 48th Street Ter., St. Joseph, MO 64503	059130
* * *	* *

(2) * * *

Drug labeler code	Firm name and address
* *	* * *
059130	Teva Animal Health, Inc., 3915 South 48th Street Ter., St. Joseph, MO 64503
* *	* * *

Dated: April 29, 2009.

Steven D. Vaughn,

Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.

[FR Doc. E9–10262 Filed 5–4–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 522

[Docket No. FDA–2009–N–0665]

Implantation or Injectable Dosage From New Animal Drugs; Change of Sponsor; Repository Corticotropin Injection

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect a change of sponsor's name from Summit Hill Laboratories to Putney, Inc.

DATES: This rule is effective May 5, 2009.

FOR FURTHER INFORMATION CONTACT: David R. Newkirk, Center for Veterinary Medicine (HFV–100), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–276–8307, e-mail: *david.newkirk@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: Summit Hill Laboratories, P.O. Box 535, Navesink, NJ 07752, has informed FDA that it has transferred ownership of, and all rights and interest in, NADA 8–760 for ADRENOMONE (repository corticotropin injection U.S.P.) to Putney, Inc., 400 Congress St., suite 200, Portland, ME 04101. Accordingly, the regulations are amended in 21 CFR 522.480 to reflect this change of sponsorship.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects in 21 CFR Part 522

Animal drugs.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 522 is amended as follows:

PART 522—IMPLANTATION OR INJECTABLE DOSAGE FORM NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 522 continues to read as follows:

Authority: 21 U.S.C. 360b.

§ 522.480 [Amended]

■ 2. In paragraph (a)(2) of § 522.480, remove ''037990'' and add in its place ''026637''.

Dated: April 30, 2009.

Steven D. Vaughn,

Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.

[FR Doc. E9–10291 Filed 5–4–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 589

[Docket No. FDA–2002–N–0031] (formerly Docket No. 2002N–0273)

RIN 0910–AF46

Substances Prohibited From Use in Animal Food or Feed; Confirmation of Effective Date of Final Rule; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; confirmation of effective date; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting a final rule; confirmation of effective date, that appeared in the **Federal Register** of Friday, April 24, 2009 (74 FR 18626) (the April 24, 2009, final rule; confirmation of effective date). That document had confirmed the effective date of April 27, 2009, for a final rule that published in the **Federal Register** of April 25, 2008 (73 FR 22720), entitled ''Substances Prohibited From Use in Animal Food or Feed.'' In the April 24, 2009, final rule; confirmation of effective date, the agency also established a compliance date of October 26, 2009, in order to allow additional time for renderers to comply with the new requirements. The April 24, 2009, final rule; confirmation of effective date was published with an inadvertent error in the ''Background'' section. This document corrects that error.

DATES: This correction is effective: May 5, 2009.

FOR FURTHER INFORMATION CONTACT: Joyce A. Strong, Office of Policy, Planning, and Preparedness (HF–27), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–7010.

SUPPLEMENTARY INFORMATION: In FR Doc. E9–9466, appearing on page 18626 in the **Federal Register** of Friday, April 24, 2009, the following correction is made:

On page 18626, in the third column, under ''I. Background,'' in the first paragraph, the first sentence ''In the **Federal Register** of April 25, 2008, FDA published a final rule entitled ''Substances Prohibited From Use in Animal Food or Feed)'' (referred to herein as the April 25, 2008, final rule), that would become effective 1 year after the April 27, 2009, date of publication.'' is corrected to read ''In the **Federal Register** of April 25, 2008, FDA published a final rule entitled ''Substances Prohibited From Use in Animal Food or Feed'' (referred to herein as the April 25, 2008, final rule), that would become effective 1 year after that publication.''

Dated: April 28, 2009.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E9–10138 Filed 5–4–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 601

[Docket No. FDA–2009–N–0100]

Revision of the Requirements for Publication of License Revocation

AGENCY: Food and Drug Administration, HHS.

ACTION: Direct final rule.

SUMMARY: The Food and Drug Administration (FDA) is clarifying the regulatory procedures for notifying the public about the revocation of a biologics license to be consistent with current practices. FDA is amending the regulations in accordance with the agency's direct final rule procedures. Elsewhere in this issue of the **Federal Register**, we are publishing a companion proposed rule under FDA's usual procedures for notice and comment rulemaking to provide a procedural framework to finalize the rule in the event that we receive any significant adverse comments on the direct final rule. If we receive any significant adverse comments that warrant terminating the direct final rule, we will consider such comments on the proposed rule in developing the final rule.

DATES: This rule is effective September 17, 2009. Submit written or electronic comments on or before July 20, 2009. If FDA receives no significant adverse comments within the specified comment period, the agency will publish a document confirming the effective date of the final rule in the **Federal Register** within 30 days after the comment period on this direct final rule ends. If timely significant adverse comments are received, the agency will publish a document in the **Federal Register** withdrawing this direct final rule.

ADDRESSES: You may submit comments, identified by Docket No. FDA–2009–N–0100, by any of the following methods:

Electronic Submissions

Submit electronic comments in the following way:

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

Written Submissions

Submit written submissions in the following ways:

- FAX: 301–827–6870.
- Mail/Hand delivery/Courier [For paper, disk, or CD–ROM submissions]: Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

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

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

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

FOR FURTHER INFORMATION CONTACT: Paul E. Levine, Jr., Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448, 301–827–6210.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of January 25, 1977 (42 FR 4680), FDA issued a final rule revising, among other things, the procedures under part 601 (21 CFR part 601) for issuing, revoking, and suspending biologics licenses, and publishing license revocations. FDA revised these procedures in order to simplify and codify existing practices, establish new requirements where appropriate, and ensure that practices and procedures would be consistently applied throughout the agency.

A provision under the January 25, 1977, final rule provided that a ''Notice of revocation of a license, with statement of the cause therefor, shall be issued by the Commissioner and published in the **Federal Register**'' (§ 601.8). FDA interprets this requirement to apply only to a license which the Commissioner of Food and Drugs (the Commissioner) has found grounds to revoke under § 601.5(b). FDA has not routinely published, in the **Federal Register**, a notice of revocation of a biologics license resulting from a manufacturer's voluntary request for revocation for reasons unrelated to a finding by the Commissioner that reasonable grounds to revoke the license exist under § 601.5(b). Examples of situations in which a manufacturer might voluntarily request that a license be revoked include economic loss, change in product marketing strategy, lack of public need, corporate reorganization, or the emergence of innovative replacement products. FDA does not consider the revocation of licenses in such circumstances to require publication in the **Federal Register**. However, FDA may publish a notice of revocation for licenses revoked at the voluntary request of a manufacturer in situations where such notice is in the interest of public health.

II. Highlights of the Direct Final Rule

FDA is amending § 601.8 to read: ''The Commissioner, following revocation of a biologics license under 21 CFR 601.5(b), will publish a notice in the **Federal Register** with a statement of the specific grounds for the revocation.''

This amendment revises the existing regulation to clarify that FDA will publish a notice of license revocation in cases where the Commissioner has made a finding that reasonable grounds for revocation exist under § 601.5(b). This amendment also clarifies that the phrase ''with statement of the cause therefor,'' (§ 601.8) refers to the specific grounds for revocation enumerated in § 601.5(b). The rule, as amended, does not affect other regulations or procedures for notification of license revocation. The rule does not alter existing FDA practices for publishing notices of voluntary withdrawal, including notices of voluntary withdrawal of new drug applications.

III. Legal Authority

FDA is issuing this regulation under the biological products provisions of the Public Health Service Act (42 U.S.C. 262 and 264) and the drugs and general administrative provisions of the Federal Food, Drug, and Cosmetic Act (sections 201, 301, 501, 502, 503, 505, 510, 701, and 704) (21 U.S.C. 321, 331, 351, 352, 353, 355, 360, 371, and 374). Under these provisions of the Public Health Service Act and the Federal Food, Drug, and Cosmetic Act, we have the authority to issue and enforce regulations designed to ensure that biological products are safe, pure, and potent; and prevent the introduction, transmission, and spread of communicable disease.

IV. Rulemaking Action

In the **Federal Register** of November 21, 1997 (62 FR 62466), FDA described the agency's procedures for when and how we will employ direct final rulemaking. We have determined that this rule is appropriate for direct final rulemaking because it includes only noncontroversial amendments, and we anticipate no significant adverse comments. Consistent with our procedures on direct final rulemaking, FDA is publishing, elsewhere in this issue of the **Federal Register**, a companion proposed rule to amend § 601.8. The companion proposed rule provides a procedural framework within which the rule may be finalized in the event that the direct final rule is withdrawn due to any significant adverse comments. The comment period for the direct final rule runs concurrently with the companion proposed rule. Any comments received in response to the companion proposed rule will be considered as comments regarding the direct final rule.

A significant adverse comment is defined as a comment that explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. In determining whether an adverse comment is significant and warrants terminating a direct final rulemaking, we will consider whether the comment raises an issue serious enough to warrant a substantive response in a notice-and-comment process in accordance with section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553). Comments that are frivolous, insubstantial, or outside the scope of the rule will not be considered significant or adverse under this procedure.

A comment recommending a regulation change in addition to that in this rule will not be considered a significant adverse comment unless the comment states why the rule would be ineffective without the additional change. In addition, if a significant adverse comment applies to an amendment, paragraph, or section of this rule that can be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of a significant adverse comment.

If any significant adverse comments are received during the comment period, FDA will publish, before the effective date of the direct final rule, a document withdrawing the direct final rule. If we withdraw the direct final rule, any comments received will be applied to the companion proposed rule and will be considered in developing a final rule using the usual notice-and-comment procedures under the APA (5 U.S.C. 552a *et seq*).

If FDA receives no significant adverse comments during the specified comment period, FDA intends to publish a document confirming the effective date within 30 days after the comment period ends. Additional information about direct rulemaking procedures is set forth in a guidance published in the **Federal Register** of November 21, 1997 (62 FR 62466).

V. Analysis of Impacts

A. Review Under Executive Order 12866, the Regulatory Flexibility Act, and the Unfunded Mandates Reform Act of 1995

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

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because the direct final rule makes current regulations consistent with existing FDA practices and procedures, the agency certifies that this direct final rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any Federal mandate that may

result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $130 million, using the most current (2007) Implicit Price Deflator for the Gross Domestic Product. FDA does not expect this final rule to result in any 1-year expenditure that would meet or exceed this amount.

B. Environmental Impact

The agency has determined under 21 CFR 25.31(h) that this action is of a type that does not individually or cumulatively have a significant adverse effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

C. Federalism

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

VI. Paperwork Reduction Act of 1995

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

VII. Request for Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 601

Administrative practice and procedure, Biologics, Confidential business information.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and the Public Health Service Act, and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 601 is amended as follows:

PART 601—LICENSING

■ 1. The authority citation for 21 CFR part 601 continues to read as follows:

Authority: 15 U.S.C. 1451–1561; 21 U.S.C. 321, 351, 352, 353, 355, 356b, 360, 360c–360f, 360h–360j, 371, 374, 379e, 381; 42 U.S.C. 216, 241, 262, 263, 264; sec 122, Pub. L. 105–115, 111 Stat. 2322 (21 U.S.C. 355 note).

■ 2. Revise § 601.8 to read as follows:

§ 601.8 Publication of revocation.

The Commissioner, following revocation of a biologics license under 21 CFR 601.5(b), will publish a notice in the **Federal Register** with a statement of the specific grounds for the revocation.

Dated: March 25, 2009.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E9–10244 Filed 5–4–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2009–0024]

Drawbridge Operation Regulation; High Street Drawbridge, Alameda, CA

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Eleventh Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the High Street drawbridge across the Oakland Inner Harbor, mile 6.0, at Alameda, CA. The deviation is necessary to allow seismic retrofitting of the bridge. This deviation allows single leaf operation of the double leaf, bascule style drawbridge, during the deviation period.

DATES: This deviation is effective from 12:01 a.m. on May 1, 2009 until 11:59 p.m. on August 31, 2009.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of the docket USCG–2009–0024 and are available online by going to *http://www.regulations.gov*, selecting the Advanced Docket Search option on the right side of the screen, inserting USCG–2009–0024 in the Docket ID box, pressing Enter, and then clicking on the item in the Docket ID column. This material is also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule call David H. Sulouff, Chief, Bridge Section, Eleventh Coast Guard District, telephone (510) 437–3516. If you have questions on viewing the docket, call Renee Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION: The County of Alameda requested a temporary change to the operation of the High Street drawbridge across the Oakland Inner Harbor, mile 6.0, at Alameda, CA. The High Street drawbridge navigation span provides a horizontal clearance of 244 feet between pier fenders. During single leaf operation, horizontal clearance is reduced to approximately 100 feet. The drawbridge provides a vertical clearance of 16 feet above Mean High Water in the closed-to-navigation position and unlimited vertical clearance in the open-to-navigation position. As required by 33 CFR 117.181, the draw shall open on signal; except that, from 8 a.m. to 9 a.m. and 4:30 p.m. to 6:30 p.m. Monday through Friday except Federal holidays, the draw need not be opened for the passage of vessels. However, the draw shall open during the above closed periods for vessels which must, for reasons of safety, move on a tide or slack water, if at least two hours notice is given. The waterway is navigated by commercial, recreational, emergency and law enforcement vessels.

Between the hours of 7 a.m. and 9 p.m. Monday through Thursday, and between the hours of 7 a.m. and 3:30 p.m. on Friday, the drawspan may be operated, one leaf at a time, while the opposite leaf is seismically retrofitted. The drawbridge will be operated in the normal double leaf operation mode at night and on weekends, when work is not actually being performed on the bridge. The starting and ending dates for the project are from 12:01 a.m. on May

1, 2009 until 11:59 p.m. on August 31, 2009. This temporary deviation has been coordinated with the waterway users. The largest tug and barge combination on the waterway will be able to continue navigating safely through the bridge. Recreational and other waterway traffic will not be negatively impacted by the project.

Vessels that can transit the bridge, while in the closed-to-navigation position, may continue to do so at any time.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: April 16, 2009.

P.F. Zukunft,

Rear Admiral, U.S. Coast Guard, Commander, Eleventh Coast Guard District.

[FR Doc. E9–10241 Filed 5–4–09; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2009–0016]

RIN 1625–AA00

Safety Zone; Allegheny River Mile Marker 0.4 to Mile Marker 0.6, Pittsburgh, PA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for the waters of the Allegheny River from mile marker 0.4 to mile marker 0.6, extending the entire width of the river. This safety zone is needed to protect spectators and vessels from the hazards associated with the Pittsburgh Pirates Fireworks Display. Entry into this zone is prohibited, unless specifically authorized by the Captain of the Port Pittsburgh or a designated representative.

DATES: This rule is effective from 8:30 p.m. on May 2, 2009 until 11:30 p.m. on September 26, 2009.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2009–0016 and are available online by going to *http://www.regulations.gov*, selecting the Advanced Docket Search option on the right side of the screen, inserting USCG–2009–0016 in the Docket ID box, pressing Enter, and then clicking on the item in the Docket ID column. They are also available for inspection or copying two locations: the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays, and the U.S. Coast Guard Marine Safety Unit Pittsburgh, Suite 1150 Town Place, 100 Forbes Avenue, Pittsburgh, PA 15222, between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call Lieutenant Junior Grade Douglas Kang Marine Safety Unit Pittsburgh, telephone 412–644–5808. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

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**. Publishing an NPRM and delaying its effective date would be contrary to public interest because immediate action is needed to protect participant and spectator craft from the hazards associated with the Pittsburgh Pirates Fireworks Display.

Background and Purpose

The Captain of the Port Pittsburgh is establishing a safety zone for the waters of the Allegheny River from mile marker 0.4 to mile marker 0.6, extending the entire width of the river at the conclusion of each Pittsburgh Pirates baseball game involving a fireworks display. A safety zone is needed to protect participant and spectator craft from the hazards associated with the Pittsburgh Pirates Fireworks Display.

Discussion of Rule

The Captain of the Port Pittsburgh is establishing a safety zone for the waters of the Allegheny River from mile marker 0.4 to mile marker 0.6, extending the entire width of the river. Vessels shall not enter into, depart from, or move within this safety zone without permission from the Captain of the Port Pittsburgh or his authorized representative. Persons or vessels requiring entry into or passage through a safety zone must request permission from the Captain of the Port Pittsburgh, or a designated representative. They may be contacted on VHF–FM Channel 13 or 16, or through Coast Guard Sector Ohio Valley at 1–800–253–7465. This rule is effective from 8:30 p.m. on May 2, 2009 until 11:30 p.m. on September 26, 2009. However, this rule will only be enforced from 8:30 p.m. until 11:30 p.m. on days in which fireworks are scheduled to follow a Pittsburgh Pirates baseball game. These dates are: May 2, May 30, June 27, July 18, August 8, September 5, and September 26, 2009. The times of enforcement and scheduled game dates are based upon a prearranged schedule and may change. The Captain of the Port Pittsburgh will inform the public through broadcast notices to mariners of the enforcement period for the safety zone as well as any changes in the planned schedule.

Regulatory Analyses

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

Regulatory Planning and Review

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

This rule will be in effect for a short period of time and notifications to the marine community will be made through broadcast notices to mariners. The impacts on routine navigation are expected to be minimal.

Small Entities

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

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

This rule will affect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit that portion of the Allegheny River from mile marker 0.4 to mile marker 0.6, from 8:30 p.m. on May 2, 2009 until 11:30 p.m. on

September 26, 2009. This safety zone will not have a significant economic impact on a substantial number of small entities because this rule will only be enforced for a short period of time.

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 affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 0023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded 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 is categorically excluded, under figure 2–1, paragraph (34)(g.), of the Instruction, from further environmental documentation. 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(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T08–0016 to read as follows:

§ 165.T08–0016 Safety Zone; Allegheny River Mile Marker 0.4 to Mile Marker 0.6, Pittsburgh, PA.

(a) *Location*. The following area is a Safety Zone: the waters of the Allegheny River from mile marker 0.4 to mile marker 0.6, extending the entire width of the river.

(b) *Effective date*. This rule is effective from 8:30 p.m. on May 2, 2009 until 11:30 p.m. on September 26, 2009.

(c) *Periods of Enforcement*. This rule will only be enforced from 8:30 p.m. until 11:30 p.m. on days in which fireworks are scheduled to follow a Pittsburgh Pirates baseball game. These

dates are: May 2, May 30, June 27, July 18, August 8, September 5, and September 26, 2009. The Captain of the Port Pittsburgh or a designated representative will inform the public through broadcast notices to mariners of the enforcement period for the safety zone as well as any changes in the planned schedule.

(d) *Regulations.*

(1) In accordance with the general regulations in § 165.23 of this part, entry into this zone is prohibited unless authorized by the Captain of the Port Pittsburgh.

(2) Persons or vessels requiring entry into or passage through a safety zone must request permission from the Captain of the Port Pittsburgh or a designated representative. They may be contacted on VHF–FM Channel 13 or 16, or through Coast Guard Sector Ohio Valley at 1–800–253–7465.

(3) All persons and vessels shall comply with the instructions of the Captain of the Port Pittsburgh and designated on-scene U.S. Coast Guard patrol personnel. On-scene U.S. Coast Guard patrol personnel includes Commissioned, Warrant, and Petty Officers of the U.S. Coast Guard.

Dated: March 9, 2009.

S.M. Wischmann,

Commander, U.S. Coast Guard, Captain of the Port Pittsburgh.

[FR Doc. E9–10240 Filed 5–4–09; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2009–0175]

RIN 1625–AA00

Safety Zone; Allegheny River, Pittsburgh, PA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard has established a temporary safety zone from mile marker 0.0 (Point State Park) on the Allegheny River to mile marker 1.0 (Norfolk and Southern Railroad Bridge), extending 328 feet out from the left descending bank. This safety zone is needed to protect spectators and vessels from the hazards associated with the Venture Outdoors Festival event. Entry into this zone is prohibited, unless specifically authorized by the Captain of the Port Pittsburgh or a designated representative.

DATES: This rule is effective from 11 a.m. until 6 p.m. on May 16, 2009.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2009–0175 and are available online by going to *http://www.regulations.gov,* selecting the Advanced Docket Search option on the right side of the screen, inserting USCG–2009–0175 in the Docket ID box, pressing Enter, and then clicking on the item in the Docket ID column. They are also available for inspection or copying at two locations: The Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays, and the U.S. Coast Guard Marine Safety Unit Pittsburgh, Suite 1150 Town Place, 100 Forbes Avenue, Pittsburgh, PA 15222, between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call Lieutenant Junior Grade Douglas Kang, Marine Safety Unit Pittsburgh, telephone 412–644–5808. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final 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 immediate action is needed to protect participant and spectator craft from the hazards associated with the Venture Outdoors Festival event.

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**. Publishing an NPRM and delaying its effective date would be contrary to public interest because immediate action is needed to protect participant and spectator craft from the hazards associated with the Venture Outdoors Festival event.

Background and Purpose

The Coast Guard has established a temporary safety zone from mile marker 0.0 (Point State Park) on the Allegheny River to mile marker 1.0 (Norfolk and Southern Railroad Bridge), extending 328 feet out from the left descending bank. This safety zone is needed to protect spectators and vessels from the hazards associated with the Venture Outdoors Festival event.

Discussion of Rule

The Captain of the Port Pittsburgh is establishing a safety zone from mile marker 0.0 (Point State Park) on the Allegheny River to mile marker 1.0 (Norfolk and Southern Railroad Bridge), extending 328 feet out from the left descending bank. Vessels shall not enter into, depart from, or move within this safety zone without permission from the Captain of the Port Pittsburgh or his authorized representative. Persons or vessels requiring entry into or passage through a safety zone must request permission from the Captain of the Port Pittsburgh, or a designated representative. They may be contacted on VHF–FM Channel 13 or 16, or through Coast Guard Sector Ohio Valley at 1–800–253–7465. This rule is effective from 11 a.m. until 6 p.m. on May 16, 2009. The Captain of the Port Pittsburgh will inform the public through broadcast notices to mariners of the enforcement period for the safety zone as well as any changes in the planned schedule.

Regulatory Analyses

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

Regulatory Planning and Review

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

This rule will be in effect for a short period of time and notifications to the marine community will be made through broadcast notices to mariners. The impacts on routine navigation are expected to be minimal.

Small Entities

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

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

This rule will affect the following entities, some of which may be small entities: The owners or operators of vessels intending to transit that portion of the waterways from mile marker 0.0 (Point State Park) on the Allegheny River to mile marker 1.0 (Norfolk and Southern Railroad Bridge), extending 328 feet out from the left descending bank from 11 a.m. to 6 p.m. on Saturday, May 16, 2009. This safety zone will not have a significant economic impact on a substantial number of small entities because this rule will only be in effect for a short period of time.

Assistance for Small Entities

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

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

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 0023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded 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 is categorically excluded, under figure 2–1, paragraph (34)(g.), of the Instruction, from further environmental documentation.

Under figure 2–1, paragraph (34)(g.), of the Instruction, an environmental analysis checklist and a categorical exclusion determination are not required for this rule.

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(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T08–0175 to read as follows:

§ 165.T08–0175 Safety Zone; Allegheny River, Pittsburgh, PA.

(a) *Location.* The following area is a Safety Zone: the portion of the waterways from mile marker 0.0 (Point State Park) on the Allegheny River to mile marker 1.0 (Norfolk and Southern Railroad Bridge), extending 328 feet out from the left descending bank.

(b) *Effective date.* This rule is effective from 11 a.m. until 6 p.m. on May 16, 2009.

(c) *Periods of Enforcement.* This rule will only be enforced from 11 a.m. until 6 p.m. on May 16, 2009. The Captain of the Port Pittsburgh or a designated representative will inform the public through broadcast notices to mariners of the enforcement period for the safety zone as well as any changes in the planned schedule.

(d) *Regulations.*

(1) In accordance with the general regulations in § 165.23 of this part, entry into this zone is prohibited unless authorized by the Captain of the Port Pittsburgh.

(2) Persons or vessels requiring entry into or passage through a safety zone must request permission from the Captain of the Port Pittsburgh or a designated representative. They may be contacted on VHF–FM Channel 13 or 16, or through Coast Guard Sector Ohio Valley at 1–800–253–7465.

(3) All persons and vessels shall comply with the instructions of the Captain of the Port Pittsburgh and designated on-scene U.S. Coast Guard patrol personnel. On-scene U.S. Coast Guard patrol personnel includes Commissioned, Warrant, and Petty Officers of the U.S. Coast Guard.

Dated: March 31, 2009.

S.T. Higman,

Lieutenant Commander, U.S. Coast Guard, Acting Captain of the Port Pittsburgh.

[FR Doc. E9–10242 Filed 5–4–09; 8:45 am]

BILLING CODE 4910–15–P

POSTAL SERVICE

39 CFR Part 955

Rules of Practice Before the Postal Service Board of Contract Appeals

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: This document contains the final revisions to the rules of procedure before the Postal Service Board of Contract Appeals (Board), which will govern all proceedings before the Board. These rules of procedure completely replace and supersede the prior rules.

DATES: *Effective Date:* June 1, 2009.

FOR FURTHER INFORMATION CONTACT: Administrative Judge Gary E. Shapiro, Board Member, (703) 812–1910.

SUPPLEMENTARY INFORMATION: On February 11, 2009, the Board published for comment a proposed revision to the rules governing practice before the Board (74 FR 6845). Following the receipt of comments, the Board has made further revisions to its original proposal, as discussed below, and has determined that it is appropriate to adopt the rules of practice, as revised. The Board has also determined that it is appropriate to make these rules of practice effective on June 1, 2009, in the interest of orderly public administration.

A. Executive Summary

The rules governing proceedings involving contract disputes before the Postal Service Board of Contract Appeals are set forth in 39 CFR Part 955. The Board has adopted these rules pursuant to its authority contained in the Contract Disputes Act of 1978 (41 U.S.C. 601–613).

B. Background

The Board published proposed rules and a request for comments in the **Federal Register** on February 11, 2009 (74 FR 6845). This notice announced the intention to promulgate final rules of procedure, following the Board's review and consideration of all comments. The period for comments closed on March 13, 2009. The Board has considered all comments received, has revised the proposed rules as explained below, and now promulgates its final rules of procedure.

C. Summary of Comments and Changes

The Board received comments from three sources: the General Counsel's Office of the United States Postal Service, which represents the Postal Service in all Board proceedings; a law firm which practices regularly before the Board; and a bar association whose members practice before the various boards of contract appeals. The Board carefully considered each comment and adopted several of the suggestions made. The more significant of those comments are discussed below.

Section 955.1 Jurisdiction, Procedure, Service of Documents

The Board adopted a comment that the Board's working hours be specified for purposes of filing. The same commenter suggested that the Board address electronic filing, and adopt it as soon as possible. The Board recognizes advantages of electronic filing but is not presently in a position to provide a system to implement electronic filing. Electronic service between parties is not prohibited by the rules.

The Board adopted a comment to include an exception to the new requirement that requests for extensions of time must represent that the moving party has contacted the opposing party about the request, for situations in which the moving party unsuccessfully has made reasonable and good faith efforts to do so. The Board also adopted a comment concerning filings by fax and clarified that such filings are to be followed by filing by mail.

Section 955.3 Contents of Notice of Appeal

One commenter suggested that the Board identify the presiding judge and indicate the availability of alternative dispute resolution early in the proceedings. The Board's existing practice already includes identifying in the Notice of Docketing the availability of and providing information about alternative dispute resolution. The Board deems it advisable to leave further discussion of alternative dispute resolution to the discretion of the presiding judge based upon the circumstances of the appeal. The Board's practice has been not to assign a presiding judge formally to permit flexibility within the Board. Parties wishing to contact the presiding judge should inquire with the Board's Recorder.

The Board adopted a comment clarifying identification of the contract at issue in notices of appeal.

Section 955.4 Forwarding of Appeals

The Board adopted a comment requesting that the contracting officer be permitted to forward to the Board a copy of the notice of appeal rather than the original.

Section 955.5 Preparation, Contents, Organization, Forwarding, and Status of Appeal File

The Board declined to adopt a comment requesting that the requirement to number all pages in the appeal file be left to the discretion of each judge on a case by case basis, rather than remaining as a rule in all appeals. The proposed rule is consistent with preexisting Board practice. If a party believes numbering to constitute a burden in any particular case, it may seek relief from the requirement from the Board.

The Board also declined to adopt a comment to delay the deadline for submission of the appeal file until the filing of the answer. The Board believes that, generally, appellants should have the benefit of appeal files prior to being required to file a complaint. The revised rules allow later filing of the appeal file than the previous rules, and the Board does not believe that further delay is appropriate. If a party believes that the circumstances of a particular case warrant a delay in submission of the appeal file or supplement, it may seek an extension from the Board.

Section 955.7 Pleadings

The Board adopted minor clarifying language in § 955.7(a) suggested by a commenter.

The Board declined to adopt comments objecting to the proposed rules allowing the Board to require the respondent to file complaints in appeals of affirmative Government claims. The commenter suggested that requiring appellants to file the first pleading renders the proceedings more efficient. It further suggested that the Board's rule change allowing the Board *sua sponte* to designate a notice of appeal as a complaint (§ 955.7(a)) adequately addresses potential injustice to appellants. The Board agrees with countervailing comments received from another commenter that where the underlying claim is an affirmative Government claim, the Postal Service may be in a better position to explain the basis for the claim in an initial pleading. The rule leaves the order of filing of pleadings to the discretion of the Board based on the circumstances of each appeal, which merely incorporates the Board's existing practice.

Section 955.11 Prehearing or Presubmission Conference

A commenter suggested that the Board consider a mandatory initial scheduling conference early in each appeal to discuss issues in each appeal, available procedures, a schedule for discovery and other matters, to address the possibility of alternative dispute resolution, and to discuss possible dispositive motions. The Board believes that the suggestion is well taken and often conducts such a conference. However, the Board prefers that such conferences be addressed case by case, rather than by rule.

Another commenter also suggested that the Board's practice to require a joint status report near the start of proceedings in an effort to establish deadlines for the proceeding be memorialized in the rules. Again, while the Board believes this is an appropriate and efficient practice and intends to continue its use, the Board prefers to leave the requirement for and timing of such procedures to its discretion, on a case by case basis.

Section 955.12 Submission Without a Hearing

In response to a comment suggesting the possibility of confusion between § 955.9 and § 955.12, the Board deleted the first sentence of § 955.12. The Board's intent is to retain with the Board itself the ultimate determination whether to conduct a hearing where the parties disagree, after considering the circumstances of each such case.

Section 955.13 Optional Small Claims (Expedited) and Accelerated Procedures

The Board declined to adopt comments proposing to eliminate discovery in Small Claims (Expedited) Proceedings and to limit discovery in Accelerated Proceedings. Use of these procedures is optional at the election of appellants. The commenter suggested that where discovery is appropriate, appellants may opt out of the Expedited or Accelerated Procedure that was previously elected. The commenter also suggested that discovery in such cases may inappropriately tax limited party resources. The Board concluded that the rules adequately address these concerns and allow the Board, in its discretion in consideration of the circumstances of each case, to eliminate or reduce discovery and other procedures. Concerns about discovery in any particular case may be raised with the Board for appropriate action.

Section 955.14 Settling the Record

The Board declined to adopt a comment that evidence identified during discovery be included within the list of items that may be included in the record as settled. The Board interprets the rule, as written, to include such evidence.

Section 955.16 Interrogatories to Parties, Admission of Facts, and Production and Inspection of Documents

The Board declined to adopt a suggestion to allow a 45-day response time for discovery requests as provided in the rules of the Armed Services Board of Contract Appeals. The Board believes that 30 days, provided by the rules of the Civilian Board of Contract Appeals and this Board, are adequate and that additional time, where needed, should be addressed case by case, through time extension requests between the parties or to the Board where necessary.

The Board also declined to adopt a comment that requests for admissions be deemed admitted if not timely denied. The Board prefers to consider the circumstances of each case, and retain the permissive formulation of the rule.

Section 955.17 Depositions

The Board declined to adopt a comment to alter its rule concerning designation of the purpose of a deposition where application for a deposition is submitted. The rule serves the purpose of providing notice to the opposing party to allow for development of a full record, where the purpose of a deposition is for evidence as opposed to discovery. However, the rule is not intended to preclude the potential use of the transcript of a deposition designated as a discovery deposition where the deponent becomes unavailable unexpectedly or where the parties may agree, or when the Board deems it appropriate.

The Board adopted another comment by the same commenter to leave the admission of deposition testimony in a hearing to the broad discretion of the Board. The Board also revised the rule to allow for introduction of a deposition transcript prior to a hearing as well as during a hearing.

The Board declined to adopt a comment to add a rule imposing the deposition costs of an expert on the party retaining the expert. Ordinarily, payment should be resolved between the parties.

Section 955.20 Unexcused Absence of a Party

A commenter sought clarification that a party that is absent from an ordered hearing will not be permitted to submit evidence or testimony after the

conclusion of the hearing. The Board has reviewed the comment and does not believe that a change to the rule is required. The Board prefers to leave the matter to its discretion on a case by case basis. The same commenter suggested that the Board should consider an application for costs by the party that attends the hearing, particularly if the hearing was requested by the party that is absent without excuse. The rules allow for such consideration or other action considered appropriate by the Board, and the Board does not believe it is necessary to revise the rules in this way.

Section 955.21 Nature of Hearings

The Board adopted a comment addressing the use of foreign language interpreters in hearings.

Section 955.22 Examination of Witnesses

The Board adopted a comment concerning exceptions to the ordered exclusion of witnesses. The revised rule reflects that the Board possesses considerable discretion concerning ordering exclusion of witnesses and exceptions to such exclusions.

Section 955.25 Transcript of Proceedings

One commenter requested clarification of the meaning of the rule that transcripts of proceedings will be provided to both parties. Prior Board practice provided transcripts of proceedings to the Postal Service without additional request or cost, but required specific request by appellants of the court reporter and payment. The intent of the rule as revised is to provide transcripts of proceedings to appellants as well, without additional request or payment, and therefore to treat both parties equally.

Section 955.26 Representation of the Parties

The Board adopted comments that attorneys identify their contact information and the jurisdiction in which they are licensed to practice in notices of appearance. The Board also adopted a comment that an attorney or party be required to file a written notice of any change of address, telephone number or fax number.

Section 955.27 Withdrawal of Attorney

The Board declined to adopt a comment concerning withdrawal of counsel and related notice thereof, as already adequately covered by this section.

Section 955.30 Motion for Reconsideration

The Board adopted a comment suggesting that the standard for motions for reconsideration be deleted. Such motions will be addressed on a case by case basis utilizing established Board precedent.

Section 955.34 Sanctions

The Board adopted a comment adding to its sanction power disqualification from practice before the Board.

Section 955.35 Subpoenas

The Board declined to adopt a comment seeking an explicit rule allowing for production of documents by subpoena in the absence of a subpoena for a deposition. The rule is consistent with the authority granted boards under the Contract Disputes Act.

D. Additional Comments

Alternative Dispute Resolution

A commenter suggested that the Board adopt a rule addressing details concerning alternative dispute resolution. The Board's existing practice already includes identifying in the Notice of Docketing the availability of and providing information about alternative dispute resolution. The Board prefers to address such procedures further on a case by case basis, by request of the parties or on its own initiative.

Service of Board Orders by Fax

The Board declined to adopt a comment requiring it to serve time-sensitive orders upon the parties by fax. The Board will continue its practice of faxing orders where it deems it appropriate in the absence of an established standard in its rules.

List of Subjects in 39 CFR Part 955

Administrative practice and procedure, Contract Disputes Act of 1978, Postal Service.

■ For the reasons stated in the preamble, the Postal Service hereby revises 39 CFR Part 955 as set forth below:

PART 955—RULES OF PRACTICE BEFORE THE POSTAL SERVICE BOARD OF CONTRACT APPEALS

Sec.

955.1 Jurisdiction, procedure, service of documents.
955.2 Notice of appeals.
955.3 Contents of notice of appeal.
955.4 Forwarding of appeals.
955.5 Preparation, contents, organization, forwarding, and status of appeal file.
955.6 Motions.
955.7 Pleadings.
955.8 Amendments of pleadings or record.
955.9 Hearing election.
955.10 Prehearing briefs.
955.11 Prehearing or presubmission conference.
955.12 Submission without a hearing.
955.13 Optional Small Claims (Expedited) and Accelerated Procedures.
955.14 Settling the record.
955.15 Discovery.
955.16 Interrogatories to parties, admission of facts, and production and inspection of documents.
955.17 Depositions.
955.18 Hearings—where and when held.
955.19 Notice of hearings.
955.20 Unexcused absence of a party.
955.21 Nature of hearings.
955.22 Examination of witnesses.
955.23 Copies of papers, withdrawal of exhibits.
955.24 Posthearing briefs.
955.25 Transcript of proceedings.
955.26 Representation of the parties.
955.27 Withdrawal of attorney.
955.28 Suspension.
955.29 Decisions.
955.30 Motion for reconsideration.
955.31 Dismissal without prejudice.
955.32 Dismissal for failure to prosecute.
955.33 *Ex parte* communications.
955.34 Sanctions.
955.35 Subpoenas.
955.36 Effective dates and applicability.

Authority: 39 U.S.C. 204, 401; 41 U.S.C. 607, 608, 610.

§ 955.1 Jurisdiction, procedure, service of documents.

(a) *Jurisdiction for considering appeals.* Pursuant to the Contract Disputes Act of 1978, 41 U.S.C. 601–613, the Postal Service Board of Contract Appeals (Board) has jurisdiction to consider and decide any appeal from a decision of a contracting officer of the United States Postal Service or the Postal Regulatory Commission relative to a contract made by either. In addition the Board has jurisdiction over other matters assigned to it by the Postmaster General, and over matters otherwise authorized by applicable law.

(b) *Organization and location of the Board.* (1) The Board is located at 2101 Wilson Boulevard, Suite 600, Arlington, Virginia 22201–3078. The Board's telephone number is (703) 812–1900, and its Web site is *http://www.usps.gov/judicial.* The Board's fax number is (703) 812–1901.

(2) The Board consists of the Judicial Officer as Chairman, the Associate Judicial Officer as Vice Chairman, and the Judges of the Board, as appointed by the Postmaster General in accordance with the Contract Disputes Act of 1978, 41 U.S.C. 601–613. All members of the Board shall meet the qualifications established in the Contract Disputes Act. In general, appeals are assigned to a panel of at least three members of the

Board. The decision of a majority of the panel constitutes the decision of the Board.

(c) *Board procedures.* (1) *Rules.* Appeals to the Board are handled in accordance with the rules of the Board.

(2) *Administration and interpretation of rules.* These rules will be interpreted so as to secure a just and inexpensive determination of appeals without unnecessary delay. Emphasis is placed upon the sound administration of these rules in specific cases, because it is impracticable to articulate a rule to fit every possible circumstance which may be encountered. The Board may consider the Federal Rules of Civil Procedure for guidance in construing those Board rules that are similar to Federal Rules and for matters not specifically covered herein.

(3) *Time, computation, and extensions.* (i) All time limitations specified for various procedural actions are computed as maximums, and are not to be fully exhausted if the action described can be accomplished in a lesser period. These time limitations are similarly eligible for extension in appropriate circumstances.

(ii) Except as otherwise provided by law, in computing any period of time prescribed by these rules or by any order of the Board, the day of the event from which the designated period of time begins to run shall not be included, but the last day of the period shall be included unless it is a Saturday, Sunday, or a federal holiday in which event the period shall run to the end of the next business day. Except as otherwise provided in these rules or an applicable order, prescribed periods of time are measured in calendar days rather than business days.

(iii) Requests for extensions of time from either party shall be made in writing stating good cause therefor, shall represent that the moving party has contacted the opposing party about the request, or made reasonable and good faith efforts to do so, and shall indicate whether the opposing party consents to the extension. If the request for extension of time is filed after the time for taking the required action has expired, the request should indicate the reasons for the party's failure to have submitted the request before that time expired.

(4) *Place of filings.* Unless the Board otherwise directs, pleadings and other communications shall be filed with the Recorder of the Board at its office at 2101 Wilson Boulevard, Suite 600, Arlington, Virginia 22201–3078. Generally, and unless otherwise prescribed by law, rule or applicable Board order, the Board considers documents filed upon the earlier of receipt by the Recorder of the Board during the Board's working hours (8:45–4:45) or, if mailed, the date mailed to the Board. A United States Postal Service postmark shall be prima facie evidence that the document with which it is associated was mailed on the date of the postmark.

(5) *Service.* Documents shall be served personally or by mail, addressed to the party upon whom service is to be made. Copies of simultaneous briefs shall be filed directly with the Board for distribution and shall not be sent directly by the parties to each other. The party filing any other document with the Board shall send a copy thereof to the opposing party, by an equally or more expeditious means of transmittal, noting on the document filed with the Board, or on the transmitting letter, that a copy has been so furnished. The filing of a document by fax transmission occurs upon receipt by the Board of the entire legible submission by fax. The Board may determine not to extend a deadline for filing if the extension is necessary solely because the Board's fax machine is busy or otherwise unavailable when a filing is due. Submissions filed by fax shall be followed promptly by filing by mail.

§ 955.2 Notice of appeals.

Notice of an appeal must be in writing, and the original, together with two copies, may be filed with the contracting officer from whose decision the appeal is taken, or may be filed directly with the Board. The notice of appeal must be mailed or otherwise filed within the time specified by applicable law.

§ 955.3 Contents of notice of appeal.

(a) A notice of appeal from a contracting officer's decision should indicate that an appeal is thereby intended. It should identify the contract by number or other identifying reference, and identify the decision from which the appeal is taken, or it should attach a copy of the contracting officer's decision. If an appeal is taken from the failure of a contracting officer to issue a decision, the notice of appeal should describe in detail the claim that the contracting officer has failed to decide and/or attach a copy of the claim that the contracting officer has failed to decide, and explain that the contracting officer has failed to decide the claim as required.

(b) The notice of appeal should be signed personally by the appellant (the contractor taking the appeal), or by an officer of the appellant corporation or member of the appellant firm, or by the contractor's duly authorized representative or attorney. The complaint referred to in § 955.7 may be filed with the notice of appeal, or the appellant may designate the notice of appeal as a complaint, if it otherwise fulfills the requirements of a complaint.

§ 955.4 Forwarding of appeals.

Upon receipt of a notice of appeal in any form, the contracting officer shall indicate thereon the date of mailing (or date of receipt, if otherwise conveyed) and within 10 days shall forward said notice of appeal to the Board, and shall include a copy of the contracting officer's final decision if one has been issued. Following receipt by the Board of the notice of an appeal (whether through the contracting officer or otherwise), the contractor and contracting officer will be advised promptly of its receipt, and the contractor will be furnished a copy of these rules.

§ 955.5 Preparation, contents, organization, forwarding, and status of appeal file.

(a) *Duties of the respondent.* Within 30 days from receipt of the Board's docketing notice, or such other period as the Board may order, the respondent's counsel shall file with the Board an appeal file consisting of all documents pertinent to the appeal and shall provide a copy to the appellant. The appeal file shall include:

(1) The claim and contracting officer's final decision from which the appeal is taken;

(2) The contract, including pertinent specifications, amendments, plans and drawings;

(3) All correspondence between the parties pertinent to the appeal;

(4) Transcripts of any testimony taken during the course of proceedings, and affidavits or statements of any witnesses on the matter in dispute made prior to the filing of the notice of appeal with the Board; and

(5) Any additional information considered pertinent.

(b) *Duties of the appellant.* Within 30 days after receipt of a copy of the appeal file, the appellant shall supplement the appeal file by transmitting to the Board any documents not contained therein considered to be pertinent to the appeal, and shall furnish copies of such documents to Postal Service counsel.

(c) *Organization of appeal file.* Documents in the appeal file or supplement, as applicable, may be originals or legible copies thereof, and shall be arranged in chronological order where practicable, numbered sequentially, tabbed, and indexed to

identify the contents. Page numbering shall be consecutive and continuous from one document to the next, so that the complete file or supplement, as applicable, will consist of one set of consecutively numbered pages.

(d) *Lengthy documents.* The Board may waive the requirement of furnishing to the other party copies of bulky, lengthy, or out-of-size documents in the appeal file when a party has shown that doing so would impose an undue burden. The party filing with the Board a document as to which such a waiver has been granted, shall notify the other party at the time of filing that the document is available for inspection at the offices of the Board or of the party.

(e) *Status of documents in appeal file.* Documents contained in the appeal file are considered, without further action by the parties, as part of the record upon which the Board will render its decision, unless a party objects to the consideration of a particular document. Unless otherwise provided by Board order, any such objection shall be made at least 10 days prior to a hearing or the date specified for settling the record in the event there is no hearing on the appeal. If timely objection to a document is made, the Board will rule upon its admissibility into the record as evidence in accordance with §§ 955.14 and 955.21.

§ 955.6 Motions.

(a) Any motion addressed to the jurisdiction of the Board shall be promptly filed. Hearing on the motion may be afforded on application of either party. The Board may at any time and on its own motion raise the issue of its jurisdiction to proceed with a particular case.

(b) A motion filed in lieu of an answer shall be filed no later than the date on which the answer is required to be filed or such later date as may be established by Board order. Any other dispositive motion shall be filed as soon as practicable after the grounds therefor are known.

(c) Motions for summary judgment may be considered by the Board. However, the Board may defer ruling on a motion for summary judgment, in its discretion, until after a hearing or other presentation of evidence. Motions for summary judgment may be filed only when a party believes that, based upon uncontested material facts, it is entitled to relief as a matter of law. The parties are to consider proceeding by submission of the case without a hearing in accordance with § 955.12, in lieu of a motion for summary judgment.

(1) Motions for summary judgment shall include a separate document titled *Statement of Uncontested Facts,* which shall contain in separately numbered paragraphs all of the material facts upon which the moving party bases its motion and as to which it contends there is no genuine issue. This statement shall include references to affidavits, declarations and/or documents relied upon to support such statement.

(2) The opposing party shall file with its opposition a separate document titled *Statement of Genuine Issues.* This document shall identify, by reference to specific paragraph numbers in the moving party's Statement of Uncontested Facts, those facts as to which the opposing party claims there is a genuine issue necessary to be litigated. An opposing party shall state the precise nature of its disagreement, and support its opposition with references to affidavits, declarations and/or documents that demonstrate the existence of a genuine dispute.

(3) The moving party and the non-moving party shall each submit a memorandum of law supporting or opposing summary judgment.

(4) If, despite reasonable efforts, the opposing party cannot present facts essential to justify its opposition, the Board may defer ruling on the motion to permit affidavits to be obtained or depositions to be taken or other discovery to be conducted, or may issue such other order as is just. The parties should not expect the Board to search the record for evidence in support of either party's position.

§ 955.7 Pleadings.

(a) *Appellant.* Within 45 days after receipt of notice of docketing of the appeal, the appellant shall file with the Board a complaint setting forth simple, concise and direct statements of each of its claims, alleging the basis, with appropriate reference to contract provisions, for each claim, and the dollar amount claimed, and shall serve the respondent with a copy. This pleading shall fulfill the generally recognized requirements of a complaint although no particular form or formality is required. Should the complaint not be filed within the time required, appellant's claim and notice of appeal may, if in the opinion of the Board the issues before the Board are sufficiently defined, be deemed to constitute the complaint and the respondent shall be so notified.

(b) *Respondent.* Within 30 days from receipt of said complaint, or the aforesaid notice from the Board, the respondent shall prepare and file with the Board an answer thereto, setting forth simple, concise, and direct statements of the respondent's defenses to each claim asserted by the appellant, and shall serve the appellant with a copy. This pleading shall fulfill the generally recognized requirements of an answer, and shall set forth any affirmative defenses or counterclaims as appropriate. Should the answer not be filed within the time required, the Board may, in its discretion, enter a general denial on behalf of the respondent, and the appellant shall be so notified.

(c) *Affirmative claims by the respondent.* Where an appellant has appealed an affirmative claim by the respondent asserted in a final decision by a Postal Service contracting officer, such as a termination for default or a Postal Service claim that a contractor owes the Postal Service money under a contract, the Board may order the respondent to file the complaint as described in § 955.7(a), and the appellant to file the answer as described in § 955.7(b).

§ 955.8 Amendments of pleadings or record.

(a) Upon its own initiative or upon application by a party, the Board may, in its discretion, order a party to submit a more definite statement of the complaint or answer, or to reply to an answer.

(b) When issues within the proper scope of an appeal, but not raised in the pleadings, have been raised without objection or with permission of the Board at a hearing or in record submissions, they may be treated in all respects as if they had been raised in the pleadings. If evidence is objected to at a hearing on the ground that it is not within the issues raised by the pleadings, in its discretion the Board may admit the evidence and grant the objecting party a continuance or other relief if necessary to enable it to meet such evidence.

§ 955.9 Hearing election.

As directed by Board order, each party shall inform the Board, in writing, whether it desires a hearing as prescribed in §§ 955.18 through 955.25, or in the alternative submission of its case on the record without a hearing as prescribed in § 955.12. If a hearing is elected, the election should state where and when the electing party desires the hearing to be conducted and should explain the reasons for its choices.

§ 955.10 Prehearing briefs.

Based on an examination of the documentation described in § 955.5, the pleadings, and a determination of whether the arguments and authorities addressed to the issues are adequately set forth therein, the Board may, in its

discretion, require the parties to submit prehearing briefs in any case in which a hearing has been elected pursuant to § 955.9. In the absence of a Board requirement therefor, either party may, in its discretion and upon appropriate and sufficient notice to the other party, furnish a prehearing brief to the Board. In any case where a prehearing brief is submitted, it shall be furnished so as to be received by the Board at least 15 days prior to the date set for hearing, and a copy shall be furnished simultaneously to the other party.

§ 955.11 Prehearing or presubmission conference.

(a) Whether the case is to be submitted pursuant to § 955.12, or heard pursuant to §§ 955.18 through 955.25, the Board may upon its own initiative or upon the application of either party, convene a conference to consider:

(1) The simplification or clarification of the issues;

(2) The possibility of obtaining stipulations, admissions, agreements on documents, understandings on matters already of record, or similar agreements which will avoid unnecessary proof;

(3) The limitation of the number of expert witnesses, or avoidance of similar cumulative evidence, if the case is to be heard;

(4) The possibility of agreement disposing of all or any of the issues in dispute; and

(5) Such other matters as may aid in the disposition of the appeal.

(b) The results of the conference shall be reduced to writing by the Board and this writing shall thereafter constitute part of the record.

§ 955.12 Submission without a hearing.

Submission of the case without hearing does not relieve the parties from the necessity of proving the facts supporting their allegations or defenses. Affidavits, depositions, admissions, answers to interrogatories, and stipulations may be employed to supplement other documentary evidence in the record which will be settled pursuant to § 955.14. The Board may permit such submission to be supplemented by oral argument (transcribed if requested), and by briefs in accordance with § 955.24.

§ 955.13 Optional Small Claims (Expedited) and Accelerated Procedures.

(a) *The Small Claims (Expedited) Procedure.* (1) The Expedited Procedure is available solely at the election of the appellant. Such election requires decision of the appeal, whenever possible, within 120 days after the Board receives written notice of the appellant's election to utilize this procedure.

(2) The appellant may elect this procedure when:

(i) There is a monetary amount in dispute and that amount is $50,000 or less, or

(ii) There is a monetary amount in dispute and that amount is $150,000 or less and the appellant is a small business concern (as that term is defined in the Small Business Act and regulations promulgated under the Act).

(3) In cases proceeding under the Expedited Procedure, the respondent shall send the Board a copy of the contract, the contracting officer's final decision, and the appellant's claim letter or letters, if any, within ten days from the respondent's first receipt from either the appellant or the Board of a copy of the appellant's notice of election of the Expedited Procedure. If either party requests an oral hearing in accordance with § 955.9, the Board shall promptly schedule such a hearing for a mutually convenient time consistent with administrative due process and the 120-day limit for a decision, at a place determined under § 955.18. If a hearing is not requested by either party, the appeal shall be deemed to have been submitted under § 955.12 without a hearing.

(4) Promptly after receipt of the appellant's election of the Expedited Procedure, the Board shall establish a schedule of proceedings that will allow for the timely resolution of the appeal. Pleadings, discovery, and other prehearing activities may be restricted or eliminated at the Board's discretion as necessary to enable the Board to decide the appeal within 120 days after the Board has received the appellant's notice of election of the Expedited Procedure. In so doing, the Board may reserve whatever time it considers necessary for preparation of the decision.

(5) Written decisions by the Board in cases processed under the Expedited Procedure will be short and contain only summary findings of fact and conclusions. Decisions will be rendered for the Board by a single Judge. If there has been a hearing, the Judge presiding at the hearing may, in his or her discretion, at the conclusion of the hearing and after entertaining such oral arguments as he or she deems appropriate, render on the record oral summary findings of fact, conclusions of law, and a decision of the appeal. Whenever such an oral decision is rendered, the Board will subsequently furnish the parties a printed copy of such oral decision for the record and payment purposes and for the establishment of the commencement date of the period for filing a motion for reconsideration under § 955.30.

(6) Decisions of the Board under the Expedited Procedure will not be published, will have no value as precedents, and in the absence of fraud, cannot be appealed.

(b) *The Accelerated Procedure.* (1) The Accelerated Procedure is available solely at the election of the appellant and shall apply only to appeals where there is a monetary amount in dispute and the amount in dispute is $100,000 or less. Such election requires decision of the appeal, whenever possible, within 180 days after the Board receives written notice of the appellant's election to utilize this procedure.

(2) Promptly after receipt of the appellant's election of the Accelerated Procedure, the Board shall establish a schedule of proceedings that will allow for the timely resolution of the appeal. The Board, in its discretion, may shorten time periods prescribed elsewhere in these Rules as necessary to enable the Board to decide the appeal within 180 days after the Board has received the appellant's notice of election of the Accelerated Procedure.

(3) Written decisions by the Board in cases processed under the Accelerated Procedure will normally be short and contain only summary findings of fact and conclusions. Decisions will be rendered for the Board by a single Judge with the concurrence of the Chairman or Vice Chairman or other designated Judge, or by a majority among these two and an additional designated member in case of disagreement. In cases where the amount in dispute is $50,000 or less and in which there has been a hearing, the single Judge presiding at the hearing may, with the concurrence of both parties, convert the appeal to an Expedited Proceeding and at the conclusion of the hearing, after entertaining such oral arguments as he or she deems appropriate, render on the record oral summary findings of fact, conclusions of law, and a decision of the appeal. Whenever such an oral decision is rendered, the Board will subsequently furnish the parties a printed copy of such oral decision for record and payment purposes and to establish the date of commencement of the period for filing a motion for reconsideration under § 955.30.

(c) *Denial of election.* At the request of the respondent, or on its own initiative, the Board may determine whether the amount in dispute and/or the appellant's status make the election of the Expedited Procedure or the Accelerated Procedure inappropriate.

(d) *Motions for Reconsideration in Cases Arising Under § 955.13.* Motions for reconsideration of cases decided under either the Expedited Procedure or the Accelerated Procedure need not be decided within the time periods prescribed by this § 955.13 for the initial decision of the appeal, but all such motions shall be processed and decided rapidly so as to fulfill the intent of this section.

(e) *General rule.* Except as herein modified, the rules of this Part 955 otherwise apply in all aspects.

§ 955.14 Settling the record.

(a) The record upon which the Board's decision will be rendered consists of the appeal file described in § 955.5, and to the extent the following items have been filed, pleadings, prehearing conference memoranda or orders, prehearing briefs, depositions or interrogatories received in evidence, admissions, stipulations, transcripts of conferences and hearings, hearing exhibits, posthearing briefs, and documents which the Board has specifically designated be made a part of the record. The record will at all reasonable times be available for inspection by the parties at the Board.

(b) Except as the Board may otherwise order in its discretion, no proof shall be received in evidence after completion of an oral hearing or, in cases submitted on the record, after notification by the Board that the case is ready for decision.

(c) The weight to be attached to any evidence of record will rest within the sound discretion of the Board. The Board may in any case require either party, with appropriate notice to the other party, to submit additional evidence on any matter relevant to the appeal.

(d) The Board may consider the Federal Rules of Evidence for guidance regarding admissibility of evidence and other evidentiary issues in construing those Board rules that are similar to Federal Rules and for matters not specifically covered herein.

§ 955.15 Discovery.

(a) The parties are encouraged to engage in voluntary discovery procedures. In connection with any deposition or other discovery procedure, the Board may issue any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, and those orders may include limitations on the scope, method, time and place for discovery, and provisions for protecting the secrecy of confidential information or documents.

(b)(1) The Board may limit the frequency or extent of use of discovery methods described in these rules. In doing so, generally the Board will consider whether:

(i) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) The party seeking discovery has had ample opportunity by discovery in the case to obtain the information sought; or

(iii) The discovery is unduly burdensome and expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake.

(2) The parties are required to make a good faith effort to resolve objections to discovery requests informally. A party receiving an objection to a discovery request, or a party which believes that another party's response to a discovery request is incomplete or entirely absent, may file a motion to compel a response, but such a motion must include a representation that the moving party has tried in good faith, prior to filing the motion, to resolve the matter informally. The motion to compel shall include a copy of each discovery request at issue and the response, if any.

(c) If a party fails to appear for a deposition, after being served with a proper notice, or fails to serve answers or objections to interrogatories, requests for admission of facts, or requests for the production or inspection of documents, after proper service, the party seeking discovery may request that the Board impose appropriate rulings or sanctions.

§ 955.16 Interrogatories to parties, admission of facts, and production and inspection of documents.

(a) *Interrogatories to parties.* After an appeal has been filed with the Board, a party may serve on the other party written interrogatories to be answered separately in writing, signed under oath and returned within 30 days. Upon timely objection, the Board will determine the extent to which the interrogatories will be permitted. The scope and use of interrogatories will be controlled by § 955.15.

(b) *Admission of facts.* After an appeal has been filed with the Board, a party may serve upon the other party a request for the admission of specified facts. Within 30 days after service, the party served shall answer each requested fact or file objections thereto. The factual propositions set out in the request may be ordered by the Board as deemed admitted upon the failure of a party to respond timely and fully to the request for admissions.

(c) *Production and inspection of documents.* After an appeal has been filed with the Board, a party may serve on the other party written requests for the production, inspection, and copying of any documents, electronically stored information, or things, to be answered within 30 days. Upon timely objection, the Board will determine the extent to which the requests must be satisfied, and if the parties cannot themselves agree thereon, the Board shall specify just terms and conditions of compliance.

§ 955.17 Depositions.

(a) *When depositions permitted.* After an appeal has been docketed and complaint filed, the parties may mutually agree to, or the Board may, upon application of either party and for good cause shown, order the taking of testimony of any person by deposition upon oral examination or written interrogatories before any officer authorized to administer oaths at the place of examination, for use as evidence or for purpose of discovery. The application for order shall specify whether the purpose of the deposition is discovery or for use as evidence.

(b) *Orders on depositions.* The time, place, and manner of taking depositions shall be as mutually agreed by the parties or, failing such agreement, governed by order of the Board.

(c) *Use as evidence.* No testimony taken by deposition shall be considered as part of the evidence in the hearing of an appeal unless and until such testimony is offered and received in evidence at or before such hearing. It will not ordinarily be received in evidence if the deponent is available to testify at the hearing, but the Board may admit testimony taken by deposition in its discretion. A deposition may be used to contradict or impeach the testimony of the witness given at the hearing. In cases submitted on the record, the Board may, in its discretion, receive depositions as evidence in supplementation of that record.

(d) *Expenses.* Each party shall bear its own expenses associated with the taking of any deposition.

§ 955.18 Hearings—where and when held.

If there is to be a hearing, it will be held at a time and place prescribed by the Board after consultation with the party or parties electing the hearing. At the discretion of the Board, hearings may be held in the Board's hearing room in Arlington, Virginia or may be held at another location with due consideration

to the just, informal, expeditious and inexpensive resolution of each case.

§ 955.19 Notice of hearings.

The Board shall issue an order reasonably in advance of the hearing identifying the time and place thereof.

§ 955.20 Unexcused absence of a party.

The unexcused absence of a party at the time and place set for hearing will not be occasion for delay. In the event of such absence, the hearing will proceed and the case will be regarded as submitted by the absent party as provided in § 955.12.

§ 955.21 Nature of hearings.

Hearings shall be as informal as may be reasonable and appropriate under the circumstances. The Board may exclude evidence to avoid unfair prejudice, confusion of the issues, undue delay, waste of time, or presentation of irrelevant, immaterial or cumulative evidence. Although the Board will consider the Federal Rules of Evidence as described in § 955.14(d), letters or copies thereof, affidavits, or other evidence not ordinarily admissible under the Federal Rules, may be admitted in the discretion of the Board. The weight to be attached to evidence presented in any particular form will be within the discretion of the Board, taking into consideration all the circumstances of the particular case. Stipulations of fact agreed upon by the parties may be accepted as evidence at the hearing. The parties may stipulate the testimony that would be given by a witness if the witness were present. The Board may in any case require evidence in addition to that offered by the parties. A party requiring the use of a foreign language interpreter allowing testimony to be taken in English for itself or witnesses it proffers is responsible for making all necessary arrangements and paying all costs and expenses associated with the use of an interpreter.

§ 955.22 Examination of witnesses.

Witnesses before the Board will be examined orally under oath or affirmation, unless the facts are stipulated, or the Board shall otherwise order. If the testimony of a witness is not given under oath or affirmation, the Board may warn the witness that his or her statements may be subject to the provisions of 18 U.S.C. 287 and 1001, and any other provisions of law imposing penalties for knowingly making false representations in connection with claims against the United States or in any matter within the jurisdiction of any department or agency thereof. Upon the request of either party, or if the Board deems it advisable, the Board may exclude witnesses from the hearing room. The Board will not exclude a party who is an individual, the properly designated representative of a party which is an entity, a person whose presence is essential to the presentation of a party's case, or a person required by statute to be present.

§ 955.23 Copies of papers, withdrawal of exhibits.

(a) When books, records, papers, or documents have been received in evidence, a true copy thereof or of such part thereof as may be material or relevant may be substituted therefor, during the hearing or at the conclusion thereof.

(b) After a decision has become final, upon request and after notice to the other party, the Board in its discretion may permit the withdrawal of original exhibits, or any part thereof, by the party entitled thereto. The substitution of true copies of exhibits or any part thereof may be required by the Board in its discretion as a condition of granting permission for such withdrawal.

§ 955.24 Posthearing briefs.

Posthearing briefs may be submitted upon such terms as may be ordered by the Board at the conclusion of the hearing. Ordinarily, they will be simultaneous briefs, submitted to the Board on a date established by the Board, following receipt of transcripts.

§ 955.25 Transcript of proceedings.

Testimony and argument at hearings shall be reported verbatim, unless the Board otherwise orders. Transcripts of the proceedings will be provided to the parties by the Board.

§ 955.26 Representation of the parties.

(a) The term *appellant* means a party that has filed an appeal for resolution by the Board. An individual appellant may appear before the Board in his or her own behalf, a corporation may appear before the Board by an officer thereof, a partnership or joint venture may appear before the Board by a member thereof, or any of these may appear before the Board by an attorney at law duly licensed in any state, commonwealth, territory of the United States, or in the District of Columbia. An attorney representing an appellant shall file a written notice of appearance with the Board, including his or her address, telephone number, fax number, and jurisdiction in which the attorney is licensed to practice law.

(b) The term *respondent* means the U.S. Postal Service. Postal Service counsel, who shall be an attorney at law licensed to practice in a state, commonwealth, or territory of the United States, or in the District of Columbia, designated by the General Counsel, will represent the interest of the Postal Service before the Board. Postal Service counsel shall file a written notice of appearance with the Board, including his or her address, telephone number, fax number, and jurisdiction in which the attorney is licensed to practice law.

(c) References to contractor, appellant, contracting officer, respondent and parties shall include respective counsel for the parties, as soon as appropriate notices of appearance have been filed with the Board. A self-represented party or an attorney representing either party shall inform the Board promptly of any change in his or her address, telephone number, or fax number.

§ 955.27 Withdrawal of attorney.

Any attorney for either party who has filed a notice of appearance and who wishes to withdraw from a case must file a motion or notice which includes the name, address, telephone number, and fax number of the person who will assume responsibility for representation of the party in question.

§ 955.28 Suspension.

(a) Whenever at any time it appears that the parties are in agreement as to disposition of the controversy, the Board may suspend further processing of the appeal: *Provided, however,* That if the Board is advised thereafter by either party that the controversy has not been disposed of by agreement, the case shall be restored to the Board's active docket.

(b) The Board may in its discretion suspend proceedings to permit a contracting officer to issue a decision when an appeal has been taken from the contracting officer's failure to render a timely decision, or for other good cause.

§ 955.29 Decisions.

Decisions of the Board will be made in writing and sent simultaneously to both parties. The rules of the Board and all final orders and decisions shall be open for public inspection at the offices of the Board, and may be made available on its official Web site and to commercial publishers. Decisions of the Board will be made solely upon the record, as described in § 955.14.

§ 955.30 Motion for reconsideration.

A motion for reconsideration, if filed by either party, shall set forth specifically the ground or grounds relied upon to sustain the motion, and shall be filed within 30 days from the

date of the receipt of a copy of the decision of the Board by the party filing the motion.

§ 955.31 Dismissal without prejudice.

In certain cases, appeals docketed before the Board are required to be placed in a suspense status and the Board is unable to proceed with disposition thereof for reasons not within the control of the Board. In any such case where the suspension has continued, or it appears that it will continue, for an inordinate length of time, the Board may, in its discretion, dismiss such appeals from its docket without prejudice to their restoration when the cause of suspension has been removed. Unless either party or the Board acts within three years to reinstate any appeal dismissed without prejudice, the dismissal shall be deemed with prejudice.

§ 955.32 Dismissal for failure to prosecute.

Whenever a record discloses the failure of either party to file documents required by these rules, respond to notices or correspondence from the Board, comply with orders of the Board, or otherwise indicates an intention not to continue the prosecution or defense of an appeal, the Board may issue an order requiring the offending party to show cause why the appeal should not be either dismissed or granted, as appropriate. If the offending party shall fail to show such cause, the Board may take such action as it deems reasonable and proper under the circumstances.

§ 955.33 Ex parte communications.

No member of the Board or of the Board's staff shall entertain, nor shall any person directly or indirectly involved in an appeal submit to the Board or the Board's staff, off the record, any evidence, explanation, analysis, or advice, whether written or oral, regarding any matter at issue in an appeal. This provision does not apply to consultation among Board members nor to *ex parte* communications concerning the Board's administrative functions or procedures.

§ 955.34 Sanctions.

(a) All parties and their attorneys must obey directions and orders prescribed by the Board and adhere to standards of conduct applicable to such parties and attorneys. As to an attorney, the standards include the rules of professional conduct and ethics of the jurisdictions in which that attorney is licensed to practice, to the extent that those rules are relevant to conduct affecting the integrity of the Board, its process, or its proceedings.

(b) If any party or its attorney fails to comply with any direction or order issued by the Board, or engages in misconduct affecting the Board, its process, or its proceedings, the Board may issue such orders as are just, including the imposition of appropriate sanctions. Sanctions may include:

(1) Taking the facts pertaining to the matter in dispute to be established for the purpose of the case;

(2) Forbidding challenge of the accuracy of any evidence;

(3) Refusing to allow the disobedient party to support or oppose designated claims or defenses;

(4) Prohibiting the disobedient party from introducing in evidence designated documents or testimony;

(5) Striking pleadings or parts thereof, or staying further proceedings until the order is obeyed;

(6) Dismissing or granting the case or any part thereof;

(7) Imposing such other sanctions as the Board deems appropriate.

(c) In addition, the Board may sanction individual attorneys for a violation of any Board order or direction or standard of conduct applicable to such individual where the violation seriously affects the integrity of the Board, its process, or its proceedings. Sanctions may be public or private, and may include admonishment, disqualification from a particular matter, disqualification from practice before the Board in accordance with 39 CFR Part 951, referral to an appropriate licensing authority, or such other action as circumstances may warrant.

§ 955.35 Subpoenas.

(a) *General.* Upon written request of either party filed with the Recorder, or on the Board's own initiative, the Board may issue a subpoena requiring:

(1) *Testimony at a deposition.* The deposing of a witness in the city or county where the witness resides or is employed or transacts business in person, or at another convenient location as determined by the Board;

(2) *Testimony at a hearing.* The attendance of a witness for the purpose of taking testimony at a hearing; or

(3) *Production of books and papers.* The production by a witness of books, papers, documents, electronically stored information, and other tangible and intangible things designated in the subpoena.

(b) *Voluntary cooperation.* Each party is expected:

(1) To cooperate and make available witnesses and evidence under its control as requested by the other party, without issuance of a subpoena; and

(2) To secure voluntary attendance of desired third-party witnesses, books, papers, documents, or tangible things whenever possible.

(c) *Requests for subpoenas.* (1) A request for a subpoena shall normally be filed at least:

(i) 15 days before a scheduled deposition where the attendance of a witness at a deposition is sought, and/or where the production by a witness of books, papers, documents, electronically stored information, and other tangible and intangible things is sought; and

(ii) 30 days before a scheduled hearing where the attendance of a witness at a hearing is sought; except that

(iii) In its discretion the Board may honor requests for subpoenas not made within these time limitations.

(2) A request for a subpoena shall state the reasonable scope and general relevance to the case of the testimony and of any books, papers, documents, electronically stored information, and other tangible and intangible things sought.

(d)(1) *Requests to quash or modify.* Upon written request by the person subpoenaed or by a party, made within 10 days after service but in any event not later than the time specified in the subpoena for compliance, the Board may:

(i) Quash or modify the subpoena if it is unreasonable and oppressive or for other good cause shown; or

(ii) Require the person in whose behalf the subpoena was issued to advance the reasonable cost of compliance.

(2) Where circumstances require, the Board may act upon such a request at any time after a copy has been served upon the opposing party.

(e) *Form; issuance.* (1) Every subpoena shall state the name of the Board and the title of the appeal and shall command each person to whom it is directed to attend and give testimony, and where appropriate, to produce specified books, papers, documents, electronically stored information, and other tangible and intangible things at a time and place therein specified. In issuing a subpoena to a requesting party, the Judge shall sign the subpoena and may enter the name of the witness and otherwise leave it blank. The party to whom the subpoena is issued shall complete the subpoena before service.

(2) Where the witness is located in a foreign country, a letter rogatory or subpoena may be issued and served under the circumstances and in the manner provided in 28 U.S.C. 1781–1784.

(f) *Service.* (1) The party requesting issuance of a subpoena shall arrange for service.

(2) A subpoena may be served by a United States marshal or deputy marshal, or by any other person who is not a party and not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by personally delivering a copy to that person and tendering the fees for one day's attendance and the mileage provided by 28 U.S.C. 1821 or other applicable law.

(3) The party at whose instance a subpoena is issued shall be responsible for the payment of fees and mileage of the witness and of the officer who serves the subpoena. The failure to make payment of such charges on demand may be deemed by the Board as a sufficient ground for striking the testimony of the witness and the evidence the witness has produced.

(g) *Contumacy or refusal to obey a subpoena.* In case of contumacy or refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of a U.S. District Court, the Board will apply to the Court through the Attorney General of the United States for an order requiring the person to appear before the Board or a member thereof to give testimony or produce evidence or both. Any failure of any such person to obey the order of the Court may be punished by the Court as a contempt thereof.

§ 955.36 Effective dates and applicability.

These revised rules govern proceedings in all cases docketed by the Board on or after June 1, 2009.

Stanley F. Mires,

Chief Counsel, Legislative.

[FR Doc. E9–10336 Filed 5–1–09; 11:15 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2008–0031; FRL–8899–3]

Approval and Promulgation of Air Quality Implementation Plans; Indiana; Extended Permit Terms for Renewal of Federally Enforceable State Operating Permits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is approving Indiana's rule revision to extend permit terms for the renewal of Federally Enforceable State Operating Permits (FESOPs) from five years to ten years. Indiana submitted this rule revision for approval on December 19, 2007. FESOPs apply to non-major sources that obtain enforceable limits to avoid being subject to certain Clean Air Act (Act) requirements, including the Title V operating permit program. Neither the Act nor its implementing regulations specify a permit-term requirement for FESOPs. This rule revision will provide relief to Indiana's resource burden of processing permit renewals. It will also allow the Indiana Department of Environmental Management (IDEM) to devote more resources to major source Title V permitting actions and permit modifications for both Title V and FESOP sources.

DATES: This direct final rule will be effective July 6, 2009, unless EPA receives adverse comments by June 4, 2009. If adverse comments are received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2008–0031, by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *E-mail: blakley.pamela@epa.gov.*
3. *Fax:* (312) 692–2450.
4. *Mail:* Pamela Blakley, Chief, Air Permits Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
5. *Hand Delivery:* Pamela Blakley, Chief, Air Permits Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m. excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R05–OAR–2008–0031. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. We recommend that you telephone Sam Portanova, Environmental Engineer, at (312) 886–3189 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Sam Portanova, Environmental Engineer, Air Permits Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–3189, *Portanova.sam@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. This supplementary information section is arranged as follows:

I. What Is Being Addressed in This Document?
II. What Are the Changes That EPA Is Approving?
III. What Action Is EPA Taking?
IV. Statutory and Executive Order Reviews

I. What Is Being Addressed in This Document?

We are approving revisions to the State of Indiana's FESOP regulations. EPA approved the Indiana FESOP program into the state implementation plan (SIP) on August 18, 1995 (60 FR 43008). On December 19, 2007, IDEM submitted revisions to the FESOP regulations requesting EPA approval as a revision to the SIP. This submittal includes revisions to 326 IAC 2–1.1–9.5 and 326 IAC 2–8–4 to extend FESOP permit renewal terms for up to ten years. We have determined that this submittal is approvable.

II. What Are the Changes That EPA Is Approving?

326 IAC 2–1.1–9.5 is a general provision in the Indiana permitting rules that cites the term of a permit. This section has been modified to add a provision (326 IAC 2–1.1–9.5(b)) stating that a FESOP permit renewal is effective for a permit term not to exceed ten years. The rule modification also states that a minor source operating permit (MSOP) renewal is effective for a permit term not to exceed ten years. However, MSOPs are not part of the Indiana SIP and MSOP rules are specifically excluded from Indiana's December 19, 2007, request.

Indiana has modified 326 IAC 2–8–4(2)(B) to increase the permit term for FESOP renewals from five years to ten years. In addition, Indiana has made some minor grammatical changes to 326 IAC 2–8–4. The change in permit term only applies to FESOP renewals and not to a source's first-time FESOP permit, which will continue to have a permit term of five years pursuant to 326 IAC 2–8–4(2)(A). This provision does not apply to Title V permits issued by IDEM under 326 IAC 2–7.

EPA's requirements for FESOPs are contained in a June 28, 1989, rule addressing federal enforceability (54 FR 27274). In its August 18, 1995, approval of FESOP rule 326 IAC 2–8, EPA determined that Indiana's regulation was consistent with those requirements. EPA's June 28, 1989, rule does not require a specific permit term for FESOPs. As such, EPA finds the modifications to 326 IAC 2–1.1–9.5 and 326 IAC 2–8–4 acceptable.

III. What Action Is EPA Taking?

EPA is approving the revisions to 326 IAC 2–1.1–9.5 and 326 IAC 2–8–4 regarding the permit terms for FESOP renewals. We are publishing this action without prior proposal because we view this as a noncontroversial amendment and anticipate no adverse comments. However, in the proposed rules section of this **Federal Register** publication, we are publishing a separate document that will serve as the proposal to approve the state plan if relevant adverse written comments are filed. This rule will be effective July 6, 2009 without further notice unless we receive relevant adverse written comments by June 4, 2009. If we receive such comments, we will withdraw this action before the effective date by publishing a subsequent document that will withdraw the final action. All public comments received will then be addressed in a subsequent final rule based on the proposed action. The EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. If we do not receive any comments, this action will be effective July 6, 2009.

IV. Statutory and Executive Order Reviews

Under the Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register.** A major rule cannot take effect until 60 days after it is published in the **Federal Register.** This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 6, 2009. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register,** rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the

proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: April 20, 2009.

Walter W. Kovalick, Jr.,

Acting Regional Administrator, Region 5.

■ For the reasons stated in the preamble, part 52, chapter I, of title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart P—Indiana

■ 2. Section 52.770 is amended by adding and reserving paragraph (c)(189) and adding paragraph (c)(190) to read as follows:

§ 52.770 Identification of plan.

* * * * *

(c) * * *

(189) [Reserved]

(190) On December 19, 2007, Indiana submitted modifications to its Federally Enforceable State Operating Permits rules as a revision to the state implementation plan. The revision extends the maximum permit term for renewals of Federally Enforceable State Operating Permits from five years to ten years. EPA has determined that this revision is approvable under the Clean Air Act.

(i) *Incorporation by reference.*

(A) Indiana Administrative Code Title 326, Article 2: Permit Review Rules, sections 2–1.1–9.5, ''General provisions; term of permit'', and 2–8–4, ''Permit content'', are incorporated by reference. Filed with the Publisher of the Indiana Register on November 16, 2007, and became effective on December 16, 2007. Published in the Indiana Register on December 13, 2007 (20071212–IR–326060487FRA).

[FR Doc. E9–10335 Filed 5–4–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2007–1186–200821(w); FRL–8900–4]

Approval and Promulgation of Implementation Plans; Kentucky; Section 110(a)(1) Maintenance Plans for the 1997 8-Hour Ozone Standard for the Huntington-Ashland Area, Lexington Area and Edmonson County; Withdrawal of Direct Final Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of direct final rule.

SUMMARY: Due to an adverse comment, EPA is withdrawing the direct final rule, published March 25, 2009, approving a revision to the State Implementation Plan (SIP) of the Commonwealth of Kentucky. This revision was provided in accordance with Kentucky's obligations to meet the statutory and regulatory requirements related to the 1997 8-hour ozone standard and section 110(a)(1) of the Clean Air Act for the Huntington-Ashland Area, Lexington Area and Edmonson County. As stated in the direct final rule, if EPA received an adverse comment by April 24, 2009, the rule would be withdrawn and not take effect. EPA subsequently received an adverse comment on April 17, 2009. EPA will address the comment in a subsequent final action based upon the proposed action also published on March 25, 2009. EPA will not institute a second comment period on this action.

DATES: The direct final rule published March 25, 2009, at 74 FR 12567, is withdrawn effective May 5, 2009.

FOR FURTHER INFORMATION CONTACT: Ms. Lynorae Benjamin, Chief, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9040. Ms. Benjamin can also be reached via electronic mail at *benjamin.lynorae@epa.gov.*

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: April 24, 2009.

Beverly H. Banister,

Acting Regional Administrator, Region 4.

Accordingly, the amendments to 40 CFR 52.920 (which were published in the **Federal Register** on March 25, 2009, at 74 FR 12567) are withdrawn effective May 5, 2009.

[FR Doc. E9–10333 Filed 5–4–09; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 09–834; MB Docket No. 08–217; RM–11434]

Radio Broadcasting Services; Kihei, Hawaii.

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The staff grants a rulemaking petition filed by Shirk-Mays, LLC to allot Channel 264C2 to Kihei, Hawaii, as a third local aural service. The reference coordinates for Channel 264C2 at Kihei, Hawaii, are 20–39–36 NL and 156–21–50 WL.

DATES: Effective June 1, 2009.

ADDRESSES: Secretary, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Andrew J. Rhodes, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order,* MB Docket No. 08–217, adopted April 15, 2009, and released April 17, 2009. The full text of this *Report and Order* is available for inspection and copying during normal business hours in the FCC Reference Information Center (Room CY–A257), 445 12th Street, SW., Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.*

The *Notice of Proposed Rule Making* in this proceeding proposed the allotment of Channel 264C2 at Kihei, Hawaii. *See* 73 FR 67828 (November 17, 2008). The *Report and Order* does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not

contain any proposed information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4). The Commission will send a copy of the Report and Order in this proceeding in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ As stated in the preamble, the Federal Communications Commission amends 47 CFR Part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Hawaii, is amended by adding Channel 264C2 at Kihei.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. E9–10322 Filed 5–4–09; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 90

[WT Docket No. 02–55; DA 09–442]

Public Safety and Homeland Security Bureau Establishes Post-Reconfiguration 800 MHz Band Plan for the U.S.-Canada Border Regions

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document the Federal Communications Commission's Public Safety and Homeland Security Bureau (PSHSB or Bureau), on delegated authority, addresses a petition for reconsideration of the reconfigured 800 MHz band plan established for the U.S.-Canada border in the Second Report and Order and, on its own motion, clarifies and corrects certain rules established in the Second Report and Order.

DATES: Effective July 6, 2009.

ADDRESSES: Federal Communications Commission, 445–12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Brian Marenco, Policy Division, Public Safety and Homeland Security Bureau, (202) 418–0838.

SUPPLEMENTARY INFORMATION: This is a summary of the Fourth Memorandum Opinion and Order, DA 09–442, released on February 25, 2009. The complete text of this document is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone (800) 378–3160 or (202) 863–2893, facsimile (202) 863–2898, or via e-mail at *http://www.bcpiweb.com.* It is also available on the Commission's Web site at *http://www.fcc.gov.*

1. In a July 2004 Report and Order, the Commission reconfigured the 800 MHz band to eliminate interference to public safety and other land mobile communication systems operating in the band, 69 FR 67823, November 22, 2004. However, the Commission deferred consideration of band reconfiguration plans for the border areas, noting that ''implementing the band plan in areas of the United States bordering Mexico and Canada will require modifications to international agreements for use of the 800 MHz band in the border areas.'' The Commission stated that ''the details of the border plans will be determined in our ongoing discussions with the Mexican and Canadian governments.''

2. In a Second Memorandum Opinion and Order, adopted in May 2007, the Commission delegated authority to PSHSB to propose and adopt border area band plans once agreements are reached with Canada and Mexico, 72 FR 39756, July 20, 2007.

3. In July 2007, the U.S. and Canada reached an agreement on a process that will enable the U.S. to proceed with band reconfiguration in the border region. Consequently, on November 1, 2007, PSHSB issued a Further Notice of Proposed Rulemaking (FNPRM) seeking comment on specific proposals for reconfiguring the eight U.S.-Canada border regions, 72 FR 63869, November 13, 2007. The Commission received ten comments and eight reply comments in response to the FNPRM.

4. On May 9, 2008, PSHSB issued a Second Report and Order (Second R&O) establishing reconfigured band plans in the U.S.-Canada border regions, 73 FR 33728, June 13, 2008. The band plans adopted in the Second R&O are designed to separate—to the greatest extent possible—public safety and other non-cellular licensees from licensees that employ cellular technology in the band.

5. On July 14, 2008, Sprint filed a Petition for Clarification seeking reconsideration of certain portions of the 800 MHz Second R&O.

6. Consequently, on February 25, 2009, PSHSB issued a Fourth Memorandum Opinion and Order (Fourth MO&O) addressing Sprint's petition. In this Fourth MO&O, PSHSB also clarifies and corrects certain rules established in the 800 MHz Second R&O.

Procedural Matters

A. Final Regulatory Flexibility Certification

7. A Final Regulatory Flexibility Certification required by section 604 of the Regulatory Flexibility Act, 5 U.S.C. 604, is included in Appendix A of the Fourth MO&O.

B. Final Paperwork Reduction Act of 1995 Analysis

8. The Fourth MO&O does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. Therefore it does not contain any new or modified ''information burden for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198.

Final Regulatory Flexibility Certification

9. The Regulatory Flexibility Act of 1980, as amended (RFA) requires that a regulatory flexibility analysis be prepared for rulemaking proceedings, unless the agency certifies that ''the rule will not have a significant economic impact on a substantial number of small entities.'' The RFA generally defines ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). In sum, we certify that the rule changes and actions in the Fourth MO&O will have no significant economic impact on a substantial number of small entities.

10. As required by the RFA, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the FNPRM in WT Docket 02–55, 72 FR 63869, November 13, 2007. In the FNPRM, the PSHSB sought written public comment on proposals to reconfigure the 800 MHz band along the U.S.-Canada border, including comment on the IRFA. Based upon the comments in response to the FNPRM, PSHSB established a new band plan for the 800 MHz band along the U.S.-Canada border in the Second R&O and included a Final Regulatory Flexibility Analysis (''FRFA'') in that order, 73 FR 33728, June 13, 2008.

11. The Fourth MO&O clarifies portions of the Second R&O and addresses a petition for reconsideration of the Second R&O filed by Sprint Nextel Corporation (Sprint). Interested parties were afforded notice and opportunity to comment on the petition for reconsideration. See 73 FR 43753 and 73 FR 45103.

12. *Border Area Region 3 Band Plan.* In its petition, Sprint states that the ''allocation'' of eight public safety pool channels above 815.75/860.75 MHz in Region 3 (Ohio/Michigan) along the U.S.-Canada border is both unnecessary and needlessly complicating for rebanding. In this proceeding, the Bureau had adopted a band plan for Region 3 which included over 300 channels for public safety in the lower portion of the band and an additional eight channels for public safety in the upper portion of the band immediately above 815.75/860.75 MHz. Sprint avers that the Bureau created enough spectrum ''slots'' to accommodate all existing public safety entities in the bottom of the band in this region. Consequently, Sprint seeks clarification that the Bureau intended to assign the eight channels above 815.75/860.75 MHz to the public safety pool, if, and only if, those channels are necessary for retuning public safety licensees that cannot be accommodated at the lowermost portion of the band. The State of Michigan (Michigan) opposes Sprint's proposal to modify the Region 3 band plan. Michigan notes that the Bureau's decision to provide a small allocation of non-NPSAC public safety channels above 815.75/860.75 MHz was in direct response to comments from public safety entities who advised the Bureau that these additional channels were needed to maintain post-rebanding spectrum comparability. For instance, Michigan notes that any attempt to accommodate non-NPSAC licensees in the 806–809 MHz/851–854 MHz portion of the band could seriously jeopardize the ''smooth'' migration of the NPSPAC licensees to this portion of the band.

13. The Bureau agrees with Michigan on this issue and, in the Fourth MO&O, declines to make the change to the Region 3 band plan proposed by Sprint. The Bureau indicates that the eight 25 kHz spaced channels above 815.75/860.75 MHz will be needed to accommodate non-NPSPAC public safety licensees relocating from the new NPSPAC band (806–809/851–854 MHz). Without these channels, the Bureau is concerned that additional non-NPSPAC public safety licensees will be forced to remain in the new NPSPAC band further complicating the relocation of NPSPAC licensees to this portion of the band. Since the Bureau is electing to make no change to the Region 3 band plan, we certify that our decision here will have no significant economic impact on a substantial number of small entities.

14. *Requests for Planning Funding.* In its petition, Sprint seeks clarification that the Bureau did not intend to change the existing process for the submitting and handling of Requests for Planning Funding (RFPF) when the Bureau created its timeline for planning, negotiation and mediation for licensees along the U.S.-Canada border to complete planning. Sprint notes that pursuant to the current policies established by the 800 MHz Transition Administrator (TA), licensees are to submit RFPFs first to the TA and then, once they are deemed acceptable for processing, to Sprint. Consequently, in the Fourth MO&O, the Bureau clarifies that it had no intention of modifying the TA's policy for submission and handling of RFPFs and specifies that border area licensees who intend to seek planning funding should first submit RFPFs to the TA for approval before submitting them to Sprint in accordance with the TA policy. Because the Bureau is making no change to the TA's existing policy, we certify that this clarification will have no significant impact on a substantial number of small entities.

15. *Clarifications and Corrections to Section 90.619(c).* In the Second R&O, the Bureau updated Section 90.619(c) to reflect the new 800 MHz band plan along the U.S.-Canada border. In the Fourth MO&O, the Bureau makes certain clarifications and corrections to Section 90.619(c). Specifically, in Table C3 of Section 90.619(c), the Bureau corrects the range for certain assumed average terrain elevation levels along the U.S.-Canada border. The Bureau also modifies Table C5 of Section 90.619(c) to clarify that licensees operating within 30 kilometers of certain cities along the U.S.-Canada border are exempt from sharing primary spectrum with Canada but subject to the power and antenna height limits which apply to all licensees operating along the border. Furthermore, the Bureau corrects a typo in Table C7 of Section 90.619(c) which lists channels available for licensing in the General Category along the U.S.-Canada border. We certify that none of these clarifications or corrections will have a significant impact on a substantial number of small entities.

C. Report to Congress

16. The Commission will send a copy of the Fourth MO&O, including the Final Regulatory Flexibility Certification, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

Ordering Clauses

17. Accordingly, *it is ordered,* pursuant to sections 4(i) and 332 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 332, this Fourth Memorandum Opinion and Order *is adopted.*

18. *It is further ordered* that the amendments of the Commission's rules set forth in the rule changes *are adopted,* effective July 6, 2009.

19. *It is further ordered* that the Final Regulatory Flexibility Certification required by section 604 of the Regulatory Flexibility Act, 5 U.S.C. 604, and as set forth in Appendix A herein *is adopted.*

20. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this *Fourth Memorandum Opinion and Order,* including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 90

Radio.

Federal Communications Commission.

David Furth,

Acting Chief, Public Safety and Homeland Security Bureau.

Rule Changes

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 90 as follows:

PART 90—PRIVATE LAND MOBILE RADIO SERVICES

■ 1. The authority citation for part 90 continues to read as follows:

Authority: Sections 4(i), 11, 303(g), 303(r), and 332(c)(7) of the Communications Act of

1934, as amended, 47 U.S.C. 154(i), 161, 303(g), 303(r), 332(c)(7).

■ 2. In Section 90.619, Table C3 in paragraph (c)(2), Table C5 of paragraph (c)(5) and the introductory text, Table C7 of paragraph (c)(7), and paragraph (c)(11) introductory text are revised to read as follows:

§ 90.619 Operations within the U.S./Mexico and U.S./Canada border areas.

* * * * *

(c) * * *

(2) * * *

TABLE C3—ASSUMED AVERAGE TERRAIN ELEVATION (AATE) ALONG THE U.S.-CANADA BORDER

Longitude (Φ) (° West)	Latitude (Ω) (° North)	Assumed average terrain elevation			
		United States		Canada	
		Feet	Metres	Feet	Metres
65 ≤ Φ < 69	Ω < 45	0	0	0	0
”	45 ≤ Ω < 46	300	91	300	91
”	Ω ≥ 46	1000	305	1000	305
69 ≤ Φ < 73	All	2000	609	1000	305
73 ≤ Φ < 74	”	500	152	500	152
74 ≤ Φ < 78	”	250	76	250	76
78 ≤ Φ < 80	Ω < 43	250	76	250	76
”	Ω ≥ 43	500	152	500	152
80 ≤ Φ < 90	All	600	183	600	183
90 ≤ Φ < 98	”	1000	305	1000	305
98 ≤ Φ < 102	”	1500	457	1500	457
102 ≤ Φ < 108	”	2500	762	2500	762
108 ≤ Φ < 111	”	3500	1066	3500	1066
111 ≤ Φ < 113	”	4000	1219	3500	1066
113 ≤ Φ < 114	”	5000	1524	4000	1219
114 ≤ Φ < 121.5	”	3000	914	3000	914
121.5 ≤ Φ < 127	”	0	0	0	0
Φ ≥ 127	54 ≤ Ω < 56	0	0	0	0
”	56 ≤ Ω < 58	500	152	1500	457
”	58 ≤ Ω < 60	0	0	2000	609
”	60 ≤ Ω < 62	4000	1219	2500	762
”	62 ≤ Ω < 64	1600	488	1600	488
”	64 ≤ Ω < 66	1000	305	2000	609
”	66 ≤ Ω < 68	750	228	750	228
”	68 ≤ Ω < 69.5	1500	457	500	152
”	Ω ≥ 69.5	0	0	0	0

* * * * *

(5) Stations authorized to operate within 30 kilometers of the center city coordinates listed in Table C5 may operate according to the band plan for Canadian Border Regions 7A and 7B as indicated below.

TABLE C5—CITIES THAT ARE CONSIDERED TO FALL WITHIN CANDIAN BORDER REGION 7

Location	Coordinates		Canadian border region
	Latitude	Longitude	
Akron, Ohio	41°05′00.2″ N	81°30′39.4″ W	7A
Youngstown, Ohio	41°05′57.2″ N	80°39′01.3″ W	7A
Syracuse, New York	43°03′04.2″ N	76°09′12.7″ W	7B

* * * * *

(7) * * *

TABLE C7—GENERAL CATEGORY 806–821/851–866 MHZ BAND CHANNELS IN THE CANADA BORDER REGIONS

Canada border region	General category channels where 800 MHz high density cellular systems are prohibited	General category channels where 800 MHz high density cellular systems are permitted
Regions 1, 4, 5 and 6	261–560	561–710
Region 2	231–620	621–710
Region 3	321–500	509–710
Regions 7A and 8	231–260, 511–550	None
Region 7B	511–550	None

* * * * *

(11) In Canada Border Regions 1, 2, 3, 4, 5 and 6, the following General Category channels are available for licensing to all entities except as described below in paragraphs (c)(11)(i) and (c)(11)(ii): in Regions 1, 4, 5 and 6, channels 261–560; in Region 2, channels 231–620 and in Region 3, channels 321–500.

* * * * *

[FR Doc. E9–10324 Filed 5–4–09; 8:45 am]

BILLING CODE 6712–01–P

GENERAL SERVICES ADMINISTRATION

48 CFR Parts 537 and 552

[GSAR Amendment 2009–03; GSAR Case 2008–G510 (Change 29)Docket 2008–0007; Sequence 4]

RIN 3090–AI54

General Services Administration Acquisition Regulation; GSAR Case 2008–G510; Rewrite of GSAR Part 537, Service Contracting

AGENCIES: General Services Administration (GSA), Office of the Chief Acquisition Officer.

ACTION: Final rule.

SUMMARY: The General Services Administration (GSA) is amending the General Services Administration Acquisition Regulation (GSAR) by revising the text addressing service contracting. This rule is a result of the General Services Administration Acquisition Manual (GSAM) rewrite initiative undertaken by GSA to revise the GSAM to maintain consistency with the Federal Acquisition Regulation (FAR), and to implement streamlined and innovative acquisition procedures that contractors, offerors, and GSA contracting personnel can utilize when entering into and administering contractual relationships. The GSAM incorporates the GSAR as well as internal agency acquisition policy.

DATES: *Effective Date*: June 4, 2009.

FOR FURTHER INFORMATION CONTACT For clarification of content, contact Michael O. Jackson, Procurement Analyst, at (202) 208–4949. For information pertaining to status or publication schedules, contact the Regulatory Secretariat (VPR), Room 4041, GS Building, Washington, DC, 20405, (202) 501–4755. Please cite Amendment 2009–03, GSAR case 2008–G510 (Change 29).

SUPPLEMENTARY INFORMATION:

A. Background

An Advance Notice of Proposed Rulemaking (ANPR) with request for comments on all parts of the GSAM was published in the **Federal Register** at 71 FR 7910 on February 15, 2006. No comments were received on Part 537. However, internal review comments have been incorporated as appropriate. A proposed rule for the regulatory portion of the GSAM was published in the **Federal Register** at 73 FR 32276 on June 6, 2008. In addition, GSA Acquisition Letter V–05–11, entitled, ''Exclusion of Leases or Leasehold Interest in Real Property from the Use of Performance-Based Contracting,'' dated June 6, 2005, was incorporated into Subpart 537.102–70. The public comment period for the proposed rule on GSAR Part 537 closed on August 5, 2008, and four (4) comments were received from one (1) commenter.

The Rewrite of Part 537

This final rule contains the revisions made to GSAR Subpart 537, Service Contracting. The rule revises GSAR Subpart 537 to address the text at GSAR 537.101, Definitions; GSAR 537.110 Solicitation provisions and contract clauses; provision GSAR 552.237–70, Qualifications of Offerors; and clause GSAR 552.237–73, Restriction on Disclosure of Information. The language in GSAR 537.101, Definitions, is removed from inclusion in the GSAR. This language clarifies the definition for ''contracts for building services'' for contracting officers; therefore, this language is being incorporated as non-regulatory GSAM language. In addition, because these definitions may have impact beyond the agency, GSAM 537.201, Definitions, is being made regulatory with deletions in the definitions where the GSAM language was redundant with the FAR. GSAR clauses 552.237–71, Qualifications of Employees and 552.237–72, Prohibition Regarding ''Quasi-Military Armed Forces'' are retained with no changes, except minor edits to correct clause prescription references.

GSAR 537.102–70 was written to incorporate the policy that GSA contracting activities are not required to use performance-based acquisition (PBA) methods for leases and leasehold interests in real property from GSA Acquisition Letter V–05–11, dated June 6, 2005.

Discussion of Comments

A proposed rule was published in the **Federal Register** at 73 FR 32276 on June 6, 2008. The comment period closed August 5, 2008, and four (4) comments were received from one (1) commenter. Also, GSA Acquisition Letter V–05–11, published on June 6, 2005, was incorporated in the final rule.

Comment 1: One commenter responded that GSAM 552.237–70 clause is misleading in that it refers to ''qualifications'' within the same context that it discusses determinations of ''responsibility'' which the commenter believes are two totally different requirements with separate applications and procedures. The commenter believes this clause is inappropriate for the reasons cited below.

- The issues of ''financial resources'' and ''performance capability'' both fall under FAR 9.1's responsibility standards. Conversely, ''qualifications'' go to the ''quality'' of the service that must ''be addressed in every source selection through consideration of one or more non-cost evaluation factors such as past performance, compliance with solicitation requirements, technical excellence, management capability, personnel qualifications, and prior experience'' and references FAR 15.304(c)(2) and FAR 15.202(a). Consequently, factors dealing with ''comparable contracts,'' ''experience,'' and ''competency in performing comparable…contracts'' fall under the realm of quality or qualifications as outlined in FAR 15 rather than FAR 9.1 responsibility standards. Qualifications must be ''evaluated'' as part of the technical factors, and related standards/criteria that are outlined in the RFP/solicitation.
- Since ''qualifications'' must be specifically addressed in the RFP, as required under FAR 15.3's Source Selection procedures, and responsibility standards are already addressed in FAR 9.1, the commenter recommends GSA delete this clause on the basis that it is inappropriate, ambiguous, impractical, and unnecessary.
- If the clause is retained, the commenter questions its applicability only to building service contracts. The commenter's position is that qualifications and responsibility matters could apply to all contracts including supply, construction, A–E, as well as all professional services. If retained, the commenter recommends that GSA consider moving the clause under GSAM 509.2 to align with FAR 9.2's ''Qualifications Requirements.''

Response: Nonconcur. The information summarizes the requirements for the performance of building service contracts that is not found in other parts of the FAR and GSAM. The GSA position is that the FAR and GSAM coverage is adequate for responsibility and qualifications matters.

Comment 2: The commenter stated that FAR 9.1 deals with ''responsibility'' requirements that apply to all ''prospective contractors'' including sealed bid competitors. However, competitors' qualifications cannot be considered in a sealed bid procurement which is limited to ''only price and the price-related factors'' per FAR 14.408–1(a). Pursuant to FAR 14.103–2(d), ''An award is made to the *responsible* bidder (see 9.1)''…Also see FAR 14.408–2(a) which says, ''The contracting officer shall determine that a prospective contractor is *responsible* (per FAR 9.1)…'' Therefore, GSA should consider revising the GSAM/GSAR 537.110(a) prescription to prohibit its use, for qualifying firms, on sealed bid procurements.

Response: Nonconcur. Contracting activities are encouraged not to use sealed bidding procedures for building service contracts, however, some activities still use the sealed bidding procedures for smaller building service contract actions.

Comment 3: The commenter refers to comments covering GSAM 509 which allows Contracting Officers to use the GSA Form 527 to ''furnish a statement of its financial resources,'' yet fails to require Contracting Officers to document any analytical report to reflect review of same with conclusory findings.

Response: This comment is outside the scope of this GSAR case.

Comment 4: Commenter stated that they considered it a ''reporting burden'' for GSA to not allow comments to be submitted electronically on this notice.

Response: Comments on this case were accepted electronically.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The General Services Administration does not expect this final rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the changes in the final rule are editorial in nature, *e.g.*, changing a definition from regulatory to non-regulatory, adding the new name of the Javits-Wagner-O'Day (JWOD) program of Ability One, eliminating redundancy with regard to GSAR and FAR definitions at GSAR 537.201 and making minor edits to GSAR 552.237–70 and 552.237–73.

C. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the GSAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 3090–0007.

List of Subjects in 48 CFR Parts 537 and 552

Government procurement.

Dated: March 11, 2009

Rodney P. Lantier,

Acting, Senior Procurement Executive, Office of the Chief Acquisition Officer, General Services Administration.

■ Therefore, GSA amends 48 CFR parts 537 and 552 as set forth below:

PART 537—SERVICE CONTRACTING

■ 1. The authority citation for 48 CFR part 537 is revised to read as follows:

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

537.101 [Removed]

■ 2. Remove section 537.101.

537.110 [Amended]

■ 3. Amend section 537.110 by removing from the introductory text of paragraph (a) ''initiated under'' and adding ''initiated with Ability One under'' in its place.

■ 4. Add section 537.201 to read as follows:

537.201 Definitions.

As used in this subpart—

Evaluation or analysis of a proposal means proposal evaluation as described in FAR 15.305. It includes: Cost or price evaluation using cost or price analysis, as defined in FAR 15.404.

Proposal means a proposal submitted for an initial contract award. (See FAR 37.203(d)). It does not include proposals submitted after contract award, such as value engineering proposals, proposals related to contract modifications, claims, or other contract administration actions.

Readily available means that employees with the requisite training and capability are employed by the agency, capable of handling additional work relating to other duties as assigned by management, and that the travel and other costs associated with using covered personnel does not exceed the projected cost of a contract for evaluation and analysis services.

Requisite training and capability means training and capability necessary to successfully perform the task or contract at issue in the time and in the manner required. It may include relevant experience, recent performance of work of similar size and scope, specific training and other factors that the contracting officer determines are necessary to the successful performance of the task or contract at issue.

PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. The authority citation for 48 CFR part 552 continues to read as follows:

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

■ 6. Amend section 552.237–70 by revising the date of the provision and the second sentence in paragraph (a) to read as follows:

552.237–70 Qualifications of Offerors.

* * * * *

QUALIFICATIONS OF OFFERORS (May 2009)

(a) * * * To determine an Offeror's qualifications, the Offeror may be requested to furnish a narrative statement listing comparable contracts which it has performed; a general history of its operating organization; and its complete experience. * * *

* * * * *

■ 7. Amend section 552.237–71 by revising the introductory paragraph to read as follows:

552.237–71 Qualifications of Employees.

As prescribed in 537.110(a), insert the following clause:

* * * * *

■ 8. Amend section 552.237–72 by revising the introductory paragraph to read as follows:

552.237–72 Prohibition Regarding ''Quasi-Military Armed Forces.''

As prescribed in 537.110(b), insert the following clause:

* * * * *

■ 9. Amend section 552.237–73 by revising the date of the clause and paragraph (b) to read as follows:

552.237–73 Restriction on Disclosure of Information.

* * * * *

RESTRICTION ON DISCLOSURE OF INFORMATION (May 2009)

* * * * *

(b) The Contractor shall not disclose any information concerning the work under this contract to any persons or entity unless the Contractor obtains prior written approval from the Contracting Officer.

* * * * *

[FR Doc. E9–10259 Filed 5–4–09; 8:45 am]

BILLING CODE 6820–61–S

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Part 1002

[STB Ex Parte No. 542 (Sub-No. 16)]

Regulations Governing Fees for Services Performed in Connection With Licensing and Related Services—2009 Update

AGENCY: Surface Transportation Board, DOT.

ACTION: Final rules.

SUMMARY: The Board adopts its 2009 User-Fee Update and revises its fee schedule to reflect increased costs associated with the January 2009 government salary increases, changes to the Board's overhead costs, and to also reflect changes in the government fringe benefits.

DATES: *Effective Date:* These rules are effective on June 4, 2009.

FOR FURTHER INFORMATION CONTACT: David T. Groves, (202) 245–0327, or Anne Quinlan, (202) 245–0309. [TDD for the hearing impaired: 1–800–877–8339.]

SUPPLEMENTARY INFORMATION: The Board's regulations at 49 CFR 1002.3 provide for annual updates of the Board's user-fee schedule. Fees are revised based on the cost-study formula set forth at 49 CFR 1002.3(d). The fee increases adopted here, which reflect increased costs and changes in overhead costs, result from the mechanical application of the update formula in 49 CFR 1002.3(d). No new fees are proposed in this proceeding. Therefore, the Board finds that notice and comment are unnecessary for this proceeding. *See Regulations Governing Fees For Services—1990 Update,* 7 I.C.C.2d 3 (1990); *Regulations Governing Fees For Services—1991 Update,* 8 I.C.C.2d 13 (1991); and *Regulations Governing Fees For Services—1993 Update,* 9 I.C.C.2d 855 (1993).

The Board concludes that the fee changes adopted here will not have a significant economic impact on a substantial number of small entities because the Board's regulations provide for waiver of filing fees for those entities that can make the required showing of financial hardship.

Additional information is contained in the Board's decision. To obtain a free copy of the full decision, visit the Board's Web site at *http://www.stb.dot.gov* or call the Board's Information Officer at (202) 245B0245. [Assistance for the hearing impaired is available through Federal Information Relay Services (FIRS): (800) 877B8339.]

List of Subjects in 49 CFR Part 1002

Administrative practice and procedure, Common carriers, and Freedom of information.

Decided: April 29, 2009. By the Board, Acting Chairman Mulvey and Vice Chairman Nottingham.

Jeffrey Herzig,

Clearance Clerk.

■ For the reasons set forth in the preamble, title 49, chapter X, part 1002, of the Code of Federal Regulations is amended as follows:

PART 1002—FEES

■ 1. The authority citation for part 1002 continues to read as follows:

Authority: 5 U.S.C. 552(a)(4)(A) and 553; 31 U.S.C. 9701 and 49 U.S.C. 721(a).

■ 2. Section 1002.1 is amended by revising paragraphs (b) through (d); paragraph (f)(1); the table in paragraph (g)(6); and paragraph (g)(7) to read as follows:

§ 1002.1 Fees for record search, review, copying, certification, and related services.

* * * * *

(b) Service involved in examination of tariffs or schedules for preparation of certified copies of tariffs or schedules or extracts therefrom at the rate of $40.00 per hour.

(c) Service involved in checking records to be certified to determine authenticity, including clerical work, etc., identical thereto, at the rate of $27.00 per hour.

(d) Photocopies of tariffs, reports, and other public documents, at the rate of $1.40 per letter or legal size exposure. A minimum charge of $7.00 will be made for this service.

* * * * *

(f) * * *

(1) A fee of $70.00 per hour for professional staff time will be charged when it is required to fulfill a request for ADP data.

* * * * *

(g) * * *

(6) * * *

Grade	Rate
GS–1	$11.72
GS–2	12.76
GS–3	14.38
GS–4	16.15
GS–5	18.07
GS–6	20.14
GS–7	22.38
GS–8	24.78
GS–9	27.37
GS–10	30.15
GS–11	33.12
GS–12	39.70
GS–13	47.21
GS–14	55.78
GS–15 and over	65.62

(7) The fee for photocopies shall be $1.40 per letter or legal size exposure with a minimum charge of $7.00.

* * * * *

■ 3. In § 1002.2, paragraph (f) is revised as follows:

§ 1002.2 Filing fees.

* * * * *

(f) *Schedule of filing fees.*

Type of proceeding	Fee
PART I: Non-Rail Applications or Proceedings to Enter Upon a Particular Financial Transaction or Joint Arrangement:	
(1) An application for the pooling or division of traffic	$4,500.
(2) (i) An application involving the purchase, lease, consolidation, merger, or acquisition of control of a motor carrier of passengers under 49 U.S.C. 14303.	$2,000.
(ii) A petition for exemption under 49 U.S.C. 13541 (other than a rulemaking) filed by a non-rail carrier not otherwise covered.	$3,300.
(iii) A petition to revoke an exemption filed under 49 U.S.C. 13541(d)	$2,700.
(3) An application for approval of a non-rail rate association agreement. 49 U.S.C. 13703	$28,100.
(4) An application for approval of an amendment to a non-rail rate association agreement:	
(i) Significant amendment	$4,700.
(ii) Minor amendment	$100.
(5) An application for temporary authority to operate a motor carrier of passengers. 49 U.S.C. 14303(i)	$500.
(6) A notice of exemption for transaction within a motor passenger corporate family that does not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with motor passenger carriers outside the corporate family.	$1,700.
(7)–(10) [Reserved].	

Type of proceeding	Fee
PART II: Rail Licensing Proceedings Other Than Abandonment or Discontinuance Proceedings:	
(11) (i) An application for a certificate authorizing the extension, acquisition, or operation of lines of railroad. 49 U.S.C. 10901.	$7,400.
(ii) Notice of exemption under 49 CFR 1150.31–1150.35	$1,800.
(iii) Petition for exemption under 49 U.S.C. 10502	$12,800.
(12) (i) An application involving the construction of a rail line	$76,100.
(ii) A notice of exemption involving construction of a rail line under 49 CFR 1150.36	$1,800.
(iii) A petition for exemption under 49 U.S.C. 10502 involving construction of a rail line	$76,100.
(iv) A request for determination of a dispute involving a rail construction that crosses the line of another carrier under 49 U.S.C. 10902(d).	$250.
(13) A Feeder Line Development Program application filed under 49 U.S.C. 10907(b)(1)(A)(i) or 10907(b)(1)(A)(ii)	$2,600.
(14) (i) An application of a class II or class III carrier to acquire an extended or additional rail line under 49 U.S.C. 10902.	$6,300.
(ii) Notice of exemption under 49 CFR 1150.41–1150.45	$1,800.
(iii) Petition for exemption under 49 U.S.C. 10502 relating to an exemption from the provisions of 49 U.S.C. 10902.	$6,700.
(15) A notice of a modified certificate of public convenience and necessity under 49 CFR 1150.21–1150.24	$1,700.
(16) An application for a land-use-exemption permit for a facility existing as of October 16, 2008 under 49 U.S.C. 10909.	$6,300.
(17) An application for a land-use-exemption permit for a facility not existing as of October 16, 2008 under 49 U.S.C. 10909.	$22,200.
(18)–(20) [Reserved].	
PART III: Rail Abandonment or Discontinuance of Transportation Services Proceedings:	
(21) (i) An application for authority to abandon all or a portion of a line of railroad or discontinue operation thereof filed by a railroad (except applications filed by Consolidated Rail Corporation pursuant to the Northeast Rail Service Act [Subtitle E of Title XI of Pub. L. 97–35], bankrupt railroads, or exempt abandonments).	$22,600.
(ii) Notice of an exempt abandonment or discontinuance under 49 CFR 1152.50	$3,700.
(iii) A petition for exemption under 49 U.S.C. 10502	$6,400.
(22) An application for authority to abandon all or a portion of a line of a railroad or operation thereof filed by Consolidated Rail Corporation pursuant to Northeast Rail Service Act.	$450.
(23) Abandonments filed by bankrupt railroads	$1,900.
(24) A request for waiver of filing requirements for abandonment application proceedings	$1,800.
(25) An offer of financial assistance under 49 U.S.C. 10904 relating to the purchase of or subsidy for a rail line proposed for abandonment.	$1,500.
(26) A request to set terms and conditions for the sale of or subsidy for a rail line proposed to be abandoned	$23,100.
(27) (i) A request for a trail use condition in an abandonment proceeding under 16 U.S.C.1247(d)	$250.
(ii) A request to extend the period to negotiate a trail use agreement	$450.
(28)–(35) [Reserved].	
PART IV: Rail Applications to Enter Upon a Particular Financial Transaction or Joint Arrangement:	
(36) An application for use of terminal facilities or other applications under 49 U.S.C. 11102	$19,300.
(37) An application for the pooling or division of traffic. 49 U.S.C. 11322	$10,400.
(38) An application for two or more carriers to consolidate or merge their properties or franchises (or a part thereof) into one corporation for ownership, management, and operation of the properties previously in separate ownership. 49 U.S.C. 11324:	
(i) Major transaction	$1,520,600.
(ii) Significant transaction	$304,100.
(iii) Minor transaction	$7,600.
(iv) Notice of an exempt transaction under 49 CFR 1180.2(d)	$1,700.
(v) Responsive application	$7,600.
(vi) Petition for exemption under 49 U.S.C. 10502	$9,500.
(vii) A request for waiver or clarification of regulations filed in a major financial proceeding as defined at 49 CFR 1180.2(a).	$5,600.
(39) An application of a non-carrier to acquire control of two or more carriers through ownership of stock or otherwise. 49 U.S.C. 11324:	
(i) Major transaction	$1,520,600.
(ii) Significant transaction	$304,100.
(iii) Minor transaction	$7,600.
(iv) A notice of an exempt transaction under 49 CFR 1180.2(d)	$1,300.
(v) Responsive application	$7,600.
(vi) Petition for exemption under 49 U.S.C. 10502	$9,500.
(vii) A request for waiver or clarification of regulations filed in a major financial proceeding as defined at 49 CFR 1180.2(a).	$5,600.
(40) An application to acquire trackage rights over, joint ownership in, or joint use of any railroad lines owned and operated by any other carrier and terminals incidental thereto. 49 U.S.C. 11324:	
(i) Major transaction	$1,520,600.
(ii) Significant transaction	$304,100.
(iii) Minor transaction	$7,600.
(iv) Notice of an exempt transaction under 49 CFR 1180.2(d)	$1,200.
(v) Responsive application	$7,600.
(vi) Petition for exemption under 49 U.S.C. 10502	$9,500.
(vii) A request for waiver or clarification of regulations filed in a major financial proceeding as defined at 49 CFR 1180.2(a).	$5,600.
(41) An application of a carrier or carriers to purchase, lease, or contract to operate the properties of another, or to acquire control of another by purchase of stock or otherwise. 49 U.S.C. 11324:	

Type of proceeding	Fee
(i) Major transaction	$1,520,600.
(ii) Significant transaction	$304,100.
(iii) Minor transaction	$7,600.
(iv) Notice of an exempt transaction under 49 CFR 1180.2(d)	$1,400.
(v) Responsive application	$7,600.
(vi) Petition for exemption under 49 U.S.C. 10502	$6,700.
(vii) A request for waiver or clarification of regulations filed in a major financial proceeding as defined at 49 CFR 1180.2(a).	$5,600.
(42) Notice of a joint project involving relocation of a rail line under 49 CFR 1180.2(d)(5)	$2,400.
(43) An application for approval of a rail rate association agreement. 49 U.S.C. 10706	$71,200.
(44) An application for approval of an amendment to a rail rate association agreement. 49 U.S.C. 10706:	
(i) Significant amendment	$13,200.
(ii) Minor amendment	$100.
(45) An application for authority to hold a position as officer or director under 49 U.S.C. 11328	$800.
(46) A petition for exemption under 49 U.S.C. 10502 (other than a rulemaking) filed by rail carrier not otherwise covered.	$8,100.
(47) National Railroad Passenger Corporation (Amtrak) conveyance proceeding under 45 U.S.C. 562	$250.
(48) National Railroad Passenger Corporation (Amtrak) compensation proceeding under Section 402(a) of the Rail Passenger Service Act.	$250.
(49)–(55) [Reserved].	
PART V: Formal Proceedings:	
(56) A formal complaint alleging unlawful rates or practices of carriers:	
(i) A formal complaint filed under the coal rate guidelines (Stand-Alone Cost Methodology) alleging unlawful rates and/or practices of rail carriers under 49 U.S.C. 10704(c)(1).	$350.
(ii) A formal complaint involving rail maximum rates filed under the Simplified-SAC methodology	$350.
(iii) A formal complaint involving rail maximum rates filed under the Three Benchmark methodology	$150.
(iv) All other formal complaints (except competitive access complaints)	$21,100.
(v) Competitive access complaints	$150.
(vi) A request for an order compelling a rail carrier to establish a common carrier rate	$250.
(57) A complaint seeking or a petition requesting institution of an investigation seeking the prescription or division of joint rates or charges. 49 U.S.C. 10705.	$9,000.
(58) A petition for declaratory order:	
(i) A petition for declaratory order involving a dispute over an existing rate or practice which is comparable to a complaint proceeding.	$1,000.
(ii) All other petitions for declaratory order	$1,400.
(59) An application for shipper antitrust immunity. 49 U.S.C. 10706(a)(5)(A)	$7,100.
(60) Labor arbitration proceedings	$250.
(61) (i) An appeal of a Surface Transportation Board decision on the merits or petition to revoke an exemption pursuant to 49 U.S.C. 10502(d).	$250.
(ii) An appeal of a Surface Transportation Board decision on procedural matters except discovery rulings	$350.
(62) Motor carrier undercharge proceedings	$250.
(63) (i) Expedited relief for service inadequacies: A request for expedited relief under 49 U.S.C. 11123 and 49 CFR part 1146 for service emergency.	$250.
(ii) Expedited relief for service inadequacies: A request for temporary relief under 49 U.S.C. 10705 and 11102, and 49 CFR part 1147 for service inadequacy.	$250.
(64) A request for waiver or clarification of regulations except one filed in an abandonment or discontinuance proceeding, or in a major financial proceeding as defined at 49 CFR 1180.2(a).	$600.
(65)–(75) [Reserved].	
PART VI: Informal Proceedings:	
(76) An application for authority to establish released value rates or ratings for motor carriers and freight forwarders of household goods under 49 U.S.C. 14706.	$1,200.
(77) An application for special permission for short notice or the waiver of other tariff publishing requirements	$100.
(78) The filing of tariffs, including supplements, or contract summaries	$1 per page. ($25 minimum charge.)
(79) Special docket applications from rail and water carriers:	
(i) Applications involving $25,000 or less	$75.
(ii) Applications involving over $25,000	$150.
(80) Informal complaint about rail rate applications	$600.
(81) Tariff reconciliation petitions from motor common carriers:	
(i) Petitions involving $25,000 or less	$75.
(ii) Petitions involving over $25,000	$150.
(82) Request for a determination of the applicability or reasonableness of motor carrier rates under 49 U.S.C. 13710(a)(2) and (3).	$250.
(83) Filing of documents for recordation. 49 U.S.C. 11301 and 49 CFR 1177.3(c).	$41 per document.
(84) Informal opinions about rate applications (all modes)	$250.
(85) A railroad accounting interpretation	$1,100.
(86) (i) A request for an informal opinion not otherwise covered	$1,500.
(ii) A proposal to use on a voting trust agreement pursuant to 49 CFR 1013 and 49 CFR 1180.4(b)(4)(iv) in connection with a major control proceeding as defined at 49 CFR 1180.2(a).	$5,200.
(iii) A request for an informal opinion on a voting trust agreement pursuant to 49 CFR 1013.3(a) not otherwise covered.	$500.
(87) Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surface Transportation Board under 49 CFR 1108:	

Type of proceeding	Fee
(i) Complaint	$75.
(ii) Answer (per defendant), Unless Declining to Submit to Any Arbitration	$75.
(iii) Third Party Complaint	$75.
(iv) Third Party Answer (per defendant), Unless Declining to Submit to Any Arbitration	$75.
(v) Appeals of Arbitration Decisions or Petitions to Modify or Vacate an Arbitration Award	$150.
(88) Basic fee for STB adjudicatory services not otherwise covered	$250.
(89)–(95) [Reserved].	
PART VII: Services:	
(96) Messenger delivery of decision to a railroad carrier's Washington, DC, agent	$32 per delivery.
(97) Request for service or pleading list for proceedings	$24 per list.
(98) Processing the paperwork related to a request for the Carload Waybill Sample to be used in a Surface Transportation Board or State proceeding that:	
(i) Does not require a **Federal Register** notice:	
(a) Set cost portion	$150.
(b) Sliding cost portion	$48 per party.
(ii) Does require a **Federal Register** notice:	
(a) Set cost portion	$400.
(b) Sliding cost portion	$48 per party.
(99) (i) Application fee for the Surface Transportation Board's Practitioners' Exam	$150.
(ii) Practitioners' Exam Information Package	$25.
(100) Carload Waybill Sample data:	
(i) Requests for Public Use File for all years prior to the most current year Carload Waybill Sample data available, provided on CD–R.	$250 per year.
(ii) Specialized programming for Waybill requests to the Board	$109 per hour.

* * * * *

[FR Doc. E9–10304 Filed 5–4–09; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 090324366–9371–01]

RIN 0648–AX81

Fisheries Off West Coast States and in the Western Pacific; West Coast Salmon Fisheries; 2009 Management Measures

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

ACTION: Final rule; request for comments.

SUMMARY: NMFS establishes fishery management measures for the 2009 ocean salmon fisheries off Washington, Oregon, and California and the 2010 salmon seasons opening earlier than May 1, 2010. Specific fishery management measures vary by fishery and by area. The measures establish fishing areas, seasons, quotas, legal gear, recreational fishing days and catch limits, possession and landing restrictions, and minimum lengths for salmon taken in the U.S. exclusive economic zone (EEZ) (3–200 NM) off Washington, Oregon, and California. The management measures are intended to prevent overfishing and to apportion the ocean harvest equitably among treaty Indian, non-treaty commercial, and recreational fisheries. The measures are also intended to allow a portion of the salmon runs to escape the ocean fisheries in order to provide for spawning escapement and to provide for inside fisheries (fisheries occurring in state internal waters).

DATES: Final rule is effective from 0001 hours Pacific Daylight Time, May 1, 2009, until the effective date of the 2010 management measures, as published in the **Federal Register.**

Comments must be received by May 20, 2009.

ADDRESSES: You may submit comments, identified by 0648–AX81, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov*.
- *Fax:* 206–526–6736 *Attn:* Peggy Busby, or 562–980–4047 *Attn:* Jennifer Isé
- *Mail:* Barry A. Thom, Acting Regional Administrator, Northwest Region, NMFS, 7600 Sand Point Way NE., Seattle, WA 98115–0070 or to Rod McInnis, Regional Administrator, Southwest Region, NMFS, 501 West Ocean Boulevard, Suite 4200, Long Beach, CA 90802–4213

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Copies of the documents cited in this document are available from Dr. Donald O. McIsaac, Executive Director, Pacific Fishery Management Council, 7700 NE. Ambassador Place, Suite 200, Portland, OR 97220–1384, and are posted on its Web site (*www.pcouncil.org*).

Send comments regarding the reporting burden estimate or any other aspect of the collection-of-information requirements in these management measures, including suggestions for reducing the burden, to one of the NMFS addresses listed above and to David Rostker, Office of Management and Budget (OMB), by e-mail at *David_Rostker@omb.eop.gov,* or by fax at (202)395–7285.

FOR FURTHER INFORMATION CONTACT: Peggy Busby at 206–526–4323, or Jennifer Isé at 562–980–4046.

SUPPLEMENTARY INFORMATION:

Background

The ocean salmon fisheries in the EEZ off Washington, Oregon, and California are managed under a ''framework'' fishery management plan entitled the Pacific Coast Salmon Fishery Management Plan (Salmon FMP). Regulations at 50 CFR part 660, subpart H, provide the mechanism for making

preseason and inseason adjustments to the management measures, within limits set by the Salmon FMP, by notification in the **Federal Register.**

These management measures for the 2009 and pre-May 2010 ocean salmon fisheries were recommended by the Pacific Fishery Management Council (Council) at its April 2 to 9, 2009, meeting.

Schedule Used to Establish 2009 Management Measures

The Council announced its annual preseason management process for the 2009 ocean salmon fisheries in the **Federal Register** on December 18, 2008 (73 FR 77010), and on their Web site at (*www.pcouncil.org*). This notice announced the availability of Council documents as well as the dates and locations of Council meetings and public hearings comprising the Council's complete schedule of events for determining the annual proposed and final modifications to ocean salmon fishery management measures. The agendas for the March and April Council meetings were published in the **Federal Register** and on the Council's Web site prior to the actual meetings.

In accordance with the Salmon FMP, the Council's Salmon Technical Team (STT) and staff economist prepared a series of reports for the Council, its advisors, and the public. All four reports were posted on the Council's web site and otherwise made available to the Council, its advisors, and the public upon their completion. The first of the reports was prepared in February when the scientific information necessary for crafting management measures for the 2009 and pre-May 2010 ocean salmon fishery first became available. The first report, ''Review of 2008 Ocean Salmon Fisheries,'' summarizes biological and socio-economic data for the 2008 ocean salmon fisheries and assesses how well the Council's 2008 management objectives were met. The second report, ''Preseason Report I Stock Abundance Analysis for 2009 Ocean Salmon Fisheries'' (PRE I), provides the 2009 salmon stock abundance projections and analyzes the impacts on the stocks and Council management goals if the 2008 regulations and regulatory procedures were applied to the projected 2009 stock abundances. The completion of PRE I is the initial step in evaluating the full suite of preseason options.

Following completion of the first two reports, the Council met in Seattle, WA from March 7 to 13, 2009, to develop 2009 management options for proposal to the public. The Council proposed three options for commercial and recreational fisheries management for analysis and public comment. These options consisted of various combinations of management measures designed to protect weak stocks of coho and Chinook salmon and to provide for ocean harvests of more abundant stocks. After the March Council meeting, the Council's STT and staff economist prepared a third report, ''Preseason Report II Analysis of Proposed Regulatory Options for 2009 Ocean Salmon Fisheries,'' which analyzes the effects of the proposed 2009 management options.

Public hearings, sponsored by the Council, to receive testimony on the proposed options were held on March 30, 2009, in Westport, WA and Coos Bay, OR; and March 31, 2009, in Eureka, CA. The States of Washington, Oregon, and California sponsored meetings in various forums that also collected public testimony, which was then presented to the Council by each state's Council representative. The Council also received public testimony at both the March and April meetings and received written comments at the Council office.

The Council met from April 2 to 9, 2009, in Millbrae, CA to adopt its final 2009 recommendations. Following the April Council meeting, the Council's STT and staff economist prepared a fourth report, ''Preseason Report III Analysis of Council-Adopted Management Measures for 2009 Ocean Salmon Fisheries,'' which analyzes the environmental and socio-economic effects of the Council's final recommendations. After the Council took final action on the annual ocean salmon specifications in April, it published the recommended management measures in its newsletter and also posted them on the Council Web site (*www.pcouncil.org*).

Resource Status

Fisheries south of Cape Falcon, OR are limited primarily by the status of Sacramento River fall Chinook salmon. Fisheries north of Cape Falcon are limited by Lower Columbia River Chinook salmon, Lower Columbia River coho salmon, and Oregon Coast coho, stocks which are all listed under the Endangered Species Act (ESA), and by Thompson River coho from Canada. At the start of the preseason planning process for the 2009 management season, NMFS provided a letter to the Council, dated March 3, 2009, summarizing its ESA consultation standards for listed species as required by the Salmon FMP. The Council's recommended management measures comply with NMFS ESA consultation standards and guidance for those listed salmon species which may be affected by Council fisheries. In most cases, the recommended measures are more restrictive than NMFS's ESA requirements.

The Sacramento River fall Chinook salmon stock (SRFC) failed to meet its conservation objective of 122,000–180,000 adult natural and hatchery spawners in 2007 and 2008 (87,881 and 66,264 spawners respectively). The preseason forecast for SRFC escapement in 2009, in the absence of fishing, is 122,200. SRFC is the major contributing stock to ocean Chinook salmon fisheries off Oregon and California. To conserve this stock, the Council proposed no commercial fisheries on Chinook salmon for 2009 ocean fisheries south of Cape Falcon, Oregon, and a recreational Chinook salmon fishery that is restricted in time and place to target Klamath River fall Chinook salmon, which are projected to be well above their escapement goal. In addition to ocean fishing, SRFC is vulnerable to in-river fisheries that target *late* fall Chinook salmon, a separately managed stock. The in-river fishery is managed by the State of California and is thus outside the Council's jurisdiction. In March 2009, the Council's Salmon Technical Team met with representatives of the California Department of Fish and Game; it was agreed at this meeting that if the late fall Chinook salmon fishery were to begin after November 15, and occur only between Knights Landing and Red Bluff Diversion Dam, incidental harvest of SRFC would be negligible. The California Fish and Game Commission met on April 21, 2009 and confirmed that the Sacramento River late fall Chinook salmon fishery in 2009 will occur November 16 through December 31, and occur only between Knights Landing and Red Bluff Diversion Dam, resulting in negligible incidental harvest of SRFC.

NMFS consulted under ESA section 7 and provided guidance to the Council regarding the effects of the 2009 fisheries on the Lower Columbia River (LCR) Chinook salmon Evolutionarily Significant Unit (ESU). NMFS has completed a Biological Opinion concluding that the proposed 2009 fisheries are not likely to jeopardize the continued existence of LCR Chinook.

The LCR Chinook salmon ESU is comprised of a spring component, a ''far-north'' migrating bright component, and a component of north migrating tules. The bright and tule components both have fall run timing. The 2004 Interim Regional Recovery Plan identified twenty-one separate populations within the tule component

of this ESU. Unlike the spring or bright populations of the ESU, LCR tule populations are caught in large numbers in Council fisheries, as well as fisheries to the north and in the Columbia River. Therefore this component of the ESU is the one most likely to constrain Council area fisheries. Total exploitation rate on tule populations has been reduced from 49 percent in 2006, to 42 percent in 2007, and then to 41 percent in 2008.

The United States recently approved a new Pacific Salmon Treaty (PST) Agreement that was negotiated and recommended by the Pacific Salmon Commission. That Agreement includes a new Chinook salmon regime that reduces the allowable annual Chinook salmon catch by 30 percent in Canada's West Coast Vancouver Island (WCVI) troll and sport fishery and 15 percent in Alaska's Southeast Alaska all-gear fishery. Lower Columbia River tule Chinook salmon in particular will benefit from the reduction in the WCVI fishery. The United States negotiated for harvest reductions in Canadian intercepting fisheries largely to benefit the escapement of natural origin stocks. LCR tule and Puget Sound Chinook salmon were specifically identified to Canada as the intended beneficiaries of these reductions. NMFS indicated in its biological opinion on the PST Agreement that it intended to ensure that reductions in tule harvest secured by the new agreement would be passed through to escapement. In 2008 the total exploitation rate on LCR tule Chinook salmon was limited to a maximum of 41 percent. NMFS estimated in its biological opinion on the new PST Agreement that the catch reductions in the northern fisheries would reduce the exploitation rate on tule Chinook salmon by approximately three percentage points relative to what would have occurred under the previous Chinook salmon regime. Therefore, for 2009, Council fisheries should be managed such that the total exploitation rate in all fisheries on LCR tule Chinook salmon does not exceed 38 percent. This reduction is a further step intended to address the needs of the LCR Chinook salmon ESU and the weaker tule populations in the ESU in particular. NMFS intends to develop a longer-term biological opinion for LCR Chinook salmon in 2010 that will provide more certainty regarding harvest limits that would be required for LCR Chinook salmon in the future.

In 2008, NMFS conducted section 7 consultation and issued a biological opinion regarding the effects of Council fisheries and fisheries in the Columbia River on LCR coho. The states of Oregon and Washington have focused on use of a harvest matrix for LCR coho, developed by Oregon, following their listing under Oregon's State ESA. Under the matrix the allowable harvest in a given year depends on indicators of marine survival and brood year escapement. The matrix has both ocean and in-river components which can be combined to define a total exploitation rate limit for all ocean and in-river fisheries. Generally speaking, NMFS supports use of management planning tools that allow harvest to vary depending on the year-specific circumstances. Conceptually, we think Oregon's approach is a good one. However, NMFS has taken a more conservative approach for LCR coho in recent years because of unresolved issues related to application of the matrix. NMFS will continue to apply the matrix as we have in the past, by limiting the total harvest to that allowed under the matrix for the ocean fisheries. For 2009, the harvest matrix prescribes an ocean exploitation rate of 20 percent, and a combined ocean and freshwater exploitation rate of 29.2 percent. However, under these circumstances, the 2008 biological opinion limits the overall exploitation rate to that specified in the ocean portion of the matrix. As a consequence, ocean salmon fisheries under the Council's jurisdiction in 2009, and commercial and recreational salmon fisheries in the mainstem Columbia River, including select area fisheries (*e.g.,* Youngs Bay), must be managed subject to a total exploitation rate limit on LCR coho not to exceed 20 percent. Recommended management measures that would affect LCR coho are consistent with this requirement.

The ESA listing status of Oregon Coast (OC) coho has changed over the years. On February 11, 2008, NMFS again listed OC coho as threatened under the ESA (73 FR 7816 February 11, 2008). Regardless of their listing status, the Council has managed OC coho consistent with the terms of Amendment 13 of the Salmon FMP and subsequent guidance provided by the 2000 ad hoc Work Group appointed by the Council. NMFS concluded that the management provisions for OC coho would not jeopardize the continued existence of the ESU through its section 7 consultation on Amendment 13 in 1999, and has since supported use of the expert advice provided by the Council's ad hoc Work Group. For the 2009 season, the applicable spawner status is in the ''low'' category while the marine survival index is in the ''medium'' category. Under this circumstance, the Work Group report requires that the exploitation rate be limited to no more than 15 percent. Recommended management measures that would affect OC coho are consistent with this requirement.

Interior Fraser (Thompson River) coho, a Canadian stock, continues to be depressed, remaining in the ''low'' status category under the Pacific Salmon Treaty and, along with LCR coho, is the coho stock most limiting the 2009 ocean fisheries north of Cape Falcon. The recommended management measures satisfy the maximum 10.0 percent total U.S. exploitation rate called for by the Pacific Salmon Treaty agreements and the Salmon FMP, with a marine exploitation rate of 9.8 percent in U.S. fisheries.

Management Measures for 2009 Fisheries

The Council-recommended ocean harvest levels and management measures for the 2009 fisheries are designed to apportion the burden of protecting the weak stocks identified and discussed in PRE I equitably among ocean fisheries and to allow maximum harvest of natural and hatchery runs surplus to inside fishery and spawning needs. NMFS finds the Council's recommendations responsive to the goals of the Salmon FMP, the requirements of the resource, and the socioeconomic factors affecting resource users. The recommendations are consistent with the requirements of the Magnuson-Stevens Fishery Conservation and Management Act and U.S. obligations to Indian tribes with federally recognized fishing rights, and U.S. international obligations regarding Pacific salmon. Accordingly, NMFS has adopted them.

North of Cape Falcon the 2009 management measures have a similar Chinook salmon quota and a substantially higher coho quota relative to the 2008 season. The total allowable catch for 2009 is 80,000 Chinook and 270,000 marked hatchery coho. These fisheries are restricted to protect threatened Lower Columbia River Chinook, threatened Lower Columbia River coho, threatened Oregon Coastal Natural coho, and coho salmon from the Thompson River in Canada. Washington coastal and Puget Sound Chinook generally migrate to the far north and are not significantly affected by ocean harvests from Cape Falcon, OR, to the U.S.-Canada border. Nevertheless, ocean fisheries in combination with fisheries inside Puget Sound are also restricted in order to meet ESA related conservation objectives for Puget Sound Chinook. North of Cape Alava, WA, the Council recommended a provision prohibiting retention of chum salmon during

August and September to protect ESA listed Hood Canal summer chum. The Council has recommended such a prohibition for the last eight years.

South of Cape Falcon, OR, the commercial salmon fishery will be limited to an 11,000-fish quota of coho between Cape Falcon and Humbug Mountain, Oregon. There will be no commercial salmon fishery on Chinook salmon south of Cape Falcon in 2009 because Sacramento River Fall Chinook salmon are projected to be at the lower end of the range of their conservation objective, even with no fishing on the stock. Recreational fisheries south of Cape Falcon will have a quota of 117,000 marked hatchery coho, thus providing increased opportunity for coho fishing off Oregon compared to 2008. Recreational fisheries for Chinook salmon south of Cape Falcon will be limited to a 10-day season, August 29 through September 7, in the Klamath Management Zone (Humbug Mountain, Oregon to Horse Mountain, California) with a quota of 30,800 Chinook salmon.

The treaty-Indian commercial troll fishery quota is 39,000 Chinook in ocean management areas and Washington State Statistical Area 4B combined. This quota is slightly higher than the 37,500–Chinook quota in 2008. The fisheries include a Chinook-directed fishery in May and June with a quota of 19,000 Chinook, and an all-salmon season beginning July 1 with a 20,000 Chinook sub-quota. The coho quota for the treaty-Indian troll fishery in ocean management areas, including Washington State Statistical Area 4B, for the July-September period is 60,000 coho, a substantial increase from the 20,000-coho quota in 2008.

Management Measures for 2010 Fisheries

The timing of the March and April Council meetings makes it impracticable for the Council to recommend fishing seasons that begin before May 1 of the same year. Therefore, the 2010 fishing seasons opening earlier than May 1 are also established in this action. The Council recommended, and NMFS concurs, that the commercial season off Oregon from Cape Falcon to Humbug Mountain, from Humbug Mountain to the Oregon/California border and the recreational season off Oregon from Cape Falcon to Humbug Mountain and off California south of Horse Mountain will open in 2010 as indicated in the Season Description section. At the March 2010 meeting, the Council may consider inseason recommendations to adjust the commercial season prior to May 1 in the areas off Oregon and California.

Inseason Actions

The following sections set out the management regime for the salmon fishery. Open seasons and days are described in Sections 1, 2, and 3 of the 2009 management measures. Inseason closures in the commercial and recreational fisheries are announced on the NMFS hotline and through the U.S. Coast Guard Notice to Mariners as described in Section 6. Other inseason adjustments to management measures are also announced on the hotline and through the Notice to Mariners. Inseason actions will also be published in the **Federal Register** as soon as practicable.

The following are the management measures recommended by the Council and approved and implemented here for 2009 and, as specified, for 2010.

Section 1. Commercial Management Measures for 2009 Ocean Salmon Fisheries

Note: This section contains restrictions in parts A, B, and C that must be followed for lawful participation in the fishery. Each fishing area identified in part A specifies the fishing area by geographic boundaries from north to south, the open seasons for the area, the salmon species allowed to be caught during the seasons, and any other special restrictions effective in the area. Part B specifies minimum size limits. Part C specifies special requirements, definitions, restrictions and exceptions.

A. Season Description

North of Cape Falcon, OR—U.S./Canada Border to Cape Falcon

May 1 through the earlier of June 30 or 13,735 Chinook quota. Open May 1–5, 8–12, then Saturday through Tuesday thereafter with a landing and possession limit of 75 Chinook per vessel for each open period north of Leadbetter Point or 75 Chinook south of Leadbetter Point (C.1, C.8.e). All salmon except coho (C.7). Mandatory Yelloweye Rockfish Conservation Area, Cape Flattery and Columbia Control Zones closed (C.5). See gear restrictions and definitions (C.2, C.3). Oregon State regulations require that fishers south of Cape Falcon, OR intending to fish within this area notify Oregon Department of Fish and Wildlife before transiting the Cape Falcon, OR line (45°46′00″ N. lat.) at the following number: 541–867–0300 Ext. 271. Vessels must land and deliver their fish within 24 hours of any closure of this fishery. Under state law, vessels must report their catch on a state fish receiving ticket. Vessels fishing or in possession of salmon while fishing north of Leadbetter Point must land and deliver their fish within the area and north of Leadbetter Point. Vessels fishing or in possession of salmon while fishing south of Leadbetter Point must land and deliver their fish within the area and south of Leadbetter Point, except that Oregon permitted vessels may also land their fish in Garibaldi, Oregon. Oregon State regulations require all fishers landing salmon into Oregon from any fishery between Leadbetter Point, Washington and Cape Falcon, Oregon must notify ODFW within one hour of delivery or prior to transport away from the port of landing by calling 541–867–0300 Ext. 271. Notification shall include vessel name and number, number of salmon by species, port of landing and location of delivery, and estimated time of delivery. Inseason actions may modify harvest guidelines in later fisheries to achieve or prevent exceeding the overall allowable troll harvest impacts (C.8).

July 1 through the earlier of September 15 or 6,765 preseason Chinook guideline (C.8) or a 33,600 marked coho quota (C.8.d). Open July 1–7, then Saturday through Tuesday thereafter, with a landing and possession limit of 40 Chinook and 200 coho per vessel for each open period north of Leadbetter Point or 40 Chinook and 200 coho south of Leadbetter Point (C.1, C.8.e). All Salmon except no chum retention north of Cape Alava, Washington beginning August 1 (C.7). All coho must be marked (C.8.d). Mandatory Yelloweye Rockfish Conservation Area, Cape Flattery and Columbia Control Zones closed (C.5). Oregon State regulations require that fishers south of Cape Falcon, OR intending to fish within this area notify Oregon Department of Fish and Wildlife before transiting the Cape Falcon, OR line (45°46′00″ N. lat.) at the following number: 541–867–0300 Ext. 271. Vessels must land and deliver their fish within 24 hours of any closure of this fishery. Under state law, vessels must report their catch on a state fish receiving ticket. Vessels fishing or in possession of salmon while fishing north of Leadbetter Point must land and deliver their fish within the area and north of Leadbetter Point. Vessels fishing or in possession of salmon while fishing south of Leadbetter Point must land and deliver their fish within the area and south of Leadbetter Point, except that Oregon permitted vessels may also land their fish in Garibaldi, Oregon. Oregon State regulations require all fishers landing salmon into Oregon from any fishery between Leadbetter Point, Washington and Cape Falcon, Oregon must notify ODFW within one hour of delivery or prior to

transport away from the port of landing by calling 541–867–0300 Ext. 271. Notification shall include vessel name and number, number of salmon by species, port of landing and location of delivery, and estimated time of delivery. Inseason actions may modify harvest guidelines in later fisheries to achieve or prevent exceeding the overall allowable troll harvest impacts (C.8).

South of Cape Falcon, OR—Cape Falcon to Humbug Mountain

September 1 through the earlier of September 30 or an 11,000 preseason coho quota (C.8.f). All salmon except Chinook (B, C.8.f, C.9). Seven days per week with a landing and possession limit of 100 coho per vessel per calendar week (Sunday through Saturday) (C.1, C.8.e), no coho mark-selective restriction (C.7). All vessels fishing in the area must land their fish in the State of Oregon. See gear restrictions and definitions (C.2, C.3) and Oregon State regulations for a description of special regulations at the mouth of Tillamook Bay.

In 2010, the season will open March 15 for all salmon except coho, with a 27 inch Chinook minimum size limit. This opening could be modified following Council review at its March 2010 meeting.

Humbug Mountain to Oregon/California Border

Closed in 2009. In 2010, the season will open March 15 for all salmon except coho, with a 27 inch Chinook minimum size limit. This opening could be modified following Council review at its March 2010 meeting.

Oregon/California Border to U.S./Mexico Border

Closed.

B. Minimum Size (Inches) (See C.1)

Area (when open)	Chinook		Coho		Pink
	Total length	Head-off	Total length	Head-off	
North of Cape Falcon, OR	28.0	21.5	16.0	12.0	None.
Cape Falcon to OR-CA Border	—	—	16.0	12.0	None.
OR-CA Border to US-Mexico Border	.....	.....	.....	.....	.....

Metric equivalents: 28.0 in = 71.1 cm, 27.0 in = 68.6 cm, 26.0 in = 66.0 cm, 21.5 in = 54.6 cm, 19.5 in = 49.5 cm, 16.0in = 40.6 cm, and 12.0 in = 30.5 cm.

C. Special Requirements, Definitions, Restrictions, or Exceptions

C.1. Compliance With Minimum Size or Other Special Restrictions:

All salmon on board a vessel must meet the minimum size, landing/possession limit, or other special requirements for the area being fished and the area in which they are landed if the area is open. Salmon may be landed in an area that has been closed more than 96 hours only if they meet the minimum size, landing/possession limit, or other special requirements for the area in which they were caught. Salmon may be landed in an area that has been closed less than 96 hours only if they meet the minimum size, landing/possession limit, or other special requirements for the areas in which they were caught and landed.

States may require fish landing/receiving tickets to be kept on board the vessel for 90 days after landing to account for all previous salmon landings.

C.2. Gear Restrictions:

Salmon may be taken only by hook and line using barbless hooks.

a. Single point, single shank, barbless hooks are required in all fisheries.

b. Cape Falcon, Oregon, to the OR/CA border: No more than 4 spreads are allowed per line.

c. OR/CA border to U.S./Mexico border: No more than 6 lines are allowed per vessel, and barbless circle hooks are required when fishing with bait by any means other than trolling.

C.3. Gear Definitions:

Trolling defined: Fishing from a boat or floating device that is making way by means of a source of power, other than drifting by means of the prevailing water current or weather conditions.

Troll fishing gear defined: One or more lines that drag hooks behind a moving fishing vessel. In that portion of the fishery management area (FMA) off Oregon and Washington, the line or lines must be affixed to the vessel and must not be intentionally disengaged from the vessel at any time during the fishing operation.

Spread defined: A single leader connected to an individual lure or bait.

Circle hook defined: A hook with a generally circular shape and a point which turns inward, pointing directly to the shank at a 90 °angle.

C.4. Transit Through Closed Areas With Salmon on Board:

It is unlawful for a vessel to have troll or recreational gear in the water while transiting any area closed to fishing for a certain species of salmon, while possessing that species of salmon; however, fishing for species other than salmon is not prohibited if the area is open for such species, and no salmon are in possession.

C.5. Control Zone Definitions:

a. Cape Flattery Control Zone—The area from Cape Flattery (48°23′00″ N. lat.) to the northern boundary of the U.S. EEZ; and the area from Cape Flattery south to Cape Alava (48°10′00″ N. lat.) and east of 125°05′00″ W. long.

b. Mandatory Yelloweye Rockfish Conservation Area—The area in Washington Marine Catch Area 3 from 48°00.00′ N. lat.; 125°14.00′ W. long. to 48°02.00′ N. lat.; 125°14.00′ W. long. to 48°02.00′ N. lat.; 125°16.50′ W. long. to 48°00.00′ N. lat.; 125°16.50′ W. long. and connecting back to 48°00.00′ N. lat.; 125°14.00′ W. long.

c. Columbia Control Zone—An area at the Columbia River mouth, bounded on the west by a line running northeast/southwest between the red lighted Buoy #4 (46°13′35′′ N. lat., 124°06′50′′ W. long.) and the green lighted Buoy #7 (46°15′09″ N. lat., 124°06′16″ W. long.); on the east, by the Buoy #10 line which bears north/south at 357° true from the south jetty at 46°14′00″ N. lat., 124°03′07″ W. long. to its intersection with the north jetty; on the north, by a line running northeast/southwest between the green lighted Buoy #7 to the tip of the north jetty (46°15′48″ N. lat., 124°05′20″ W. long.), and then along the north jetty to the point of intersection with the Buoy #10 line; and, on the south, by a line running northeast/southwest between the red lighted Buoy #4 and tip of the south jetty (46°14′03″ N. lat., 124°04′05″ W. long.), and then along the south jetty to the point of intersection with the Buoy #10 line.

d. Bandon High Spot Control Zone—The area west of a line between 43°07′00″ N. lat.; 124°37′00″ W. long. and 42°40′30″ N. lat; 124°52′0″ W. long. extending to the western edge of the exclusive economic zone (EEZ).

e. Klamath Control Zone—The ocean area at the Klamath River mouth bounded on the north by 41°38′48″ N. lat. (approximately six nautical miles

north of the Klamath River mouth); on the west, by 124°23′00″ W. long. (approximately 12 nautical miles off shore); and on the south, by 41°26′48″ N. lat. (approximately six nautical miles south of the Klamath River mouth).

C.6. Notification When Unsafe Conditions Prevent Compliance With Regulations:

If prevented by unsafe weather conditions or mechanical problems from meeting special management area landing restrictions, vessels must notify the U.S. Coast Guard and receive acknowledgment of such notification prior to leaving the area. This notification shall include the name of the vessel, port where delivery will be made, approximate amount of salmon (by species) on board, and the estimated time of arrival.

C.7. Incidental Halibut Harvest:

During authorized periods, the operator of a vessel that has been issued an incidental halibut harvest license may retain Pacific halibut caught incidentally in Area 2A while trolling for salmon. Halibut retained must be no less than 32 inches (81.28 cm) in total length, measured from the tip of the lower jaw with the mouth closed to the extreme end of the middle of the tail, and must be landed with the head on. License applications for incidental harvest must be obtained from the International Pacific Halibut Commission (phone: 206–634–1838). Applicants must apply prior to April 1 of each year. Incidental harvest is authorized only during May and June troll seasons and after June 30 if quota remains and if announced on the NMFS hotline (phone: 800–662–9825). ODFW and Washington Department of Fish and Wildlife (WDFW) will monitor landings. If the landings are projected to exceed the 29,362 pound preseason allocation or the total Area 2A non-Indian commercial halibut allocation, NMFS will take inseason action to prohibit retention of halibut in the non-Indian salmon troll fishery.

Beginning May 1, license holders may possess or land no more than one Pacific halibut per each two Chinook, except one Pacific halibut may be possessed or landed without meeting the ratio requirement, and no more than 35 halibut may be possessed or landed per trip. Pacific halibut retained must be no less than 32 inches in total length (with head on).

A ''C-shaped'' yelloweye rockfish conservation area is an area to be voluntarily avoided for salmon trolling. NMFS and the Council request salmon trollers voluntarily avoid this area in order to protect yelloweye rockfish. The area is defined in the Pacific Council Halibut Catch Sharing Plan in the North Coast subarea (Washington marine area 3), with the following coordinates in the order listed:

48°18′ N. lat.; 125°18′ W. long.;
48°18′ N. lat.; 124°59′ W. long.;
48°11′ N. lat.; 124°59′ W. long.;
48°11′ N. lat.; 125°11′ W. long.;
48°04′ N. lat.; 125°11′ W. long.;
48°04′ N. lat.; 124°59′ W. long.;
48°00′ N. lat.; 124°59′ W. long.;
48°00′ N. lat.; 125°18′ W. long.;

and connecting back to 48°18′ N. lat.; 125°18′ W. long.

C.8. Inseason Management:

In addition to standard inseason actions or modifications already noted under the season description, the following inseason guidance is provided to NMFS:

a. Chinook remaining from the May through June non-Indian commercial troll harvest guideline north of Cape Falcon may be transferred to the July through September harvest guideline on a fishery impact equivalent basis.

b. NMFS may transfer fish between the recreational and commercial fisheries north of Cape Falcon on a fishery impact equivalent basis if there is agreement among the areas' representatives on the Salmon Advisory Subpanel (SAS).

c. At the March 2010 meeting, the Council will consider inseason recommendations for special regulations for any experimental fisheries (proposals must meet Council protocol and be received in November 2009).

d. If retention of unmarked coho is permitted in the area from the U.S./Canada border to Cape Falcon, Oregon, by inseason action, the allowable coho quota will be adjusted to ensure preseason projected mortality of critical stocks is not exceeded.

e. Landing limits may be modified inseason to sustain season length and keep harvest within overall quotas.

f. Marked coho remaining from the June through August Cape Falcon to OR/CA border recreational coho quota may be transferred to the Cape Falcon to Humbug Mt. non-Indian commercial non-mark-selective all salmon fishery on a fishery impact equivalent basis.

C.9. State Waters Fisheries:

Consistent with Council management objectives:

a. The State of Oregon may establish additional late-season fisheries in state waters.

b. The State of California may establish limited fisheries in selected state waters.

Check state regulations for details.

C.10. For the purposes of California Department of Fish and Game (CDFG) Code, Section 8232.5, the definition of the Klamath Management Zone (KMZ) for the ocean salmon season shall be that area from Humbug Mt., Oregon, to Horse Mt., California.

Section 2. Recreational Management Measures for 2009 Ocean Salmon Fisheries

Note: This section contains restrictions in parts A, B, and C that must be followed for lawful participation in the fishery. Each fishing area identified in part A specifies the fishing area by geographic boundaries from north to south, the open seasons for the area, the salmon species allowed to be caught during the seasons, and any other special restrictions effective in the area. Part B specifies minimum size limits. Part C specifies special requirements, definitions, restrictions and exceptions.

A. Season Description

North of Cape Falcon, OR—U.S./Canada Border to Cape Alava (Neah Bay)

June 27 through the earlier of September 20 or 18,350 marked coho subarea quota with a subarea guideline of 2,200 Chinook (C5). Tuesday through Saturday through July 17; seven days per week thereafter. All salmon except no chum retention beginning August 1 and no Chinook retention east of the Bonilla-Tatoosh line beginning August 1 during Council managed ocean fishery. Two fish per day, only one of which can be a Chinook, plus two additional pink salmon. Chinook 24-inch total length minimum size limit (B). All retained coho must be marked. See gear restrictions and definitions (C.2, C.3). Inseason management may be used to sustain season length and keep harvest within the overall Chinook recreational TAC for north of Cape Falcon (C.5).

Cape Alava to Queets River (La Push Subarea)

June 27 through the earlier of September 20 or 4,480 marked coho subarea quota with a subarea guideline of 950 Chinook (C5).

September 26 through the earlier of October 11 or 100 marked coho quota or 100 Chinook quota (C5) in the area north of 47°50′00″ N. lat. and south of 48°00′00″ N. lat. (C.6).

Tuesday through Saturday through July 17; seven days per week thereafter. All salmon. Two fish per day, no more than one of which can be a Chinook, plus two additional pink salmon. All retained coho must be marked. Chinook 24-inch total length minimum size limit (B). See gear restrictions (C.2). Inseason management may be used to sustain season length and keep harvest within the overall Chinook recreational TAC for north of Cape Falcon (C.5).

Queets River to Leadbetter Point (Westport Subarea)

June 28 through the earlier of September 20 or 65,270 marked coho subarea quota with a subarea guideline of 11,850 Chinook (C.5). Sunday through Thursday through July 23, seven days per week thereafter. All salmon, two fish per day, no more than one of which can be a Chinook, plus one additional pink salmon. Chinook 24-inch total length minimum size limit) (B). All retained coho must be marked. See gear restrictions and definitions (C.2, C.3). Grays Harbor Zone closed beginning August 1 (C.4.b). Inseason management may be used to sustain season length and keep harvest within the overall Chinook recreational TAC for north of Cape Falcon (C.5).

Leadbetter Point to Cape Falcon (Columbia River Subarea)

June 28 through the earlier of September 30 or 88,200 marked coho subarea quota with a subarea guideline of 5,400 Chinook (C.5). Seven days per week. All salmon, two fish per day, no more than one of which can be a Chinook. Chinook 24-inch total length minimum size limit (B). All retained coho must be marked. See gear restrictions and definitions (C.2, C.3). Columbia Control Zone closed (C.4.c). Inseason management may be used to sustain season length and keep harvest within the overall Chinook recreational TAC for north of Cape Falcon (C.5).

South of Cape Falcon, OR—Cape Falcon to Humbug Mt.

June 20 through the earlier of August 31 or an 110,000 marked coho quota for the area between Cape Falcon and the OR/CA border (C.5.e, C.6). Seven days per week. All salmon except Chinook, three fish per day (B, C.1). All retained coho must be marked.

September 1 through the earlier of September 30 or a 7,000 preseason marked coho quota (C.5.e, C.6). Seven days per week. All salmon except Chinook, two fish per day (B). All retained coho must be marked. Coho remaining from the June through August recreational 110,000 coho quota may be transferred inseason to the coho quota for this fishery. See gear restrictions and definitions (C.2, C.3). Fishing in the Stonewall Bank groundfish conservation area restricted to trolling only on days the all depth recreational halibut fishery is open (call the halibut fishing hotline 1–800–662–9825 for specific dates) (C.3, C.4.d). Open days and bag limit may be adjusted inseason to utilize the available quota (C.5).

In 2010, the season between Cape Falcon and Humbug Mt. will open March 15 for all salmon except coho, two fish per day (B, C.1, C.2, C.3).

Humbug Mt. to OR/CA Border

June 20 through the earlier of August 31 or a 110,000 marked coho quota for the area between Cape Falcon and the OR/CA border (C.5.e, C.6). Seven days per week. Except as provided below for the all salmon fishery, all salmon except Chinook. Two fish per day (B, C.1). All retained coho must be marked.

August 29 through September 7 (C.6). Seven days per week. Except as provided above for the mark selective coho fishery, all salmon except coho. Two fish per day (C.1). Chinook minimum size limit of 24 inches total length (B).

See gear restrictions and definitions (C.2, C.3).

OR/CA Border to Horse Mt. (California KMZ)

August 29 through September 7 (C.6). Seven days per week. All salmon except coho. Two fish per day (C.1). Chinook minimum size limit of 24 inches total length (B). See gear restrictions and definitions (C.2, C.3). Klamath Control Zone closed in August (C.4.e).

Horse Mt. to U.S./Mexico Border

Closed. In 2010, season opens April 3 for all salmon except coho, two fish per day (C.1). Chinook minimum size limit of 20 inches total length (B); and the same gear restrictions as in 2009 (C.2, C.3).

B. Minimum Size (Total Length in Inches) (See C.1)

Area (when open)	Chinook	Coho	Pink
North of Cape Falcon	24.0	16.0	None
Cape Falcon to Humbug Mt	.....	16.0	None
Humbug Mt. to OR/CA Border	24.0	16.0	None
OR/CA Border to Horse Mountain	24.0	.....	24.0
Horse Mt. to U.S./Mexico Border	.....	.....	.....

Metric equivalents: 28.0 in = 71.1 cm, 27.0 in = 68.6 cm, 26.0 in = 66.0 cm, 21.5 in = 54.6 cm, 19.5 in = 49.5 cm, 16.0in = 40.6 cm, and 12.0 in = 30.5 cm.

C. Special Requirements, Definitions, Restrictions, or Exceptions

C.1. Compliance With Minimum Size and Other Special Restrictions:

All salmon on board a vessel must meet the minimum size or other special requirements for the area being fished and the area in which they are landed if that area is open. Salmon may be landed in an area that is closed only if they meet the minimum size or other special requirements for the area in which they were caught.

Ocean Boat Limits: Off the coast of Washington, Oregon, and California, each fisher aboard a vessel may continue to use angling gear until the combined daily limits of salmon for all licensed and juvenile anglers aboard has been attained (additional state restrictions may apply).

C.2. Gear Restrictions:

Salmon may be taken only by hook and line using barbless hooks. All persons fishing for salmon, and all persons fishing from a boat with salmon on board, must meet the gear restrictions listed below for specific areas or seasons.

a. U.S./Canada Border to Point Conception, California: No more than one rod may be used per angler; and no more than two single point, single shank barbless hooks are required for all fishing gear. [Note: ODFW regulations in the state-water fishery off Tillamook Bay may allow the use of barbed hooks to be consistent with inside regulations.]

b. Horse Mt., California, to Point Conception, California: Single point, single shank, barbless circle hooks (see gear definitions below) are required when fishing with bait by any means other than trolling, and no more than two such hooks shall be used. When angling with two hooks, the distance between the hooks must not exceed five inches when measured from the top of

the eye of the top hook to the inner base of the curve of the lower hook, and both hooks must be permanently tied in place (hard tied). Circle hooks are not required when artificial lures are used without bait.

C.3. Gear Definitions:

a. Recreational fishing gear defined: Angling tackle consisting of a line with no more than one artificial lure or natural bait attached. Off Oregon and Washington, the line must be attached to a rod and reel held by hand or closely attended; the rod and reel must be held by hand while playing a hooked fish. No person may use more than one rod and line while fishing off Oregon or Washington. Off California, the line must be attached to a rod and reel held by hand or closely attended. Weights directly attached to a line may not exceed four pounds (1.8 kg). While fishing off California north of Point Conception, no person fishing for salmon, and no person fishing from a boat with salmon on board, may use more than one rod and line. Fishing includes any activity which can reasonably be expected to result in the catching, taking, or harvesting of fish.

b. Trolling defined: Angling from a boat or floating device that is making way by means of a source of power, other than drifting by means of the prevailing water current or weather conditions.

c. Circle hook defined: A hook with a generally circular shape and a point which turns inward, pointing directly to the shank at a 90° angle.

C.4. Control Zone Definitions:

a. The Bonilla-Tatoosh Line: A line running from the western end of Cape Flattery to Tatoosh Island Lighthouse (48°23′30″ N. lat., 124°44′12″ W. long.) to the buoy adjacent to Duntze Rock (48°28′00″ N. lat., 124°45′00″ W. long.), then in a straight line to Bonilla Point (48°35′30″ N. lat., 124°43′00″ W. long.) on Vancouver Island, British Columbia.

b. Grays Harbor Control Zone—The area defined by a line drawn from the Westport Lighthouse (46°53′18″ N. lat., 124°07′01″ W. long.) to Buoy #2 (46°52′42″ N. lat., 124°12′42″ W. long.) to Buoy #3 (46°55′00″ N. lat., 124°14′48″ W. long.) to the Grays Harbor north jetty (46°36′00″ N. lat., 124°10′51″ W. long.).

c. Columbia Control Zone: An area at the Columbia River mouth, bounded on the west by a line running northeast/southwest between the red lighted Buoy #4 (46°13′35″ N. lat., 124°06′50″ W. long.) and the green lighted Buoy #7 (46°15′09″ N. lat., 124°06′16″ W. long.); on the east, by the Buoy #10 line which bears north/south at 357° true from the south jetty at 46°14′00″ N. lat., 124°03′07″ W. long. to its intersection with the north jetty; on the north, by a line running northeast/southwest between the green lighted Buoy #7 to the tip of the north jetty (46°15′48″ N. lat., 124°05′20″ W. long. and then along the north jetty to the point of intersection with the Buoy #10 line; and on the south, by a line running northeast/southwest between the red lighted Buoy #4 and tip of the south jetty (46°14′03″ N. lat., 124°04′05″ W. long.), and then along the south jetty to the point of intersection with the Buoy #10 line.

d. Stonewall Bank Groundfish Conservation Area: The area defined by the following coordinates in the order listed:

44°37.46′ N. lat.; 124°24.92′ W. long.;
44°37.46′ N. lat.; 124°23.63′ W. long.;
44°28.71′ N. lat.; 124°21.80′ W. long.;
44°28.71′ N. lat.; 124°24.10′ W. long.;
44°31.42′ N. lat.; 124°25.47′ W. long.;

and connecting back to 44°37.46′ N. lat.; 124°24.92′ W. long.

e. Klamath Control Zone: The ocean area at the Klamath River mouth bounded on the north by 41°38′48″ N. lat. (approximately six nautical miles north of the Klamath River mouth); on the west, by 124°23′00″ W. long. (approximately 12 nautical miles off shore); and, on the south, by 41°26′48″ N. lat. (approximately 6 nautical miles south of the Klamath River mouth).

C.5. Inseason Management:

Regulatory modifications may become necessary inseason to meet preseason management objectives such as quotas, harvest guidelines, and season duration. In addition to standard inseason actions or modifications already noted under the season description, the following inseason guidance is provided to NMFS:

a. Actions could include modifications to bag limits, or days open to fishing, and extensions or reductions in areas open to fishing.

b. Coho may be transferred inseason among recreational subareas north of Cape Falcon on an impact neutral basis to help meet the recreational season duration objectives (for each subarea) after conferring with representatives of the affected ports and the Council's SAS recreational representatives north of Cape Falcon.

c. Chinook and coho may be transferred between the recreational and commercial fisheries north of Cape Falcon on an impact neutral basis if there is agreement among the representatives of the Salmon Advisory Subpanel (SAS).

d. If retention of unmarked coho is permitted in the area from the U.S./Canada border to Cape Falcon, Oregon, by inseason action, the allowable coho quota will be adjusted to ensure preseason projected mortality of critical stocks is not exceeded.

e. Marked coho remaining from the June through August Cape Falcon to OR/CA border recreational coho quota may be transferred to the September Cape Falcon to Humbug Mt. recreational fishery, or the Cape Falcon to Humbug Mt. non-Indian commercial non-mark-selective all salmon fishery on a fishery impact equivalent basis.

C.6. Additional Seasons in State Territorial Waters:

Consistent with Council management objectives, the States of Washington, Oregon, and California may establish limited seasons in state waters. Check state regulations for details.

Section 3. Treaty Indian Management Measures for 2009 Ocean Salmon Fisheries

Note: This section contains restrictions in parts A, B, and C which must be followed for lawful participation in the fishery.

A. Season Descriptions

U.S./Canada Border to Cape Falcon

May 1 through the earlier of June 30 or 19,000 Chinook quota. All salmon except coho. If the Chinook quota for the May-June fishery is not fully utilized, the excess fish cannot be transferred into the later all-salmon season. If the Chinook quota is exceeded, the excess will be deducted from the later all-salmon season. See size limit (B) and other restrictions (C).

July 1 through the earlier of September 15, or 20,000 preseason Chinook quota, or 60,000 coho quota. All Salmon. See size limit (B) and other restrictions (C).

B. Minimum Size (Inches)

Area (when open)	Chinook		Coho		Pink
	Total	Head-off	Total	Head-off	
North of Cape Falcon	24.0	18.0	16.0	12.0	None

Metric equivalents: 24.0 in = 61.0 cm, 18.0 in = 45.7 cm, 16.0in = 40.6 cm, and 12.0 in = 30.5 cm.

C. Special Requirements, Restrictions, and Exceptions

C.1. Tribe and Area Boundaries:

All boundaries may be changed to include such other areas as may hereafter be authorized by a Federal court for that tribe's treaty fishery.

S'KLALLAM—Washington State Statistical Area 4B (All).

MAKAH—Washington State Statistical Area 4B and that portion of the FMA north of 48°02′15″ N. lat. (Norwegian Memorial) and east of 125°44′00″; W. long.

QUILEUTE—That portion of the FMA between 48°07′36″ N. lat. (Sand Pt.) and 47°31′42″ N. lat. (Queets River) and east of 125°44′00″ W. long.

HOH—That portion of the FMA between 47°54′18″ N. lat. (Quillayute River) and 47°21′00″ N. lat. (Quinault River) and east of 125°44′00″ W. long.

QUINAULT—That portion of the FMA between 47°40′06″ N. lat. (Destruction Island) and 46°53′18″ N. lat. (Point Chehalis) and east of 125°44′00″ W. long.

C.2. Gear Restrictions:

a. Single point, single shank, barbless hooks are required in all fisheries.

b. No more than eight fixed lines per boat.

c. No more than four hand held lines per person in the Makah area fishery (Washington State Statistical Area 4B and that portion of the FMA north of 48°02′15″ N. lat. (Norwegian Memorial) and east of 125°44′00″ W. long.)

C.3. Quotas:

a. The quotas include troll catches by the S'Klallam and Makah tribes in Washington State Statistical Area 4B from May 1 through September 15.

b. The Quileute Tribe will continue a ceremonial and subsistence fishery during the time frame of September 15 through October 15 in the same manner as in 2004–2008. Fish taken during this fishery are to be counted against treaty troll quotas established for the 2009 season (estimated harvest during the October ceremonial and subsistence fishery: 100 Chinook; 200 coho).

C.4. Area Closures:

a. The area within a six nautical mile radius of the mouths of the Queets River (47°31′42″ N. lat.) and the Hoh River (47°45′12″ N. lat.) will be closed to commercial fishing.

b. A closure within two nautical miles of the mouth of the Quinault River (47°21′00″ N. lat.) may be enacted by the Quinault Nation and/or the State of Washington and will not adversely affect the Secretary of Commerce's management regime.

Section 4. Halibut Retention

Under the authority of the Northern Pacific Halibut Act, NMFS promulgated regulations governing the Pacific halibut fishery which appear at 50 CFR part 300, subpart E. On March 19, 2009, NMFS published a final rule (74 FR 11681) to implement the International Pacific Halibut Commission's (IPHC) recommendations, to announce fishery regulations for U.S. waters off Alaska and fishery regulations for treaty commercial and ceremonial and subsistence fisheries, some regulations for non-treaty commercial fisheries for U.S. waters off the West Coast, and approval of and implementation of the Area 2A Pacific halibut Catch Sharing Plan and the Area 2A management measures for 2009. The regulations and management measures provide that vessels participating in the salmon troll fishery in Area 2A (all waters off the States of Washington, Oregon, and California), which have obtained the appropriate IPHC license, may retain halibut caught incidentally during authorized periods in conformance with provisions published with the annual salmon management measures. A salmon troller may participate in the halibut incidental catch fishery during the salmon troll season or in the directed commercial fishery targeting halibut, but not both.

The following measures have been approved by the IPHC, and implemented by NMFS. During authorized periods, the operator of a vessel that has been issued an incidental halibut harvest license may retain Pacific halibut caught incidentally in Area 2A while trolling for salmon. Halibut retained must be no less than 32 inches (81.28 cm) in total length, measured from the tip of the lower jaw with the mouth closed to the extreme end of the middle of the tail, and must be landed with the head on. License applications for incidental harvest must be obtained from the International Pacific Halibut Commission (phone: 206–634–1838). Applicants must apply prior to April 1 of each year. Incidental harvest is authorized only during May and June troll seasons and after June 30 if quota remains and if announced on the NMFS hotline (phone: 800–662–9825). ODFW and WDFW will monitor landings. If the landings are projected to exceed the 29,362 pound preseason allocation or the total Area 2A non-Indian commercial halibut allocation, NMFS will take inseason action to close the incidental halibut fishery.

Beginning May 1, license holders may possess or land no more than one Pacific halibut per each two Chinook, except one Pacific halibut may be possessed or landed without meeting the ratio requirement, and no more than 35 halibut may be possessed or landed per trip. Pacific halibut retained must be no less than 32 inches in total length (with head on).

NMFS and the Council request that salmon trollers voluntarily avoid a ''C-shaped'' YRCA (North Coast Recreational YRCA) in order to protect yelloweye rockfish. The area is defined in the Pacific Council Halibut Catch Sharing Plan in the North Coast subarea (WA marine area 3) (See Section 1.C.7. for the coordinates).

Section 5. Geographical Landmarks

Wherever the words ''nautical miles off shore'' are used in this document, the distance is measured from the baseline from which the territorial sea is measured.

Geographical landmarks referenced in this document are at the following locations:

Cape Flattery, WA—48°23′00″ N. lat.
Cape Alava, WA—48°10′00″ N. lat.
Queets River, WA—47°31′42″ N. lat.
Leadbetter Point, WA—46°38′10″ N. lat.
Cape Falcon, OR—45°46′00″ N. lat.
Florence South Jetty, OR—44°00′54″ N. lat.
Humbug Mountain, OR—42°40′30″ N. lat.
Oregon-California Border—42°00′00″ N. lat.
Humboldt South Jetty, CA—40°45′53″ N. lat.
Horse Mountain, CA—40°05′00″ N. lat.
Point Arena, CA—38°57′30″ N. lat.
Point Reyes, CA—37°59′44″ N. lat.
Point San Pedro, CA—37°35′40″ N. lat.
Pigeon Point, CA—37°11′00″ N. lat.
Point Sur, CA—36°18′00″ N. lat.
Point Conception, CA—34°27′00″ N. lat.

Section 6. Inseason Notice Procedures

Actual notice of inseason management actions will be provided by a telephone hotline administered by the Northwest Region, NMFS, 206–526–6667 or 800–662–9825, and by U.S. Coast Guard Notice to Mariners broadcasts. These broadcasts are announced on Channel 16 VHF–FM and 2182 KHz at frequent intervals. The announcements designate the channel or frequency over which the Notice to Mariners will be immediately broadcast. Inseason actions will also be filed with the **Federal Register** as soon as practicable. Since provisions of these management measures may be altered by inseason actions, fishermen should monitor either the telephone hotline or Coast Guard broadcasts for current information for the area in which they are fishing.

Classification

This rule is necessary for conservation and management and is consistent with the Magnuson-Stevens Act.

This notification of annual management measures is exempt from review under Executive Order 12866.

The provisions of 50 CFR 660.411 state that if, for good cause, an action must be filed without affording a prior opportunity for public comment, the measures will become effective; however, public comments on the action will be received for a period of 15 days after the date of publication in the **Federal Register.** NMFS will receive public comments on this action until May 20, 2009. These regulations are being promulgated under the authority of 16 USC 1855(d) and 16 USC 773(c).

The Assistant Administrator for Fisheries, NOAA (AA) finds good cause under 5 U.S.C. 553(b)(B), to waive the requirement for prior notice and opportunity for public comment, as such procedures are impracticable and contrary to the public interest.

The annual salmon management cycle begins May 1 and continues through April 30 of the following year. May 1 was chosen because the pre-May harvests constitute a relatively small portion of the annual catch. The time-frame of the preseason process for determining the annual modifications to ocean salmon fishery management measures depends on when the pertinent biological data are available. Salmon stocks are managed to meet annual spawning escapement goals or specific exploitation rates. Achieving either of these objectives requires designing management measures that are appropriate for the ocean abundance predicted for that year. These pre-season abundance forecasts, which are derived from the previous year's observed spawning escapement, vary substantially from year to year, and are not available until January and February because spawning escapement continues through the fall.

The preseason planning and public review process associated with developing Council recommendations is initiated in February as soon as the forecast information becomes available. The public planning process requires coordination of management actions of four states, numerous Indian tribes, and the Federal Government, all of which have management authority over the stocks. This complex process includes the affected user groups, as well as the general public. The process is compressed into a 2-month period which culminates at the April Council meeting at which the Council adopts a recommendation that is forwarded to NMFS for review, approval and implementation of fishing regulations effective on May 1.

Providing opportunity for prior notice and public comments on the Council's recommended measures through a proposed and final rulemaking process would require 30 to 60 days in addition to the two-month period required for development of the regulations. Delaying implementation of annual fishing regulations, which are based on the current stock abundance projections, for an additional 60 days, would require that fishing regulations for May and June be set in the previous year, without knowledge of current stock status. Although this is currently done for fisheries opening prior to May, relatively little harvest occurs during that period (*e.g.*, in 2007 less than one percent of commercial and recreational harvest occurred prior to May 1). Allowing the much more substantial harvest levels normally associated with the May and June seasons to be regulated in a similar way would impair NMFS ability to protect weak stocks and ESA listed stocks, and provide harvest opportunity where appropriate. The choice of May 1 as the beginning of the regulatory season balances the need to gather and analyze the data needed to meet the management objectives of the Salmon FMP and the requirements to provide adequate public notice and comment on the regulations implemented by NMFS.

If these measures are not in place on May 1, the previous year's management measures will continue to apply in most areas. However, since the 2008 recreational management measures between Cape Falcon, Oregon and the Oregon/California border were implemented through an emergency rule, which has since expired, fisheries in this area will be closed until this rule is implemented. In 2008, the commercial fishery north of Cape Falcon began on May 3, with an 11,700 Chinook salmon quota, Saturday through Tuesday, with a landing limit of 50 Chinook salmon per vessel per period. In 2009 the commercial fishery north of Cape Falcon begins on May 1, on specific dates that are not the same as last year's dates, with a 13,745 Chinook salmon quota and a landing limit of 75 Chinook salmon per vessel per period. Therefore, if this regulation is not in place on May 1, fishers will lose the opportunity to fish during the first complete periods, and will be unnecessarily restricted to a lower period limit. In addition, the discrepancy will cause confusion for the fishermen. In addition, recreational ocean salmon fisheries north of Cape Falcon had a quota of 13,500 Chinook salmon between June 1 and June 28, while under the recommended 2009 regulations those fisheries will not open before June 27. Earlier season fisheries may use up the available Chinook salmon quota early and preclude fishing opportunity later in the summer. This could reduce or eliminate opportunity for fisheries targeted at more abundant coho. It could also result in unanticipated adverse impacts to key Chinook salmon stocks that were not considered during the preseason planning process. Recreational fisheries south of Cape Falcon were greatly restricted in 2008, and would be closed until this rule is effective. Under the recommended 2009 regulations recreational fishing south of Cape Falcon will start in June, and have a quota of 110,000 coho; managing these 2009 fisheries according to 2008 regulations would limit harvest opportunity that could otherwise be available.

Overall, the annual population dynamics of the various salmon stocks require managers to vary the season structure of the various West Coast area fisheries to both protect weaker stocks and give fishers access to stronger salmon stocks, particularly hatchery produced fish. Failure to implement these measures immediately could compromise the status of certain stocks, or result in foregone opportunity to harvest stocks whose abundance has increased relative to the previous year thereby undermining the purpose of this agency action. Based upon the above-described need to have these measures effective on May 1 and the fact that there is limited time available to implement these new measures after the final Council meeting in April and before the commencement of the ocean salmon fishing year on May 1, NMFS has concluded it is impracticable and contrary to the public interest to provide an opportunity for prior notice and public comment under 5 U.S.C. 553(b)(B).

The AA also finds that good cause exists under 5 U.S.C. 553(d)(3), to waive the 30-day delay in effectiveness of this final rule. As previously discussed, data are not available until February and management measures not finalized until early April. These measures are essential to conserve threatened and endangered ocean salmon stocks, and to provide for harvest of more abundant stocks. Failure to implement these measures immediately could compromise the ability of some stocks to attain their conservation objectives preclude harvest opportunity, and

negatively impact anticipated international, state, and tribal salmon fisheries, thereby undermining the purposes of this agency action.

To enhance notification of the fishing industry of these new measures, NMFS is announcing the new measures over the telephone hotline used for inseason management actions and is also posting the regulations on both of its West Coast regional Web sites (*www.nwr.noaa.gov* and *swr.nmfs.noaa.gov*). NMFS is also advising the States of Washington, Oregon, and California on the new management measures. These states announce the seasons for applicable state and Federal fisheries through their own public notification systems.

This action contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA), and which have been approved by the Office of Management and Budget (OMB) under control number 0648–0433. The public reporting burden for providing notifications if landing area restrictions cannot be met is estimated to average 15 minutes per response. This estimate includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (see **ADDRESSES**) and by e-mail to *David_Rostker@omb.eop.gov*, or fax to 202–395–7285.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

NMFS has current ESA biological opinions that cover fishing under these regulations on all listed salmon species, except LCR Chinook. NMFS reiterated their consultation standards for all ESA listed salmon and steelhead species in their annual Guidance letter to the Council dated March 3, 2009. Some of NMFS past biological opinions have found no jeopardy, and others have found jeopardy, but provided reasonable and prudent alternatives to avoid jeopardy. The management measures for 2009 are consistent with the biological opinions that found no jeopardy, and with the reasonable and prudent alternatives in the jeopardy biological opinions. NMFS consulted this year on the effects of the 2009 annual regulations on LCR Chinook. NMFS concluded that the proposed 2009 fisheries are not likely to jeopardize the continued existence of LCR Chinook. The Council's recommended management measures therefore comply with NMFS' consultation standards and guidance for all listed salmon species which may be affected by Council fisheries. In most cases, the recommended measures result in impacts that are more restrictive than NMFS' ESA requirements.

Southern resident killer whales were listed as endangered effective February 16, 2006. NMFS consulted on the effects of the 2006, 2007, and 2008 fisheries on killer whales and concluded that the fisheries were not likely to jeopardize the continued existence of the species. NMFS is currently consulting regarding the effects of fisheries managed under the Council's Salmon FMP on the food supply for killer whales through a separate ESA consultation and biological opinion. NMFS expects to complete the consultation prior to May 1, 2009 or shortly thereafter. While the consultation may not be completed prior to approval of this action, NMFS has determined that the anticipated fisheries will not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures. In the event that the review suggests that further constraints in the 2009 fisheries are necessary, appropriate corrections can be made by NMFS through inseason action.

This final rule was developed after meaningful consultation and collaboration with the affected tribes. The tribal representative on the Council made the motion for the regulations that apply to the tribal vessels.

Authority: 16 U.S.C. 773–773k; 1801 *et seq.*

Dated: April 29, 2009.

James W. Balsiger,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. E9–10308 Filed 4–30–09; 4:15 pm]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 090428799–9802–01]

RIN 0648–AX24

Magnuson-Stevens Act Provisions; Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; Biennial Specifications and Management Measures

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

ACTION: Final rule; inseason adjustments to groundfish management measures; Pacific whiting reapportionment; correction; request for comments.

SUMMARY: This final rule establishes the 2009 fishery specifications for Pacific whiting in the U.S. exclusive economic zone (EEZ) and state waters off the coasts of Washington, Oregon, and California, as authorized by the Pacific Coast Groundfish Fishery Management Plan (FMP). These specifications include the level of the acceptable biological catch (ABC), optimum yield (OY), and allocations for the non-tribal commercial sectors. This final rule also announces the reapportionment of Pacific whiting allocation from the tribal sector to the non-tribal sectors; adjusts bycatch limits for the non-tribal commercial sectors of the Pacific whiting fishery; and corrects the Pacific whiting primary season dates.

DATES: Effective April 30, 2009. Comments on the revisions to bycatch limits must be received no later than 5 p.m., local time on May 20, 2009.

ADDRESSES: You may submit comments, identified by RIN 0648 AX24 by any of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov*.
- *Fax:* 206–526–6736, *Attn:* Becky Renko.
- *Mail:* Barry A. Thom, Acting Regional Administrator, Northwest Region, NMFS, Attn: Becky Renko, 7600 Sand Point Way, NE., Seattle, WA 98115–0070.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* <*http://www.regulations.gov/*> without change. All personal identifying information (for example, name, address, etc.)

voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Copies of the final environmental impact statement (FEIS) for this action are available from Donald McIsaac, Executive Director, Pacific Fishery Management Council (Council), 7700 NE., Ambassador Place, Portland, OR 97220, phone: 503–820–2280. Copies of additional reports referred to in this document may also be obtained from the Council. Copies of the Record of Decision (ROD), final regulatory flexibility analysis (FRFA), and the Small Entity Compliance Guide are available from Barry A. Thom, Acting Administrator, Northwest Region (Regional Administrator), NMFS, 7600 Sand Point Way, NE., Seattle, WA 98115–0070.

FOR FURTHER INFORMATION CONTACT: Becky Renko (Northwest Region, NMFS) 206–526–6110.

SUPPLEMENTARY INFORMATION:

Electronic Access

This final rule is accessible via the Internet at the Office of the Federal Register Web site at *http://www.gpoaccess.gov/fr/index.html*. Background information and documents are available at the NMFS Northwest Region Web site at *http://www.nwr.noaa.gov/Groundfish-Halibut/Groundfish-Fishery-Management/index.cfm*.

Background

A proposed rulemaking to implement the 2009–2010 specifications and management measures for the Pacific Coast groundfish fishery was published on December 31, 2008 (73 FR 80516). A final rule was published on March 6, 2009 (74 FR 9874) which codified the specifications and management measures in the CFR (50 CFR part 660, subpart G), except for the Pacific Whiting harvest specifications. This final rule establishes the 2009 harvest specifications for Pacific whiting. The rules announced a range of Pacific whiting harvest specifications that were being considered for 2009 and 2010, and also announced the intent to adopt final specifications after the Council's March 2009 and 2010 meetings. As explained below, the information necessary for the updated stock assessment is not available until January or February, which necessarily delays the preparation of the stock assessment until almost February. Delaying the adoption of whiting specifications until March is consistent with the U.S.-Canada agreement for Pacific whiting.

In November 2003, the U.S. and Canada signed an agreement regarding the conservation, research, and catch sharing of Pacific whiting. At this time, both countries are taking steps to fully implement the agreement. Until this occurs, the negotiators recommended that each country apply the agreed upon provisions to their respective fisheries. In addition to the time frame in which stock assessments are to be considered and harvest specifications established, the U.S.-Canada agreement specifies how the catch is to be shared between the two countries. The Pacific whiting catch sharing arrangement provides 73.88 percent of the total catch OY to the U.S. fisheries and 26.12 percent to the Canadian fisheries.

Pacific Whiting Stock Status

The joint U.S.-Canada Stock Assessment Review (STAR) panel met February 3–6, 2009, in Seattle, Washington to review a draft Stock Assessment of Pacific Hake (Pacific whiting) in U.S. and Canadian Waters in 2009. After careful consideration and review of the stock assessment model, the STAR panel recommended a final base model which was a particular configuration of the Stock Synthesis III model. The Stock Synthesis III model is an age-structured stock assessment model. Age-structured assessment models of various forms have been used to assess Pacific whiting since the early 1980s; these models use data on total fishery landings, fishery length and age compositions and survey abundance indices.

The final base model used for the 2009 stock assessment built on the 2008 model but included new data and refined the modeling of aging imprecision. The primary differences between the 2008 and 2009 stock assessment models are that the 2009 assessment included more flexibility in modeling fishery selectivity, improves the manner in which aging errors are handled, and freely estimated the level of recruitment variability (recruitment is the biomass of fish that mature and enter the fishery each year). The following new data were incorporated into the 2009 stock assessment: historical length data from Santa Barbara, California (1963–1970); 2008 catches from the U.S. and Canada; and 2008 length and conditional age-at-length compositions from the U.S. and Canada. In combination, these model changes and additional data produced a large downward shift in the absolute scale of Pacific whiting biomass estimate.

Imprecisely estimated stock assessment parameters are expected to change as new data are added or when changes are made to the model's structure. The 2009 stock assessment did not show an obvious retrospective pattern. The retrospective analysis was conducted by systematically removing the terminal years' (2008–2001) data, one after the other, for eight years. An obvious retrospective pattern is not a desirable characteristic and would indicate a pathological model misspecification.

In general, Pacific whiting is a very productive species with highly variable recruitment and a relatively short life span when compared to most other groundfish species. The base model indicates that the Pacific whiting female spawning biomass declined rapidly after a peak in 1984. The decline continued until 2000 and was followed by a brief increase to a peak in 2003 as the large 1999 year class matured (fish spawned during a particular year are referred to as a year class). The stock biomass at the beginning of 2009 is estimated to be at 32 percent of the estimated unfished spawning biomass. The revised estimate of the 2008 spawning biomass is 51 percent lower than the estimate from the previous assessment, reflecting a downward revision in the estimated absolute scale of the Pacific whiting biomass. However, a revised estimate of the 2008 depletion level is 41 percent, which is slightly higher than the 38 percent estimated by the 2008 assessment.

The 1999 year class was estimated to be the largest in the last 25 years and has supported fishery catches since 2002. Although the 1999 year class is still available to the fishery, the stock assessment results indicate that the biomass continues to decline as the 1999 year class moves through the fishery. Estimates of the stock status indicate that the Pacific whiting stock is at the lowest spawning biomass ever observed. Without another strong year class the biomass is projected to further decline. The 2005 year class is believed to be reasonably strong. However, the strength of the 2005 recruitment is still very uncertain, because the last survey was in 2007, and also because fewer than half of the fish younger than 4 are generally selected by either the survey or the fishery. Better information on the strength of the 2005 year class, as well as the 2006 year class, will be available

following survey work scheduled for 2009.

At the Council's March 2009 meeting the Scientific and Statistical Committee (SSC) reviewed the assessments and the STAR Panel report, and endorsed the use of the stock synthesis III model as the best available scientific data and recommended the use of the stock assessment in selecting harvest specifications. The SSC also recommended using the decision table based on Markov Chain Monte Carlo (MCMC—a computing technique used for sampling probabilistically from the possible parameterizations of the model, thus representing the uncertainty in the present state) integration of the posterior distribution for management purposes. The SSC made this recommendation because the MCMC decision table describes the Pacific whiting biomass depletion levels in probabilistic terms rather than as point estimates, and thus provides improved information on the uncertainty and risk (of both overfishing and of being overfished in any subsequent year) associated with each possible management action. The MCMC decision table is based on the distribution of possible current states of nature for the following characteristics of stock status—the female spawning biomass, the state of depletion, and the relative state of overfishing (relative spawning potential ratio)—generated from the MCMC modeling. Within the MCMC decision table, probabilities ranging from 5 percent to 95 percent were presented. The 5th percentile column identifies values where there is only a 5-percent likelihood of the true value being lower. Values in the 50th percentile (middle) columns are the best risk neutral characterization of current states, because there is an equal chance that the true values are either higher or lower.

ABC/OY Recommendations

Following the review of the new stock assessment results and consideration of the SSC comments and public comments, the Council recommended harvest specifications for 2009. The final ABC and OY values recommended by the Council for 2009 are based on a new stock assessment, and are consistent with the U.S.-Canada agreement and the impacts considered in the FEIS for the 2009 and 2010 management measures. The following use of the term ABC is not in the same sense as in Magnuson-Stevens Act's National Standard One Guidelines. It is used as defined in the Pacific Coast Groundfish FMP. The FMP defines the ABC as the Maximum Sustainable Yield (the largest average catch that can be taken continuously from a stock under average environmental conditions) harvest level associated with the current stock abundance.

Two U.S.-Canada coastwide ABC values were considered by the Council: An ABC of 291,965 metric tons (mt) based on $F_{40\%}$ harvest rate; and an ABC of 253,582 mt based on an estimated catch level at the center of the distribution (the mean value or that which produces a 50 percent probability of overfishing). The SSC indicated that with the $F_{40\%}$ harvest rate, the whiting biomass would be expected to fluctuate at a level below $B_{40\%}$ (the biomass level set out in the FMP as that at which a stock is estimated to be able to maintain its maximum sustainable yield over time). The value that the SSC identified as being the better estimate of ABC was 253,582 mt because the amount corresponds to the 50th percentile of the MCMC distribution. Following public testimony and Council deliberation, the Council recommended adoption of a U.S.-Canada coastwide ABC of 253,582 mt, and the U.S. share of the ABC is 187,346 mt (73.88 percent of the coastwide ABC).

The range of U.S. OYs analyzed in the FEIS for 2009 and 2010 specifications and management measures included: a low OY of 134,773 mt and a high OY of 404,318 mt (A U.S.-Canada OY range of 182,421 mt–547,263 mt) This range represents 50 percent to 150 percent of the 2008 U.S. OY of 269,545. These broad ranges in Pacific whiting harvest levels were analyzed in order to assess the potential range of the effects of the Pacific whiting fishery on incidentally-caught overfished species and the economic effects to coastal communities.

The range of U.S.-Canada coastwide OY values considered by the Council at its March meeting included: A high OY of 365,784 mt which is a constant harvest option based on the status quo harvest in 2008; an OY of 253,582 mt approximates to a 40–10 harvest policy with a higher ABC (The 40–10 harvest policy is used to set OYs for species that are below $B_{40\%}$ and not managed under overfished species rebuilding plans); a constant catch OY for 2009 of 215,000 mt which is an amount that has a greater than 50 percent probability that the stock depletion will fall below the overfished level by the beginning of 2010; a constant catch OY for 2009 of 184,000 mt which is the maximum harvest amount that maintains a greater than 50 percent probability of the stock remaining above $B_{25\%}$ (the overfished threshold) by the beginning of 2010; an OY of 137,526 mt based on the results of an alternative stock assessment model and the application of the 40–10 harvest policy; and 100,000 mt, the maximum constant catch amount that keeps the female spawning biomass from further decline over the next two years.

The high OY of 365,784 mt was not a viable alternative because it is expected to result in a greater than 50 percent probability of overfishing in 2009 and the stock being overfished by 2010. Under the Magnuson-Stevens Act National Standards, the choice of OY and the conservation and management measures proposed to achieve it must prevent overfishing. An OY of 253,582 mt is equal to the recommended ABC and is without the precautionary adjustments that are made to the OYs when a stock's biomass is less than $B_{40\%}$. Although an OY of 253,582 mt approximates the 40–10 harvest policy value for the maximum likelihood model, which had a higher ABC, the SSC expressed concern that given the variability in the Pacific whiting recruitment, the biomass could be expected to fluctuate below the overfished threshold ($B_{25\%}$). With an OY higher than 184,000 mt there would be a greater than 50 percent probability of the stock being overfished in 2010. The 2009 assessment indicates that with a U.S.-Canada OY of 184,000 mt or less there is a greater than 50 percent probability that the Pacific whiting biomass will stay above the overfished threshold throughout 2009.

Following deliberation and public testimony, the Council recommended adopting a U.S.-Canada coastwide OY of 184,000 mt with a corresponding U.S. OY of 135,939 mt for 2009. In making the OY recommendation, the Council expressed concern about the risk of the stock falling into the overfished category. The Council recommended this level so as to prevent overfishing, and to provide greater than a 50-percent probability that the stock will not be overfished at the beginning of 2010. The Council recommended this level with the understanding that through surveys conducted in 2009, there would be a much better understanding of the relative strength of the 2005 year class, as well as the 2006 year class, leading to better indicators of the overall abundance of Pacific whiting. The harvest will be adjusted next year, based on new information, taking into account the status of the stock at that time. Given the variation in the stock assessment results between years, the Council felt that this OY value for 2009 was a conservative approach. In reaching a conclusion the Council also considered how reductions in OY greater than this level would negatively impact fishers and processors, due to

the fact that Pacific whiting is the most abundant stock in the Pacific coast groundfish fishery and generates the highest value.

Allocations

In 1994, the United States formally recognized that the four Washington coastal treaty Indian tribes (Makah, Quileute, Hoh, and Quinault) have treaty rights to fish for groundfish in the Pacific Ocean. In general terms, the quantification of those rights is 50 percent of the harvestable surplus of groundfish that pass through the tribes' usual and accustomed ocean fishing areas (described at 50 CFR 660.324).

The Pacific Coast Indian treaty fishing rights, described at 50 CFR 660.385, allow for the allocation of fish to the tribes through the specification and management measures process. A tribal allocation (set-aside) is subtracted from the species OY before limited entry and open access allocations are derived. The tribal whiting fishery is a separate fishery, and is not governed by the limited entry or open access regulations or allocations.

Since 1996, only the Makah Tribe has prosecuted the tribal fishery for Pacific whiting. However, for the 2009–2010 harvest specification cycle, three of the four coastal tribes indicated their intent to participate in the fishery at some point during the two-year period. The Quinault Nation indicated their intent to start fishing in 2010, and both the Quileute and Makah Tribes indicated they intended to fish in both 2009 and 2010.

A Pacific whiting tribal allocation of 50,000 mt was adopted for 2009 in the 2009–2010 specifications and management measures published on March 6, 2009 (74 FR 9874) and set forth in regulation at 50 CFR 660.385. The set aside of 50,000 mt was based on the separate requests of the Quileute for up to 8,000 mt in 2009 and the Makah for up to 42,000 mt in 2009.

The 2009 commercial OY (non-tribal) for Pacific whiting is 81,939 mt. This is calculated by deducting the 50,000 mt tribal allocation and 4,000 mt for research catch and bycatch in non-groundfish fisheries from the 135,939 mt total catch OY. Regulations at 50 CFR 660.323(a)(2) divide the commercial OY into separate allocations for the non-tribal catcher/processor, mothership, and shore-based sectors of the Pacific whiting fishery.

The catcher/processor sector is comprised of vessels that harvest and process Pacific whiting. The mothership sector is comprised of motherships and catcher vessels that harvest Pacific whiting for delivery to motherships. Motherships are vessels that process, but do not harvest, Pacific whiting. The shoreside sector is comprised of vessels that harvest Pacific whiting for delivery to shoreside processors. Each sector receives a portion of the commercial OY, with the catcher/processors getting 34 percent (27,859 mt), motherships getting 24 percent (19,665 mt), and the shore-based sector getting 42 percent (34,414 mt).

Reapportionment

Regulations at 50 CFR 660.323(c) provide that if the Regional Administrator determines that a portion of the tribal set aside or another sector's allocation will not be used during the year, the Regional Administrator can reapportion that Pacific whiting to other sectors in proportion to their initial allocations. Given the low OY recommended by the Council, at the March PFMC meeting, the Makah Tribal representatives stated their intent to harvest only 23,789 mt of their 42,000 mt set aside and asked that the remaining 18,211 mt be reapportioned to the non-tribal sectors of the fishery. This notice announces the reapportionment of 18,211 mt of the tribal set aside to the non-tribal sectors of the Pacific whiting fishery. The resulting Pacific whiting allocations by sector are: catcher/processor 34,051 mt, mothership 24,034 mt, and shore-based 42,063 mt.

Bycatch Limit Adjustments

Bycatch limits have been used to restrict the catch of overfished species, particularly canary, darkblotched and widow rockfish, in the non-tribal Pacific whiting fisheries. With bycatch limits, the industry has the opportunity to harvest a larger Pacific whiting OY, providing the incidental catch of overfished species does not exceed the adopted bycatch limits. In recent years, bycatch limits have been used for the most constraining overfished species; darkblotched, canary and widow rockfish. Since 2005, a single bycatch limit for each species has been used for all commercial sectors of the fishery. However, for the 2009 fishery, concern that bycatch in one sector would result in the closure of a different sector of the fishery led to the implementation of sector-specific bycatch limits rather than a single bycatch limit for all commercial sectors (74 FR 9874; March 6, 2009).

If a sector-specific bycatch limit is reached or is projected to be reached, the Pacific whiting fishery for that sector will be closed, regardless of whether the Pacific whiting allocation has been achieved. When a sector is closed because a bycatch limit has been reached or was projected to be reached, unused amounts of the other bycatch limit species will be rolled-over to the remaining sectors of the non-tribal Pacific whiting fishery. If a sector reaches its whiting allocation, unused amounts of bycatch limit species will be shifted to those sectors of the non-tribal Pacific whiting fishery that remain open. Sector-specific bycatch limits are apportioned on the same percentages used to calculate the original sector whiting allocations.

During the development of the 2009–2010 specifications and management measures, the fleetwide widow rockfish impacts were estimated to be 450 mt. The best available data at the March Council meeting projected an increase in the catch of widow rockfish in the non-whiting groundfish fisheries over what was considered in the 2009–2010 specifications and management measures. If no reductions were made in the widow rockfish bycatch limit, the projected catch of widow rockfish in all groundfish fisheries could exceed the 2009 OY of 522 mt. Given the reductions in the Pacific whiting OY for 2009 and the projected increase in non-whiting groundfish fisheries, the Council recommended reducing the overall widow rockfish bycatch limit for the Pacific whiting fisheries to 250 mt. From the overall bycatch limit of 250 mt the following sector-specific bycatch limits are being established for widow rockfish: the catcher/processors bycatch limit is reduced from 153.0 mt to 85.0 mt; the mothership bycatch limit is reduced from 108.0 mt to 60.0 mt; and the shore-based bycatch limit is reduced from 189.0 mt to 105.0 mt. The Council also considered revising the canary and darkblotched rockfish bycatch limits, at their March meeting, but found no reason to revise them before the start of the season.

Correction

NMFS is correcting an error in the regulatory text at 50 CFR 660.373 (b)(1)(ii), which is the section that announces the start dates for the primary whiting fishery. Because of an early closure of the fishery and subsequent reopening in 2008 due to the canary rockfish bycatch limit being reached, the regulatory text in this section was revised to include the start and end dates specifically for 2008 (73 FR 60642, October 14, 2008). Inadvertently, the regulatory text was not changed back to eliminate the specific references to 2008, and to eliminate the closing dates. The correction reinstates the existing opening dates without closure dates.

This is consistent with the introductory text of the paragraph which describes a primary season fishery remaining open until the allocation or a bycatch limit is reached. Failure to make this change would leave the regulatory language outdated, confusing and internally inconsistent.

Classification

The final Pacific whiting specifications and management measures for 2009 are issued under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), and the Pacific Whiting Act of 2006, and are in accordance with 50 CFR part 660, subpart G, the regulations implementing the FMP. The Administrator, Northwest Region, NMFS, has determined that the 2009–2010 groundfish harvest specifications and management measures, which this final rule implements a portion of, are consistent with the national standards of the Magnuson-Stevens Act and other applicable laws.

For the following reasons, NMFS finds good cause, pursuant to 5 U.S.C. 553(b)(B) to waive prior public notice and comment on the 2009 Pacific whiting specifications. Also for these reasons, NMFS finds good cause to waive the 30-day delay in effectiveness pursuant to 5 U.S.C. 553(d)(3), so that this final rule may become effective as soon as possible after the April 1, 2009, fishery start date.

The FMP requires that fishery specifications be evaluated periodically using the best scientific information available. NMFS does a Pacific whiting stock assessment every year in which U.S. and Canadian scientists cooperate. The 2009 stock assessment for Pacific whiting was prepared in early 2009, which is the optimal time of year to conduct stock assessments for this species. New 2008 data used in this assessment that were not available until January, 2009 include: updated total catch, length and age data from the U.S. and Canadian fisheries, and biomass indices from the Joint US-Canadian acoustic/midwater trawl surveys. Pacific whiting differs from other groundfish species in that it has a shorter life span and the population fluctuates more swiftly. Thus, it is important to use the most recent stock assessment when determining ABC and OY. Because of the timing of the data and then the assessment, the results are not available for use in developing the new ABC and OY until just before the Council's annual March meeting. For the actions to be implemented in this final rule, affording the time necessary for prior notice and opportunity for public comment would prevent the agency from managing the Pacific whiting and related fisheries using the best available science. Delaying this action would be contrary to the public interest and NMFS's obligations under the Magnuson-Stevens Act because it would allow the fishery to proceed under the 2008 OY, which is approximately 50 percent higher than the 2009 OY. This could allow a sector to exceed its 2009 allocation, or at a minimum cause disruption of the fishery by lowering the OY part way through the season. Revisions to the season dates are necessary for regulatory consistency and to avoid confusion. Delaying action for public notice and comment is impracticable because without this correction the public will not have clear guidance regarding the timing and duration of the fishery. Under the standard regulations, the fishery opens in different areas on April 1, April 15, May 15 and June 15. Causing delay in a season because of confusion would prevent fishermen from accessing the whiting as it becomes available off their ports as the Pacific whiting migrate northward. Because notice and comment are not required, no RFA analysis is required and none was prepared.

The proposed rulemaking to implement the 2009 specifications and management measures, published on December 31, 2008 (73 FR 80516), addressed the delay in adopting the Pacific whiting ABC and harvest specifications. NMFS requested public comment on the proposed rule through January 30, 2009. The final rule was published on March 6, 2009 (74 FR 9874) and again explained that the final specifications within the proposed range would be recommended at the Council's March 2009 and 2010 meetings and implemented in the **Federal Register** as a final rule shortly thereafter.

The environmental impacts associated with the Pacific whiting harvest levels being adopted by this action are consistent with the impacts in the final environmental impact statement for the 2009–2010 specification and management measures. In approving the 2009–2010 groundfish harvest specifications and management measures, NMFS issued a Record of Decision (ROD). The ROD was signed on February 23, 2009. Copies of the FEIS and the ROD are available from the Council (see **ADDRESSES**).

An Initial Regulatory Flexibility Analysis (IRFA) and FRFA were prepared for the 2009–2010 harvest specifications and management measures, which included the regulatory impacts of this action on small entities. The IRFA was summarized in the proposed rule published on December 31, 2008 (73 FR 80516). A summary of the FRFA analysis, which covers the entire groundfish regulatory scheme of which this is a part, was published in the final rule on March 6, 2009 (74 FR 9874). A summary of the FRFA is contained below. The need for and objectives of this final rule are contained in the **SUMMARY** and in the Background section under **SUPPLEMENTARY INFORMATION**.

The final 2009–2010 specifications and management measures were intended to allow West Coast commercial and recreational fisheries participants to fish the harvestable surplus of more abundant stocks while also ensuring that those fisheries do not exceed the allowable catch levels intended to rebuild and protect overfished stocks. The specifications (ABCs and OYS) follow the guidance of the Magnuson-Stevens Act, the national standard guidelines, and the FMP for protecting and conserving fish stocks. Fishery management measures include trip and bag limits, size limits, time/area closures, gear restrictions, and other measures intended to allow year-round West Coast groundfish landings without compromising overfished species rebuilding measures.

In recent years the number of participants engaged in the Pacific whiting fishery has varied with changes in the whiting OY and economic conditions. Pacific whiting shoreside vessels (26 to 29), mothership processors (4 to 6), mothership catcher vessels (11–20), catcher/processors (5 to 9), Pacific whiting shoreside first receivers (8–16), and four tribal trawlers are the major units of this fishery.

In 2008, these participants harvested about 248,000 tons of whiting worth about $63 million in ex-vessel value based on shoreside ex-vessel prices of $254 per ton—the highest ex-vessel revenues and prices on record. In comparison, the 2007 fishery harvested about 224,000 tons worth $36 million at an average ex-vessel price of about $160 per ton. Over the years 2003–2007, estimated Pacific whiting ex-vessel values averaged about $29 million.

Seafood processors convert whiting into surimi, fillets, fish meal, and headed gutted products. Besides recent high OY levels, ex-vessel revenues have been increasing because of increased prices for headed and gutted whiting. From 2004–2007, wholesale prices for headed and gutted whiting product increased from about $1,200 per ton to $1,600 per ton. In 2008, wholesale

prices averaged $1,980 per ton according to U.S. Export Trade statistics. Fuel prices, a major expense for whiting vessels, also increased dramatically. For example, at the start of the primary fishery in June 2008 fuel prices were about $4.30 per gallon compared to June 2007 levels of $2.70 per gallon.

Being able to harvest the entire Pacific whiting OY will depend on how well the industry stays within the overfished species bycatch limits. For example, in 2008 the Pacific whiting shoreside fishery was closed prematurely because of overfished species bycatch issues, leaving a major portion of its allocation unharvested. Although NMFS transferred the unharvested allocations to the other nontribal fleets, by year-end, 7 percent of the 2008 whiting OY was unharvested. Assuming no bycatch issues, the 2009 allocations to the nontribal (100,150 mt) and tribal (31,789 mt) fleets will lead to a potential harvest of about 132,000 tons, a decrease of 47 percent from the harvest level in 2008 (248,000 mt). Assuming 2008 ex-vessel prices ($254/mt), this harvest could be potentially worth about $33.5 million. This level is similar to values earned in 2007 ($36 million) and greater than the 2003–2007 average ($29 million), but representing a 47 percent decrease from estimated 2008 ex-vessel value ($63 million).

However, market conditions in 2009 will not likely be the same as in 2008. On the positive side, the price of fuel has been declining since June of 2008. March 2009 fuel price estimates typically range from $1.60 to $1.70 a gallon depending on the port. On the negative side, some members of the industry expect whiting prices to fall substantially from record highs because of the recent decline in the U.S. and world economies.

In January 2009, the Pacific Fishery Management Council published the Final Environmental Impact Statement (FEIS): Proposed Acceptable Biological Catch and Optimum Yield Specifications and Management Measures for the 2009–2010 Pacific Coast Fishery. The FEIS includes an economic analysis of the range of alternatives the Council had under consideration. While that analysis included an assessment of the Council's Preferred Alternative, it realized the Council would make its final choice of the Pacific whiting OY in March 2009. The FEIS compared the Preferred Alternative to a No-Action Alternative (expected 2008 commercial groundfish landings and deliveries including whiting). The FEIS estimated that compared to the No-Action Alternative the Preferred Alternative would lead to an increase of $13.3 million in total tribal and nontribal commercial groundfish ex-vessel value (*See* Table 7–57a of the FEIS). However, that analysis included an assumed 2009 whiting catch of 298,000 mt (248,300 nontribal and 50,000 tribal) and an average 2009 ex-vessel value of $171/mt.

This rule limits the total tribal and nontribal catch to 132,000 mt. Thus compared to the No-Action Alternative in the FEIS, whiting harvest will decrease, not increase. Assuming average whiting ex-value used in the Council's analysis ($171 per mt), this rule would result in the total 2009 whiting ex-vessel value of $22.6 million. This is $28.5 million less than the FEIS projection of $51.1 million. When this change is combined with the projections for the other groundfish fisheries, rather than an increase of $13.3 million this rule would result in a $15.1 million decrease in the total combined tribal and non-tribal groundfish value. Updating the Council's analysis using the 2008 average whiting ex-vessel of $254/mt, the Preferred Alternative would lead to a projected decrease of $4.2 million in total combined tribal and nontribal groundfish ex-vessel value, not an increase of $13.3 million as shown in Table 7–57a of the FEIS.

Pursuant to Executive Order 13175, this action was developed after meaningful consultation and collaboration with tribal officials from the area covered by the FMP. Under the Magnuson-Stevens Act at 16 U.S.C. 1852(b)(5), one of the voting members of the Council must be a representative of an Indian tribe with federally recognized fishing rights from the area of the Council's jurisdiction. In addition, regulations implementing the FMP establish a procedure by which the tribes with treaty fishing rights in the area covered by the FMP request new allocations or regulations specific to the tribes, in writing, before the first of the two meetings at which the Council considers groundfish management measures. Both the Makah and Quileute Tribes requested a whiting allocation for 2009. The regulations at 50 CFR 660.324(d) further states ''the Secretary will develop tribal allocations and regulations under this paragraph in consultation with the affected tribe(s) and, insofar as possible, with tribal consensus.'' The release of some Pacific whiting from the Makah tribal set aside was proposed by the Makah tribe.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

List of Subjects in 50 CFR Part 660

Fisheries, Fishing, and Indian Fisheries.

Dated: April 30, 2009.

James W. Balsiger,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR part 660 is amended as follows:

PART 660—FISHERIES OFF WEST COAST STATES

■ 1. The authority citation for part 660 is amended to read as follows:

Authority: 16 U.S.C. 1801 *et seq.* and 16 U.S.C. 7001 *et seq.*

■ 2. In § 660.373 paragraphs (b)(1)(iii) and (b)(4)(i) are revised to read as follows:

§ 660.373 Pacific whiting (whiting) fishery management.

* * * * *

(b) * * *

(1) * * * * *

(iii) *Primary whiting seasons.* After the start of a primary season for a sector of the whiting fishery, the season remains open for that sector until the quota is taken or a bycatch limit is reached and the fishery season for that sector is closed by NMFS. The starting dates for the primary seasons for the whiting fishery are as follows:

(A) Catcher/processor sector—May 15.

(B) Mothership sector—May 15.

(C) Shore-based sector

(*1*) North of 42° N. lat.—June 15;

(*2*) Between 42°–40°30′ N. lat.—April 1; and

(*3*) South of 40°30′ N. lat.—April 15.

* * * * *

(4) * * *

(i) The whiting fishery bycatch limit is apportioned among the sectors identified in paragraph (a) of this section based on the same percentages used to allocate whiting among the sectors, established in § 660.323(a). The sector specific bycatch limits are: For catcher/processors 6.1 mt of canary rockfish, 85.0 mt of widow rockfish, and 8.5 mt of darkblotched rockfish; for motherships 4.3 mt of canary rockfish, 60.0 mt of widow rockfish, and 6.0 mt of darkblotched rockfish; and for shore-based 7.6 mt of canary rockfish, 105.0 mt of widow rockfish, and 10.5 mt of darkblotched rockfish.

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■ 3. In part 660, subpart G, Table 1a is revised to read as follows:

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Table 1a. To Part 660, Subpart G-2009, Specifications of ABCs, OYs, and HGs, by Management Area (weights in metric tons).

Species	ABC Specifications						OY	HG b/	
	ABC Contributions by Area					ABC			
	Vancouver a/	Columbia	Eureka	Monterey	Conception			Commercial	Recreation-al
ROUNDFISH:									
Lingcod c/ N of 42 N. lat.	4,473					5,278	5,278		
S of 42 N. lat.			805						
Pacific Cod e/	3,200		d/			3,200	1,600	1,200	
Pacific Whiting f/	187,346					187,346	135,939	81,939	
Sablefish g/ N of 36 N. lat.	9,914					9,914	7,052	6,347	
S of 36 N. lat.							1,371	1,371	
Cabezon h/ S of 42 N. lat.	d/		81		25	106	69		
FLATFISH:									
Dover sole i/	29,453					29,453	16,500		
English sole j/	14,326					14,326	14,326	-	
Petrale sole k/	1,509		1,302			2,811	2,433	-	
Arrowtooth flounder l/	11,267					11,267	11,267	-	
Starry Flounder m/	1,509					1,509	1,004		
Other flatfish n/	6,731					6,731	4,884	-	
ROCKFISH:									
Pacific Ocean Perch o/	1,160					1,160	189	187	

Species	ABC Specifications						OY	HG b/	
	ABC Contributions by Area					ABC		Commercial	Recreational
	Vancouver a/	Columbia	Eureka	Monterey	Conception				
Shortbelly p/	6,950					6,950	6,950		
Widow q/	7,728					7,728	522	460.4	7.2
Canary r/	937					937	105	42.3	43.8
Chilipepper s/	d/			3,037		3,037	2,885	2,885	
Bocaccio t/	d/			793		793	288	206.4	67.3
Splitnose u/	d/			615		615	461		
Yellowtail v/	4,562			d/		4,562	4,562		
Shortspine thornyhead w/ N of 34 27' N. lat.	2,437					2,437	1,608	1,608	
S of 34 27' N. lat.							414		
Longspine thornyhead x/ N of 34 27' N. lat.	3,766					3,766	2,231		
S of 34 27' N. lat.							395		
Cowcod y/	d/			13		13	4		
Darkblotched z/	437					437	285	282.05	
Yelloweye aa/	31					31	17	3.1	8
California Scorpionfish bb/					175	175	175		
Black cc/ N of 46 16' N. lat.	490					490	490		
S of 46 16' N. lat.			1,469			1,469	1,000		

Species	ABC Specifications						OY	HG b/	
	ABC Contributions by Area					ABC		Commercial	Recreation-al
	Vancouver a/	Columbia	Eureka	Monterey	Conception				
Minor Rockfish dd/ N of 40 10' N. lat.	3,678			--		3,678	2,283		
Minor Rockfish ee/ S of 40 10' N. lat.	--			3,384		3,384	1,990		
Remaining	1,640			1,318					
bank ff/	d/			350					
blackgill gg/	d/			292					
blue	28			213					
bocaccio north	318			--					
chilipepper north	32			--					
redstripe	576			d/					
sharpchin	307			45					
silvergrey	38			d/					
splitnose north	242			--					
yellowmouth	99			d/					
yellowtail	--			116					
gopher	d/			302					
Other rockfish hh/	2,038			2,066					
SHARKS/SKATES/RATFISH/MORIDS/GRENADIERS/KELP GREENLING:									
Longnose Skate ii/	3,428					3,428	1,349		
Other fish jj/	11,200					11,200	5,600		

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■ 4. Footnotes f/ and q/ to Tables 1a through 1c are revised to read as follows:

* * * * *

[f]Pacific whiting—The most recent stock assessment was prepared in February 2009. The stock assessment base model estimated the Pacific whiting biomass to be at 32 percent (50th percentile estimate of

depletion) of its unfished biomass in 2009. The U.S Canada coastwide ABC is 253,582 mt, the U.S. share of the ABC is 187,346 mt (73.88 percent of the coastwide ABC). The U.S.-Canada coastwide OY is 184,000 mt with a corresponding U.S. OY of 135,939 mt. The tribal set aside is 50,000 mt. The amount estimated to be taken as research catch and in non-groundfish fisheries is 4,000 mt. The commercial OY is 81,939 mt. Each sector receives a portion of the commercial OY, with the catcher/processors getting 34 percent (27,859 mt), motherships getting 24 percent (19,665 mt), and the shore-based sector getting 42 percent (34,414 mt). The allocation for the fishery south of 42°N. lat. is 1,721 mt.

* * * * *

q Widow rockfish was assessed in 2005 and an update was prepared in 2007. The stock assessment update estimated the stock to be at 36.2 percent of its unfished biomass in 2006. The ABC of 7,728 mt is based on the stock assessment update with an $F_{50\%\ FMSY}$ proxy. The OY of 522 mt is based on a rebuilding plan with a target year to rebuild of 2015 and an SPR harvest rate of 95 percent. To derive the commercial harvest guideline of 460.4 mt the OY is reduced by 1.1 mt for the amount anticipated to be taken during research activity, 45.5 mt for the tribal set-aside, 7.2 mt the amount estimated to be taken in the recreational fisheries, 0.4 mt for the amount expected to be taken incidentally in non-groundfish fisheries, and 7.4 mt for the amount projected to be taken during EFP fishing. The following are the sector specific bycatch limits established for the Pacific whiting fishery: 85.0 mt for catcher/processors, 60.0 mt for motherships, and 105.0 mt for shore-based.

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[FR Doc. E9–10306 Filed 4–30–09; 8:45 am]

BILLING CODE 3510–22–C

Proposed Rules

Federal Register
Vol. 74, No. 85
Tuesday, May 5, 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.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 983

[Doc. No. AO–FV–08–0147; AMS–FV–08–0051; FV08–983–1]

Pistachios Grown in California; Recommended Decision and Opportunity To File Written Exceptions to Proposed Amendment of Marketing Order No. 983

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and opportunity to file exceptions.

SUMMARY: This is a recommended decision regarding proposed amendments to Marketing Agreement and Order No. 983 (order), which regulates the handling of pistachios grown in California. The amendments were proposed by the Administrative Committee for Pistachios (Committee), which is responsible for local administration of the order. The proposed amendments would: Expand the production area covered under the order to include Arizona and New Mexico in addition to California; authorize the Committee to reimburse handlers for a portion of their inspection and certification costs in certain situations; authorize the Committee to recommend research projects; modify existing order authorities concerning aflatoxin and quality regulations; modify the authority for interhandler transfers of order obligations; redesignate several sections of the order; remove previously suspended order provisions, and make other related changes. The amendments are intended to improve the operation and functioning of the marketing order program. This recommended decision invites written exceptions on the proposed amendments. This rule also announces AMS's intention to request approval by the Office of Management and Budget (OMB) of a new information collection.

DATES: Written exceptions must be filed by June 4, 2009. Pursuant to the Paperwork Reduction Act, comments on the information collection burden must be received by July 6, 2009.

ADDRESSES: Written exceptions should be filed with the Hearing Clerk, U.S. Department of Agriculture, Room 1031–S, Washington, DC 20250–9200, *Fax:* (202) 720–9776 or via the Internet at *http://www.regulations.gov,* or to Martin Engeler at the E-mail address provided in the **FOR FURTHER INFORMATION CONTACT** section. All comments should reference the document number and the date and page number of this issue of the **Federal Register**. Comments will be made available for public inspection in the Office of the Hearing Clerk during regular business hours, or can be viewed at: *http://www.regulations.gov.* All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Martin Engeler, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, Suite 102–B, Fresno, California 93721; *Telephone:* (559) 487–5110, *Fax:* (559) 487–5906, or *E-mail: Martin.Engeler@ams.usda.gov;* or Laurel May, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., Stop 0237, Washington, DC 20250–0237; *Telephone:* (202) 720–1509, *Fax:* (202) 720–8938, or *E-mail: Laurel.May@ams.usda.gov.*

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

SUPPLEMENTARY INFORMATION: Prior document in this proceeding: Notice of Hearing issued on July 15, 2008, and published in the July 18, 2008, issue of the **Federal Register** (73 FR 41298).

This action is governed by the provisions of sections 556 and 557 of title 5 of the United States Code and is therefore excluded from the requirements of Executive Order 12866.

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to the proposed amendments to Marketing Agreement and Order 983 regulating the handling of pistachios grown in California, and the opportunity to file written exceptions thereto. Copies of this decision can be obtained from Martin Engeler, whose address is listed above.

This recommended decision is issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act'', and the applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR Part 900).

The proposed amendments are based on the record of a public hearing held July 29 and 30, 2008, in Fresno, California. Notice of this hearing was published in the **Federal Register** on July 18, 2008 (73 FR 41298). The notice of hearing contained the proposals submitted by the Committee.

The proposed amendments were recommended by the Committee and submitted to USDA on June 10, 2008. After reviewing the recommendation and other information submitted by the Committee, AMS determined to proceed with the formal rulemaking process and schedule the matter for hearing.

The proposed amendments include addition of new sections to the order which would result in numerical redesignation of several sections of the order. The redesignated sections would allow the related provisions to be grouped together in the order. The proposed amendments recommended by the Committee are summarized below.

1. Proposal 1 would amend the order to expand the production area to include the States of Arizona and New Mexico. The production area covered under the order is currently limited to the State of California. This proposal would revise existing § 983.26, Production area, and redesignate it as § 983.25. It would also result in corresponding changes being made to existing § 983.11, Districts; § 983.21, Part and subpart; and existing § 983.32, Establishment and membership. Existing sections 983.21 and 983.32

would also be redesignated as § 983.20 and § 983.41, respectively.

2. Proposal 2 would amend the order to authorize the Committee to reimburse handlers for travel and shipping costs related to aflatoxin inspection, under certain circumstances. This proposal would amend existing § 983.44, Inspection, certification and identification, and redesignate it as § 983.56.

3. Proposal 3 would amend the order to add a new § 983.46, Research, that would authorize the Committee to engage in research projects with the approval of USDA. This proposed amendment would also require corresponding changes to existing § 983.34, Procedure, to establish voting requirements for Committee recommendations concerning research. It would also require corresponding changes to existing § 983.46, Modification or suspension of regulations, and § 983.54, Contributions. The existing § 983.34, § 983.46, and § 983.54 would also be redesignated as § 983.43, § 983.59, and § 983.72, respectively.

4. Proposal 4 would amend the order to provide broad authority for aflatoxin regulations by revising existing § 983.38, Aflatoxin levels, and redesignating it as § 983.50. This proposal would also require corresponding changes to existing § 983.40, and redesignating that section as § 983.52. It would also require corresponding changes to § 983.1, Accredited laboratory.

5. Proposal 5 would amend the order to provide broad authority for quality regulations by revising existing § 983.39, Minimum quality levels, and redesignating it as § 983.51. It would also remove provisions from that section concerning specific quality regulations that are currently suspended. This amendment would also require corresponding changes by removing currently suspended language in § 983.6, Assessed weight; revising § 983.7, Certified pistachios; removing existing § 982.19, Minimum quality requirements and § 983.20, Minimum quality certificate; revising existing § 983.31, Shelled pistachios; revising existing § 983.41, Testing of minimal quantities, and removing currently suspended language in that section; revising existing § 983.42, Commingling; and revising existing § 983.45, Substandard pistachios. Sections 983.31, 983.41, 983.42, and 983.45 would be redesignated as sections 983.30, 983.53, 983.54, and 983.57, respectively.

6. Proposal 6 would amend the order to add a new § 983.58, Interhandler Transfers. This proposal would modify existing authority under the order by expanding the range of marketing order obligations that may be transferred between handlers when pistachios are transferred between handlers. This proposal would require a corresponding change to existing § 983.53, Assessments, and would redesignate § 983.53 as § 983.71.

7. As a result of the proposed amendments and corresponding changes to the order summarized above, numerous administrative changes to the order would also be required. Such changes include numerical redesignations to several sections of the order, changes to cross references of section numbers in regulatory text as a result of the numerical redesignations, and removal of obsolete provisions. In addition, a change would be made to amend existing § 983.70 and redesignate it as § 983.92.

In addition to the proposed amendments to the order, AMS proposed to make any such additional changes as may be necessary to the order to conform to any amendment that may result from the hearing.

Fourteen industry witnesses testified at the hearing. These witnesses represented pistachio producers and handlers in the production area, as well as Committee staff, and all were supportive of the proposed amendments.

At the conclusion of the hearing, the Administrative Law Judge established a deadline of September 26, 2008, for interested persons to file proposed findings and conclusions or written arguments and briefs based on the evidence received at the hearing. Five briefs were filed during that period; all supported the proposed amendments.

Material Issues

The material issues presented on the record of hearing are as follows:

(1) Whether to amend the order to expand the production area to include the States of Arizona and New Mexico and to make related changes regarding Committee membership, representation, and voting requirements;

(2) Whether to amend the order to authorize the Committee to reimburse handlers for travel and shipping costs related to aflatoxin inspection, under certain circumstances;

(3) Whether to amend the order to add a new section that would authorize the Committee to engage in research projects with the approval of USDA;

(4) Whether to amend the order to provide broad authority for aflatoxin regulations;

(5) Whether to amend the order to provide broad authority for quality regulations and to remove existing provisions from the order concerning specific quality regulations that are currently suspended; and,

(6) Whether to amend the order to add specific provisions for interhandler transfers of marketing order obligations. This proposal would modify existing authority under the order by expanding the range of marketing order obligations that may be transferred between handlers when pistachios are transferred between handlers.

Numerous administrative changes to the order would also be required if the proposed amendments described in the material issues above are adopted. Such changes include numerical redesignations to several sections of the order, changes to cross references of section numbers in regulatory text as a result of the numerical redesignations, and removal of obsolete provisions.

Findings and Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof.

Material Issue Number 1—Expanding the Production Area

Section 983.26 of the order should be amended to expand the production area to include the States of Arizona and New Mexico. The production area is currently limited to the State of California. This section should also be redesignated as § 983.25. Sections 983.11, Districts; 983.21, Part and subpart; and 983.32, Establishment and membership, should also be amended to reflect the proposed addition of Arizona and New Mexico to the order. Section 983.34 should likewise be amended to revise the voting requirements needed to approve Committee actions due to the above proposed changes. Existing sections 983.21 and 983.32 should also be redesignated as sections 983.20 and 983.41, respectively.

The order regulating the handling of pistachios grown in the State of California was established in 2004. The primary feature of the order is a quality provision that requires pistachios to be sampled and tested for aflatoxin prior to shipment to domestic markets. Such shipments of pistachios may not exceed a tolerance level for aflatoxin of 15 parts per billion. Aflatoxin is a carcinogen that is considered to be harmful to humans if ingested.

According to the record, one of the primary reasons the order was established was to assure consumers of a high quality product through the aflatoxin program. Reducing the risk of potential aflatoxin incidence in

pistachios would help to bolster consumer confidence in the quality of pistachios, thus leading to increased demand and improved grower returns. An economic study that included a cost-benefit analysis of the aflatoxin provisions of the pistachio marketing order was included in the hearing record as hearing exhibit 10. This study's findings, which are discussed in more detail in the Regulatory Flexibility Analysis section of this recommended decision, indicate the order's aflatoxin program results in a positive benefit to both the industry and consumers over various time horizons.

Witnesses testified at the hearing that this proposal is intended to further the goal of improving the quality of pistachios available to consumers by reducing the risk of potential aflatoxin incidence in pistachios through expanding the scope of the regulatory requirements to include all the areas of the United States where pistachios are produced commercially. Record evidence indicates that area includes the States of California, Arizona, and New Mexico. The record shows that while California accounts for over 95 percent of commercial production (up to 98 percent in some years), the States of Arizona and New Mexico are also considered to have commercially significant production. Pistachios are also grown in small quantities in Texas, Utah, and Nevada. Witnesses testified that production from those states account for less than .02 percent (two one-hundredths of one percent) of the pistachios grown in the United States. Witnesses also testified that pistachios produced in those states are considered to be the result of hobby farming and are not commercially significant in volume. California, Arizona, and New Mexico account for over 99.99 percent of domestic pistachio production and essentially all of the production used for commercial purposes, according to the record.

Witnesses from both California and the new states proposed to be added to the production area (Arizona and New Mexico) testified in support of this proposal. They testified that the implications from an aflatoxin contamination incident in pistachios, whether within the current production area or otherwise, would have an adverse impact on the entire U.S. pistachio industry, citing a previous example. Examples of other events also were cited in other agricultural commodities.

Therefore, they believe it is important to the U.S. pistachio industry that the production area be expanded to cover all commercial pistachio producing areas in the U.S.

Witnesses from California testified that the aflatoxin testing program under the order has been successful since it was implemented in 2005. Through the aflatoxin sampling and testing program, pistachio lots exceeding the maximum tolerance for aflatoxin have been prevented from being shipped to markets.

Witnesses testified that to further improve the quality of product to consumers and to reduce the likelihood of an aflatoxin incident in the pistachio industry, all product destined for commercial shipment should be subject to the same aflatoxin sampling, testing, and maximum tolerance requirements. Witnesses testified that ensuring consumers of a good quality product will increase consumer confidence in pistachios, leading to increased demand and improved grower returns.

Witnesses from Arizona and New Mexico testified in support of those states being included under the order. They recognized the need to ensure that consumers receive a good quality product. They also recognized that an aflatoxin incident in any one commercial producing area could adversely affect other commercial producing areas.

Witnesses from Arizona and New Mexico testified that pistachios from those areas should not have any specific problems or issues that would make it difficult to meet aflatoxin requirements, when compared to California-grown pistachios. They testified that Arizona and New Mexico produce a high quality product and have not had any known problems with aflatoxin. They do not anticipate any problem meeting the aflatoxin requirements currently in effect under the order. Witnesses from Arizona and New Mexico also expressed that they did not believe that pistachios grown in those states would have any trouble meeting other quality regulations that may be established in the future.

Witnesses from Arizona and New Mexico also testified that they were aware there are certain costs associated with being included under the order. However, they testified that they believe the benefits associated with being included under the order would outweigh the costs.

Witnesses also testified that including Arizona and New Mexico under the existing order would be more desirable than establishing a separate order or orders applicable to their state or states. They stated that it is important that uniform quality and testing requirements be applied consistently to all commercially produced pistachios in the U.S., and the three states should be considered one production area under the order.

In addition to having consistent quality requirements, witnesses testified that it would be more cost effective to be included under the existing pistachio order than to establish a separate order or orders. Certain fixed costs are inherent in administering a marketing order program, such as staffing costs, office space, office equipment and supplies, etc. The existing marketing order has this infrastructure in place. If a separate order or orders were established, these costs would have to be funded separately, which would likely result in higher program administration costs than if Arizona and New Mexico were added to the existing order.

Section 983.11, Districts, should be amended to add a new district for Committee representation purposes. Expanding the production area to include Arizona and New Mexico warrants a change to the order with respect to geographic representation on the Committee and membership on the Committee. Currently, the order provides for three districts within the State of California. Witnesses supported establishing a new district encompassing the States of Arizona and New Mexico for Committee representation purposes. This new district would be District 4.

Witnesses from California, Arizona, and New Mexico testified that one member representing Arizona and New Mexico would provide the new District 4 with adequate representation on the Committee. One position on the Committee is equal to 1/12 of the Committee positions, or 8.3 percent. Based on data presented at the hearing, the 5-year average production of Arizona and New Mexico production was about 3.5 percent of the 5-year average of U.S. production for the period 2002 through 2006.

Section 983.32, Establishment and membership, should be amended to reflect the addition of a new district and an additional member on the Committee. Witnesses testified in support of changes to this section to reflect the addition of the new District 4 encompassing the States of Arizona and New Mexico, an increase in Committee size from eleven to twelve total members, and an increase in the number of producer members on the Committee from eight to nine. This section should also be redesignated as § 983.41.

As a result of the inclusion of Arizona and New Mexico under the order, it is

recommended that § 983.34, Procedure, be amended to revise the voting requirements necessary to approve certain actions of the Committee. Witnesses testified that a unanimous vote of the Committee should be required in order to approve actions on research, aflatoxin regulations, and quality regulations. This would ensure that broad industry support exists before actions of the Committee regarding these issues are taken. According to the record, the more stringent voting requirements are also intended to ensure support from representatives of Arizona and New Mexico. Changes to § 983.34 pertaining to unanimous consent are discussed further under Material Issues 3, 4, and 5 in this recommended decision. Section 983.34 should also be amended to require 8 votes on issues concerning inspection programs and the establishment of the Committee. Those issues currently require 7 votes; the increase to 8 votes reflects the increase in Committee membership from 11 to 12 members, thus the proportion of votes to pass actions on these issues would remain nearly the same. Section 983.34 should also be redesignated as § 983.43.

Finally, a corresponding change to § 983.21, Part and subpart, is necessary to include Arizona and New Mexico as part of the area to which the order and regulations pertain. This section should also be redesignated as § 983.20.

Record evidence supports expanding the production area to include Arizona and New Mexico. This would help to ensure a uniform and consistent quality product from all commercial producing areas in the U.S., with the intent of increasing consumer confidence in pistachios, leading to increased demand and improved grower returns.

Record evidence also supports providing for a representative on the Committee to represent the proposed addition of the States of Arizona and New Mexico, which requires a modification to the representation districts and an increase in the size of the Committee from eleven members to twelve members. Record evidence also indicates that inclusion of Arizona and New Mexico under the existing order would be more cost effective and more desirable than establishing separate orders. Including Arizona and New Mexico in the production area would establish the smallest regional production area that is practicable. According to the record, voting requirements should also be changed to help ensure broad industry support exists for certain Committee actions.

There was no opposition testimony given against these proposed amendments. Witnesses from the producing areas of California, Arizona, and New Mexico all expressed support for the proposed amendments. For the reasons stated herein, it is recommended that § 983.26, Production area, be amended to expand the production area under the order to include the States of Arizona and New Mexico. It is also recommended that corresponding changes be made to §§ 983.11, Districts, 983.21, Part and subpart, 983.32, Establishment and membership, and 983.34, Procedure. The proposed addition of new sections to the order as discussed under material issues 3 and 6 of this recommended decision would require numerical redesignation of several sections of the order, including some of those discussed under this material issue. It is therefore also recommended that §§ 983.21, 983.26, 983.32, and 983.34 be redesignated as §§ 983.20, 983.25, 983.41, and 983.43, respectively.

Material Issue Number 2—Reimbursement of Handler Inspection Costs

Section 983.44 of the order should be amended to provide authority for the Committee to reimburse handlers for certain costs associated with aflatoxin testing of pistachios, with approval of USDA. This section should also be redesignated as § 983.56. Under this proposed amendment, the Committee could recommend to USDA informal rulemaking that would specify parameters for such reimbursement to handlers operating in areas where inspection costs for inspector travel and shipment of samples of pistachios for aflatoxin testing exceed the average of those same costs for comparable handling operations in Districts 1 and 2.

The order requires pistachios to be sampled and tested at a USDA laboratory or a USDA-approved laboratory to determine the aflatoxin level prior to shipment. Section 983.44 of the order currently provides that all inspections shall be at the expense of the handler. According to hearing evidence, typical costs associated with aflatoxin inspection include: travel for inspectors, charges for retrieving samples, shipment of samples to laboratories, laboratory analysis, and the value of the product utilized during the testing process.

Witness testimony indicates that in the State of California, handler's facilities are typically in close proximity to Federal-State Inspection Service (Inspection) offices. Inspectors therefore have relatively short distances to travel to perform the necessary services related to the aflatoxin program. In most cases, there is little or no cost for inspectors to travel to handler's facilities for aflatoxin inspections. In addition, handler's facilities are relatively close to laboratories that perform the analytical aflatoxin testing of the product. In some cases, handler facilities have on-site laboratories. Costs of shipping samples to laboratories for analyses are thus relatively minor and in some instances non-existent.

In contrast, witnesses testified that the pistachio handling operations in Arizona and New Mexico are located sizeable distances from Inspection personnel. According to the record, in some instances the nearest available inspector is over 200 miles from the handler's facility. Costs for inspector travel would thus be significant in Arizona and New Mexico in such cases.

Witnesses also testified that that there are no approved laboratories in Arizona or New Mexico for analyzing pistachio samples for aflatoxin. Further, the volume of pistachios produced and handled in Arizona and New Mexico would not warrant the establishment of analytical laboratories for testing pistachios for aflatoxin in those states. Samples of pistachios would therefore need to be shipped to California to an approved laboratory for aflatoxin analysis. As a result, costs of shipping samples would also be higher in Arizona and New Mexico than in California. According to the record, there would be no appreciable difference in other costs associated with the aflatoxin program in Arizona, New Mexico, and California.

Data was presented at the hearing to illustrate the potential difference in costs associated with aflatoxin inspections in California, Arizona, and New Mexico. As discussed above, these differences are attributed to inspector travel costs and shipping costs. Individual costs can vary depending on individual circumstances, but inspection costs associated with the aflatoxin program would be significantly higher in Arizona and New Mexico than California. A detailed analysis of the costs and possible reimbursement is discussed in the Regulatory Flexibility Analysis section of this recommended decision, as well as the benefits.

Record evidence supports adding authority to the order to allow the Committee to equitably reimburse handlers for certain costs associated with aflatoxin testing. The intent of this proposed amendment is to recognize potential differences in costs, and provide a method whereby the costs of inspection for the aflatoxin program can be more equitably distributed so that

Arizona and New Mexico industry members would not be unduly burdened as a result of their inclusion under the order. As previously discussed, this proposal would only provide authority for the Committee to recommend to USDA criteria for reimbursement, and informal rulemaking would be required prior to implementation.

There was no opposition testimony to this proposed amendment. For the reasons stated above, it is recommended that § 983.44, Inspection, certification, and identification, be amended to authorize the Committee, with approval of the Secretary, to reimburse handlers for inspection costs for inspector travel and shipment of samples for aflatoxin testing that exceed the average of those same inspection costs for comparable handling operations in Districts 1 and 2. Informal rulemaking to establish rules and regulations outlining the parameters of reimbursement would be required to implement this authority. Section 983.44 would also be redesignated as § 983.56.

Material Issue Number 3—Research

A new section 983.46, Research, should be added to the order. This proposed amendment would provide authority for the Committee to engage in research projects with the approval of USDA. Corresponding changes should be made to existing § 983.46, Modification or suspension of regulations, to reflect changes to other sections of the order. Corresponding changes should also be made to § 983.54, Contributions, to add authority for the Committee to accept voluntary contributions for research purposes. Additionally, corresponding changes to § 983.34, Procedure, should be made to establish voting requirements for Committee recommendations concerning research. Finally, existing §§ 983.34, 983.46, and 983.54 should be redesignated as §§ 983.43, 983.59, and 983.72, respectively.

Currently, the order does not contain authority for the Committee to recommend or conduct research projects. Witnesses testified that at the time the order was promulgated, the California Pistachio Commission (CPC), a state marketing program, supported the industry's production and nutrition research. Therefore, the industry did not believe that providing research authority in the order was necessary. However, CPC was discontinued in 2007, and the responsibility for production research was temporarily assumed by individual entities and other industry organizations in order to provide for continuity of ongoing projects. In December 2007, the California Pistachio Research Program (CPRP), a state program, was enacted under the authority of the California Marketing Act of 1937, Chapter 1, Part 2, Division 21 of the California Food and Agriculture Code, as amended. CPRP is authorized to conduct production and post-harvest research, for which it may collect limited assessment revenues.

The record indicates that CPRP is not authorized to conduct nutrition research. According to witnesses, nutrition research, which is designed to determine the effects of pistachio consumption on human health, is critical to the marketing of pistachios. To fill this critical need, witnesses supported amending the order to authorize the Committee to recommend, conduct, and fund research projects designed to determine the effects of pistachio consumption on human health.

One witness described previous industry research on the effects of cholesterol on heart health as related to pistachio consumption. The witness suggested that that type of research might be pursued by the Committee.

Witness testimony also supported the addition of authority to recommend, conduct, and fund research projects to improve the efficient production and postharvest handling of pistachios. The record shows that the ability to establish production research projects in response to immediate needs is important to the industry. Witnesses cited two examples of critical production research needs in the past. In the 1970's and 1980's, *Verticillium* wilt, which ultimately leads to tree death, threatened the existence of the pistachio industry in California. Through collaborative research efforts, rootstocks resistant to *Verticillium* wilt were developed and are today widely used in the industry. In the 1990's, *Botryosphaeria* blight, which attacks the nut clusters and foliage, reached epidemic proportions in northern California. According to witness testimony, industry-funded research efforts led to the development of cultural practices and fungicides that now effectively control the disease. One witness emphasized the fact that it is difficult to anticipate what production problems could arise in the future, but that the Committee could best prepare itself for emergencies by maintaining a stable funding source to address those needs.

Witnesses testified that the Committee does not intend to duplicate activities conducted by the CPRP if it is authorized to conduct research programs under the order. Witnesses explained that the Committee manager and staff, as well as many Committee members, are informed about CPRP's activities and that their participation in Committee deliberations would ensure that research activities would not be duplicative. In addition, witnesses testified that the CPRP program has a cap on the amount of assessments it may collect. This cap could limit the industry's ability to fund research projects at a level necessary to address certain issues, especially in emergency situations. Nonetheless, if a situation occurred where the CPRP could not fund critical production or post harvest research needed by the industry, the research could be funded under the Federal marketing order and still avoid duplication.

Funding for the Committee's projects would come from the collection of assessments from pistachio handlers, which is authorized under the order. Currently, the Committee's assessments cover the costs of administration of the order and operation of its other program activities. Although the Committee's assessment rate could increase to cover the costs of any research projects they might establish, record evidence indicates that the benefits to be derived from such research are expected to exceed related assessment costs.

In conjunction with the authority to establish research programs, the Committee proposed amending § 983.54, Contributions, to provide authority to accept voluntary contributions toward research programs. Currently, the Committee is authorized to accept voluntary contributions toward the administrative costs of the order. Witnesses testified that voluntary contributions could augment or replace assessment funds used for research projects. According to witnesses, contributors could designate that contributions be used for the Committee's research programs, but they would not retain control of how the Committee uses the funds. It would be the responsibility of the Committee to allocate those funds appropriately.

Addition of the authority to conduct research programs would merely authorize the Committee to recommend such programs and, following USDA approval, to plan and conduct those projects. Witnesses explained that if authority to conduct research programs is added to the order, the Committee might appoint a new subcommittee to consider research proposals and make recommendations for specific projects to the Committee.

The Committee's amendment proposals included a revision to their voting procedures under § 983.34 that

would specify that recommendations regarding research projects should require the approval of the entire Committee. Witnesses testified that requiring unanimous approval would ensure consensus from all sectors of the industry. Witnesses testifying in favor of expanding the production area to include Arizona and New Mexico (Material Issue No. 1) explained that requiring unanimous Committee approval for research recommendations would assure the industry in those states that their interests are considered in Committee decision-making with regard to potential research projects.

The Committee also recommended amending the existing § 983.46, Modification or suspension of regulations. These changes would update cross-references to other sections of the order that are being proposed to change, and removes a redundant reference to voting requirements that is already included under another section of the order.

No testimony opposing this proposal was provided at the hearing. For the reasons stated above, it is recommended that a new § 983.46, Research, be added to the order to provide authority to establish and conduct production, post harvest, and nutrition research projects. Corresponding changes should be made to § 983.34, Procedure, to establish voting requirements for Committee recommendations concerning research; § 983.46, Modification or suspension of regulations, to update cross-references and remove redundant provisions; and to § 983.54, Contributions, to authorize the Committee to accept voluntary contributions toward research programs. Finally, existing §§ 983.34, 983.46, and 983.54 should be redesignated as §§ 983.43, 983.59, and 983.72, respectively.

Material Issue Number 4—Aflatoxin Regulation

Section 983.38, Aflatoxin levels, should be renamed Aflatoxin regulations, and amended to provide broad authority for aflatoxin regulation under the order. This would require removing extensive specific regulatory provisions in the order and replacing them with a provision providing general authority for aflatoxin regulation and authority to issue specific regulatory requirements through the informal rulemaking process. The current regulatory provisions that are removed from the order could then be proposed as rules and regulations through the informal rulemaking process. This section should also be redesignated as § 983.50. Corresponding changes to § 983.40, Failed lots/rework procedure and § 983.1, Accredited laboratory, should also be made, and § 983.40 should be redesignated as § 983.52. In addition, § 983.34, Procedure, should be amended to require unanimous consent by the Committee to approve actions concerning aflatoxin levels, and § 983.34 should be redesignated as § 983.43.

Currently, the order provides authority for regulation of aflatoxin levels in pistachios, and specific regulatory requirements such as sampling, testing, and certification are also included in the order. The order provisions also allow for modification of the regulatory requirements by issuing rules and regulations through the informal rulemaking process.

Witness testimony indicated that including specific regulatory details in the order language, with authority to change such requirements through the informal rulemaking process, is not the most desired way to structure a marketing order for another reason also. If specific regulatory requirements in the order are subsequently modified through informal rulemaking, regulatory language in the order would be different than regulatory language in the rules and regulations, which might cause confusion.

Witness testimony stated that a more appropriate approach is to provide general authority for aflatoxin regulations in the order language, and provide authority to issue rules and regulations through the informal rulemaking process to implement specific regulations and procedures. Witnesses testified that it is important to maintain continuity in the existing aflatoxin regulations at this time. With this approach, the existing aflatoxin requirements could be proposed in the informal rulemaking process.

Hearing testimony also supported amending § 983.34 to require a unanimous vote of the Committee on any recommendations concerning aflatoxin regulations. The record indicates that it is important to have widespread industry support prior to implementing or changing aflatoxin regulations. With the unanimous consent provision, the States of Arizona and New Mexico would be entitled to a voting representative on the Committee and would need to vote in favor of any recommendation by the Committee with respect to regulations in order for such action to be approved.

A witness testified that a corresponding amendment to § 983.40, Failed lots/rework procedure should be made. General authority would be provided in this section of the order to authorize establishment of procedures to rework product that failed the aflatoxin requirements. Similar to the preceding amendment to § 983.38, detailed procedures currently contained in § 983.40 would be established as rules and regulations through informal rulemaking in order to avoid an interruption in the existing procedures. Section 983.40 should also be redesignated as § 983.52.

Witnesses also testified in support of amending the order to incorporate a corresponding change to § 983.1, Accredited laboratory. This change would revise the definition of accredited laboratory by removing a restriction that limited accredited laboratories to only aflatoxin testing. Testimony noted that this change would give flexibility to this definition, given the previously discussed changes to quality regulation. This discussion appears in material issue number 5.

Record evidence supports amending § 983.38, Aflatoxin levels, renaming it Aflatoxin regulations, and redesignating it as § 983.50. Corresponding changes to § 983.40, Failed lots/rework procedure and § 983.1, Accredited laboratory, are also recommended, and § 983.40 should be redesignated as 983.52. Record evidence also supports amending Section 983.34, Procedure, and redesignating it as 983.43. No opposition testimony was given regarding these proposed amendments, and they are thus recommended for adoption.

Material Issue Number 5—Quality Regulation

Section 983.39, Minimum quality levels, should be renamed Quality regulations, and should be amended to provide broad authority for quality regulation under the order. This would require removing extensive regulatory provisions in the order pertaining to minimum quality levels and replacing them with a provision providing general authority for quality regulation and authority to issue specific quality regulatory requirements through the informal rulemaking process. Section 983.39 should also be redesignated as § 983.51. Corresponding changes should also be made to § 983.6, Assessed weight; § 983.7, Certified pistachios; § 983.31, Substandard pistachios; § 983.41, Testing of minimal quantities; § 983.42, Commingling; and § 983.45, Substandard pistachios. Sections 983.19 and 983.20 should be removed as a result of this amendment. Section 983.34, Procedure, should be amended to require a unanimous vote of the Committee to approve actions concerning quality regulations. Finally, Sections 983.31, 983.41, 983.42, and

983.45 would be redesignated as sections 983.30, 983.53, 983.54, 983.57, respectively.

Witnesses testified that specific requirements pertaining to quality levels are contained in the provisions of the order. These provisions were in effect from 2004 through 2007. In December of 2007, the requirements were suspended because they were no longer meeting the industry's needs. Witness testimony indicated that while there is no desire to reinstate the specific quality regulations previously in effect or any intent at this time to recommend any form of quality regulation, the industry would like to retain authority to implement some form of quality regulation in the future if circumstances warrant. Adding broad authority for quality regulation would provide flexibility in the order because it would enable the industry to establish additional requirements for quality regulations in addition to the current requirements in the order.

Witnesses also testified that adding broad authority for quality regulation, with the ability to implement and change requirements through informal rulemaking, could be especially beneficial in the event the proposal to expand the production area to include Arizona and New Mexico is adopted. Growing conditions and other factors that impact the quality of pistachios may vary in different states. Record testimony indicates this proposal provides flexibility to take into account factors affecting the quality of pistachios from different areas, and other pertinent information in developing quality regulations that may be recommended in the future. Any regulations, if established, could be revised through the informal rulemaking process to adapt to changing industry conditions and to accommodate the various growing regions, if necessary.

Witnesses also testified that § 983.34 should be amended to require a unanimous vote of the Committee in order to recommend adopting or changing potential quality regulations established under this proposed new order authority. Witnesses testified that it was important to have widespread industry support prior to implementing any new quality regulations. According to testimony, the unanimous consent provision would help to ensure that any potential quality regulations would meet the needs of the States of Arizona and New Mexico, as well as California. Arizona and New Mexico would be entitled to a voting representative on the Committee and would need to vote in favor of any recommendation by the Committee with respect to quality regulations in order for such action to be approved.

Witness testimony supported several corresponding changes to certain definitions in the order that are associated with the existing quality provisions in the order. The definition of Assessed weight, § 983.6, should be amended by removing references to the existing quality regulations and replacing such references with a provision that would allow assessed weight to be based on such quality requirements that may be established in the future. The definition of Certified pistachios, § 983.7, should also be amended by removing a reference to specific existing aflatoxin inspection and minimum quality certificates and replacing such reference with a reference to general inspection and certification requirements. The definition of Substandard pistachios, § 983.31, should similarly be amended by removing a reference to existing aflatoxin and minimum quality regulations and replacing such reference with a reference to sections of the order under which regulations may be established. Section 983.31 should also be redesignated as 983.30.

Witness testimony also supported amending § 983.41, Testing of minimal quantities, to remove a provision pertaining to an exemption from minimum quality requirements for handlers handling less than one million pounds of pistachios. That provision would be replaced by a more general provision that would allow the Committee, with approval of the Secretary, to establish regulations regarding minimal quantities in the event quality regulations are established in the future. The proposed language for this section published in the Notice of Hearing referenced specific aflatoxin levels. However, at the hearing, a witness clarified that the language should be revised to conform with other proposed amendments to the order, specifically by replacing references to specific levels of aflatoxin with references to levels of aflatoxin that may be established by the committee and approved by the Secretary. Therefore, AMS has revised the proposed language accordingly. Finally, this section should also be redesignated as § 983.53.

Witnesses also testified in support of amending § 983.42, Commingling, to clarify that if a lot of certified pistachios is commingled with a lot of uncertified pistachios, the resulting lot would lose its certification. This section should be redesignated as § 983.54.

The record also supports amending § 983.45, Substandard pistachios, by removing a reference to specific existing aflatoxin requirements and quality requirements and replacing that reference with a more general reference to aflatoxin and quality requirements. This section should be redesignated as § 983.57.

Finally, the existing § 983.19, Minimum quality requirements, should be removed from the order because it pertains to requirements that would no longer be in effect as a result of the recommended amendments to the order. Similarly, existing § 983.20, Minimum quality certificate, should be removed from the order because it references a certificate that would no longer exist as a result of these amendments.

Record evidence supports amending the order to add broad authority for quality regulations and removing provisions concerning specific minimum quality levels. This would provide authority for the Committee to develop and recommend quality regulations in the future, if deemed appropriate, and any such regulations could take into account the new producing areas being proposed for addition to the order. Informal rulemaking would be required to implement any future quality regulations, and modifications thereto could also be accomplished through informal rulemaking. Record evidence also supports the corresponding changes as discussed in this material issue.

No testimony in opposition to this proposed amendment and corresponding changes was given. For the reasons stated above, it is recommended that § 983.39, Minimum quality levels, be renamed Minimum quality regulation, amended, and redesignated as 983.51. It is also recommended that corresponding changes be made to § 983.6, Assessed weight; and § 983.7, Certified pistachios. Corresponding changes are also recommended to § 983.31, Substandard pistachios; § 983.41, Testing of minimal quantities; § 983.42, Commingling; and § 983.45, Substandard pistachios, and those sections be redesignated as §§ 983.30, 983.53, 983.54, and 983.57, respectively. It is also recommended that § 983.34, Procedure be amended. Finally, it is recommended that § 983.19, Minimum quality requirements and § 983.20, Minimum quality certificate, be removed.

Material Issue Number 6—Interhandler Transfers

A new section, § 983.58, Interhandler Transfers, should be added to the order. This recommended section would allow handlers to transfer marketing order obligations such as aflatoxin testing requirements, assessments, inspection

requirements, or any other marketing order requirements, to the receiving handler if pistachios are transferred from one handler to another. The recommended provisions would also allow the Committee, with approval of the Secretary, to establish methods and procedures, including reports, to maintain an accurate accounting of the pistachios and accompanying marketing order obligations. The existing § 983.58 should be redesignated as § 983.80. Section 983.53, Assessments, should also be amended to provide an exception from assessment payment for those handlers who transfer the obligation to another handler pursuant to the proposed new § 983.58. Section 983.53 should also be redesignated as § 983.71.

According to witness testimony, this provision would provide flexibility in administering the marketing order, especially with regard to the proposed new District 4, the States of Arizona and New Mexico. Under the order, hulling and drying of pistachios is considered a handling function. Persons performing handling functions are considered to be handlers, and marketing order obligations are applied to handlers.

Witnesses testified that in the proposed District 4, some small producers may not have access to nearby processing facilities, and as a result must hull and dry their product prior to delivery to a facility that further processes and packages it and puts it into the stream of commerce. Under the order, such small producers would be considered handlers by definition, and would be subject to marketing order obligations such as reporting, aflatoxin testing, and payment of assessments. This proposed amendment would allow such grower/handlers to transfer the marketing order obligations to the subsequent handler that further processes the pistachios and places them into the current of commerce. This would help to ensure that marketing order obligations are met.

According to testimony, this amendment would provide flexibility under the order to allow producers and handlers in District 4 to continue their current business practices.

Witness testimony also supported a corresponding change to § 983.53, Assessments. This section of the order requires each handler to pay assessments under the order. The proposed change corresponds with the interhandler transfer authority by excepting from assessment payment those handlers who transfer the obligation to another handler pursuant to the proposed new § 983.58. Section 983.53 should also be redesignated as § 983.71.

Record evidence supports these changes to the order. No testimony in opposition to the proposed changes was given at the hearing. For the reasons stated above, it is recommended that a new § 983.58, Interhandler transfers, be added to the order; a corresponding change be made to § 983.53, Assessments; and that § 983.53 be redesignated as § 983.71.

Material Issue Number 7—Administrative Changes

The proposed amendments discussed in Material Issues 1 through 6 necessitate several administrative changes to the order. Such changes include numerical redesignations to several sections of the order, changes to cross references of section numbers in regulatory text as a result of the numerical redesignations, and removal of obsolete provisions. These changes are summarized below.

Section 983.8, Committee, should be amended by removing a reference to § 983.32 and replacing it with a reference to § 983.41. Section 983.23, Pistachios, should be redesignated as § 983.22 and amended by adding ''and species'' after the word ''genus'', as this was inadvertently omitted when the order was promulgated. Section 983.33, Initial members and nomination of successor members, should be redesignated as § 983.42 and amended by removing the word ''grower'' and replacing it with the word ''producer'', as that term is defined in the order; and references to §§ 983.32, 983.33, and 983.34 should be removed and replaced with references to §§ 983.41, 983.42, and 983.43, respectively. Section 983.34 should be redesignated as § 983.43 and in paragraphs (a)(1) and (2), the word ''level'' should be removed and replaced with the word ''regulation'' to correspond to changes made to the titles of §§ 983.51 and 983.52. Section 983.56 should be redesignated as § 983.74 and amended by removing the reference to § 983.53 and replacing it with a reference to § 983.71. Section 983.57 should be redesignated as § 983.75 and amended by removing the reference to ''§§ 983.47 through 983.56'' and replacing it with ''§§ 983.64 through 983.74''. Section 983.58, Compliance, should be redesignated as § 983.80 as a result of the proposed new § 983.58, Interhandler transfers. Section 983.65 should be redesignated as § 983.87 and amended to remove a reference to ''§ 983.66 or § 983.67'' and replacing it with ''§ 983.88 or § 983.89''.

Section 983.70 should be redesignated as § 983.92 and amended by removing references to §§ 983.38, 983.45, and 983.53 and replacing them with references to §§ 983.50, 983.58, and 983.71, respectively. Redesignated § 983.92 should further be amended to remove the words ''marketing'' and ''subpart'' and replacing them with ''production'' and ''section'', respectively. These changes would correct technical errors in the existing order provisions. This section also should be amended by replacing a reference to an exemption of 1,000 pounds with reference to an exemption of 5,000 pounds to update this order provision, given the current rules and regulations that were implemented under that section after the order was promulgated.

AMS is rewording the language that appears in the redesignated §§ 983.50, 983.52, 983.53(a), 983.59(c), and 983.92 to conform to other references to informal rulemaking that currently appear in the order. This language clarifies that the committee may establish, with the Secretary's approval, rules and regulations regarding implementation of authorities provided in those sections. AMS is also rewording the language in § 983.56 to correctly state that handlers may be ''reimbursed'' rather than ''compensated'' by the committee regarding inspection costs.

The following table identifies changes that should be made regarding redesignation of sections to the order that have not been previously discussed in this recommended decision.

Old section	New section
983.22	983.21
983.24	983.23
983.25	983.24
983.27	983.26
983.28	983.27
983.29	983.28
983.30	983.29
983.35	983.44
983.36	983.45
983.37	983.47
983.43	983.55
983.47	983.64
983.48	983.65
983.49	983.66
983.50	983.67
983.51	983.68
983.52	983.70
983.55	983.73
983.59	983.81
983.60	983.82
983.61	983.83
983.62	983.84
983.63	983.85
983.64	983.86
983.66	983.88
983.67	983.89
983.68	983.90
983.69	983.91

There was no opposition testimony to these proposed changes. Record evidence supports these changes and they are therefore recommended for adoption.

Conforming Changes

AMS also proposed to make such changes as may be necessary to the order to conform to any amendment that may result from the hearing. Other than previously discussed, no additional conforming changes have been made.

Small Business Considerations

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

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions so that small businesses will not be unduly or disproportionately burdened. Marketing orders and amendments thereto are unique in that they are normally brought about through group action of essentially small entities for their own benefit.

Small agricultural service firms, which include handlers regulated under the order, have been defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than $7,000,000. Small agricultural producers have been defined as those with annual receipts of less than $750,000.

There are approximately 24 handlers and approximately 800 producers of pistachios in the State of California. It is estimated that approximately 50 percent of the processing handlers had annual receipts of less than $7,000,000, according to information presented at the hearing. In addition, based on the number of producers, the size of the 2007 crop, and the average producer price per pound data reported by the National Agricultural Statistics Service (NASS), the average producer revenue for the 2007 crop was $702,000. It is estimated that 85% of the producers in California produced less than $750,000 worth of pistachios and would thus be considered small businesses according to the SBA definition.

Based on information presented at the hearing, it is estimated that there are approximately 40 to 50 growers of pistachios in Arizona and approximately 30 growers in New Mexico. It is also estimated that there are 2 handlers in Arizona and 3 handlers in New Mexico. Although no official data is available, based on hearing testimony it is estimated that the majority of producers in Arizona and New Mexico are small businesses according to SBA's definition. It is also estimated that all of the handlers in New Mexico are small businesses and one of the handlers in Arizona is a small business.

California accounts for the vast majority of pistachio acreage and production in the U.S. According to data from the National Agricultural Statistics Service (NASS), California's total acreage in 2007 was reported at 176,400 acres. While no 2007 acreage data is available from NASS for Arizona and New Mexico, in 2006, Arizona acreage was reported at 2,500 acres while New Mexico acreage was reported at 1,350 acres in 2002. Two witnesses from New Mexico testified that they estimate acreage in New Mexico to be about 450 acres in 2007. Pistachios are also grown in small quantities in Texas, Utah, and Nevada. However, witnesses testified that pistachios produced in those states are considered to be the result of hobby farming and are not commercially significant in volume. California, Arizona, and New Mexico account for over 99.99 percent of domestic pistachio production and essentially all of the production used for commercial purposes, according to the record.

The order regulating the handling of pistachios grown in the State of California was established in 2004. The primary feature of the order is a quality provision that requires pistachios to be sampled and tested for aflatoxin prior to shipment to domestic markets. Such shipments of pistachios may not exceed a tolerance level for aflatoxin. Information collection and dissemination is also conducted under the order. The program is funded through assessments on handlers according to the quantity of pistachios handled. The order is administered by an industry committee of handlers and growers, and is designed to support both large and small pistachio handlers and growers. Committee meetings where regulatory recommendations and other decisions are made are open to the public. All members are able to participate in Committee deliberations, and each Committee member has an equal vote. Others in attendance at meetings are also allowed to express their views.

The Committee met on March 6, 2008, and requested that USDA conduct a public hearing to consider proposed amendments to the order. USDA reviewed the request and determined to proceed to a hearing. A hearing was conducted on July 29 and 30, 2008, in Fresno, California. The Committee's meeting and the hearing were both open to the public and all that attended were able to participate and express their views.

The proposed amendments recommended by the Committee would: expand the production area to include the States of Arizona and New Mexico; authorize the Committee to reimburse handlers for certain inspection costs; authorize research activities under the order; provide broad authority for aflatoxin regulation under the order, provide broad authority for quality regulation under the order; provide authority for interhandler transfer of marketing order obligations; and make corresponding administrative changes to the order as a result of the aforementioned proposed changes.

The proposed amendments are intended to improve the operation and functioning of the marketing order program. Record evidence indicates that the proposals are intended to benefit all producers and handlers under the order, regardless of size. All grower and handler witnesses at the hearing supported the proposed amendments and while acknowledging the additional cost implications, they stated that they expected the benefits to outweigh the costs.

A description of the proposed amendments and their anticipated economic impact on small and large entities is discussed below.

Evaluation of the Potential Economic Impacts of the Proposed Amendments

The key economic issues to examine in considering the proposed amendments to the marketing order are the benefits and costs to growers and handlers of the proposed expansion of the production area and the consequences of that expansion. The most significant change in terms of its potentially significant and immediate impact is the fact that if the production area is expanded to include Arizona and New Mexico, the pistachio handlers in those two states would become regulated under the order and would have to meet the same aflatoxin certification requirements that apply to California handlers.

Aflatoxin Requirements

California handlers currently must have all pistachio lots destined for the domestic market tested and certified that they do not exceed a maximum aflatoxin tolerance. To comply with the standard, California handlers arrange for a sample to be taken from each lot that is to be shipped domestically and to have that sample tested for aflatoxin. Lots that meet the standard receive

written certifications that allow shipment to the domestic market. Lots that exceed the aflatoxin tolerance cannot be shipped domestically. Handlers may rework the lots to remove contaminated nuts and then can begin the certification process again. There are costs associated with each of these steps, which are currently borne by California handlers and would be borne by handlers in the other two states, if the order is amended.

Before considering cost-related details, it is important to examine the benefits associated with mandatory aflatoxin certification. Various grower and handler witnesses testified that they expected significant benefits to accrue from the mandatory requirements enforced through the marketing order, and increased consumer confidence in the quality of U.S. pistachios. Arizona and New Mexico handler witnesses indicated that they would willingly comply with all of the steps involved in meeting the aflatoxin standards. Grower witnesses from Arizona and New Mexico indicated awareness that at least part of the increased handler costs from aflatoxin certification would be passed onto them, but that they expected the net effect to be strongly positive. Grower witnesses from Arizona and New Mexico also stated they did not expect to have to undertake any significant changes in their pistachio production operations as a result of coming under the authority of the marketing order. Witnesses said that they believed that they would have overall improved returns and higher sales than would be the case without the marketing order regulation. They expected the benefits of the proposed amendments to far outweigh the costs.

A 2005 benefit cost analysis of federal marketing order mandatory aflatoxin requirements for California was submitted as evidence at the hearing. The analysis, prepared by agricultural economists at the University of California-Davis, was entitled ''Economic Consequences of Mandated Grading and Food Safety Assurance: *Ex Ante* Analysis of the Federal Marketing Order for California Pistachios'' (Richard S. Gray and others, University of California, Giannini Foundation Monograph 46, March 2005). In present-value terms, over a 20-year horizon, the benefits to producers in the study's baseline scenario were estimated to be $75.3 million. The study reported a ''most likely scenario'' benefit cost ratio of nearly 6:1, with a range from about 4:1 to 9:1 under alternative scenarios representing low and high aflatoxin event impacts, respectively, on the pistachio market.

One witness noted that, depending on compliance cost and aflatoxin event assumptions under alternative scenarios in the study, the expected benefit cost ratio from implementation of mandatory aflatoxin standards under the California marketing order ranged between 5:1 and 17:1. Several grower and handler witnesses suggested that these significant benefit cost ratios for the California marketing order would also likely apply if the order were expanded to include Arizona and New Mexico.

The following section examines the cost impacts of the mandatory aflatoxin requirements in an expanded marketing order.

Differences in Aflatoxin Inspection and Certification Costs

Aflatoxin inspection and certification costs can be divided into the costs of: (1) Inspector travel time to pistachio handler's premises; (2) time required for the inspector to draw samples from lots designated for domestic shipment; (3) cost of shipping samples to the testing laboratory; (4) aflatoxin analysis (testing cost); and (5) value of the destroyed pistachios used in the sampling and analysis.

The three tables below present estimated costs for representative handlers in California, Arizona, and New Mexico. Each table is designed to summarize handler costs for the lots being tested, including each of the five cost elements listed above. For clarity of the cost comparisons, the lot size to be sampled is assumed to be 50,000 pounds in the representative scenarios for all three states. The 50,000-pound lot size is most appropriate for California's handler plants, which are generally larger than the handler plants in Arizona and New Mexico. The impact in terms of higher unit cost for smaller lot sizes is discussed below.

Table 1 is a representation of the current aflatoxin certification cost situation in California, which is the production area of the current federal marketing order for pistachios. It serves as a benchmark with which to compare the costs in the other two states, Arizona and New Mexico, which would be included under the proposed expanded production area. Witnesses from the pistachio industry in each of the three states submitted as evidence the data used in the three tables, and stated that the data was representative of the situation that exists or would be faced by handlers in those states.

Witnesses pointed out that inspector travel costs and sample shipment costs were the most variable costs across the states. Inspector travel costs consist of the mileage reimbursement that inspectors need to be paid by the handlers, plus the time spent traveling to the handler's location. In California, inspectors are regularly in the plants, and there is no additional travel time associated with aflatoxin sampling. Witnesses testified that New Mexico inspector travel costs could be as high as $485 per lot due to the large distances involved, but that the figure of $432.50 was the most representative. Data presented at the hearing indicated that Arizona inspector travel cost could be as high as $100 per lot, but that a lower figure of $32.70 was more likely due to the closer proximity of Arizona Plant Services inspectors, who may be certified to take the sample.

TABLE 1—CALIFORNIA PISTACHIOS: COST SCENARIO FOR SAMPLING AND AFLATOXIN TESTING FOR REPRESENTATIVE HANDLER

	50,000-pound lots		Description of cost elements
	Dollars per lot	Dollars per pound	
Inspector Travel Time to Plant	.....	.....	No inspector travel time; inspector regularly in plant.
Inspector Sampling Time	$70.00	$0.0014	[Cost of sampler time: 2 hours) @ $35/hour = $70]; [2 hours to draw 100 samples for one lot[2]].
Value of Pistachio Sample	$44.00	$0.0009	[10 kg (22-lb) weight of sample from 100 sub-samples]; [22 lbs. @ $2.00 per pound = $44].
Shipping Cost to Laboratory[1]	.....	.....	Onsite labs in plants; no shipping cost.
Aflatoxin Testing Cost[2]	$90.00	$0.0018	$90 lab fee to determine aflatoxin level of sample.

TABLE 1—CALIFORNIA PISTACHIOS: COST SCENARIO FOR SAMPLING AND AFLATOXIN TESTING FOR REPRESENTATIVE HANDLER—Continued

	50,000-pound lots		Description of cost elements
	Dollars per lot	Dollars per pound	
Total Cost	$204.00	$0.0041	
Pct. of price received by handler		0.2%	Industry estimate of CA handler sale price per pound = $2.00.
Pct. of price received by grower		0.3%	NASS estimate of 2007 CA grower price per pound = $1.35.

[1] DFA laboratory in Fresno, CA.
[2] Aflatoxin analysis done in onsite laboratory; imputed cost of $90 is based on cost in outside laboratory.
Source: Testimony at pistachio federal marketing order hearing, July 29–30, 2008, in Fresno, CA.

TABLE 2—ARIZONA PISTACHIOS: COST SCENARIO FOR SAMPLING AND AFLATOXIN TESTING FOR REPRESENTATIVE HANDLER

	50,000-pound lots		Description of cost elements
	Dollars per lot	Dollars per pound	
Inspector Travel Time to Plant	$32.70	$0.0007	[24 miles[1] @ $0.40 per mile = $9.60]; [Cost of sampler time: 40 min. (0.66 hours) @ $35/hour = $23.10].
Inspector Sampling Time	$70.00	$0.0014	[Cost of sampler time: 2 hours) @ $35/hour = $70]; 2 hours to draw 100 samples for one lot[2].
Value of Pistachio Sample	$60.50	$0.0012	[(10 kg (22-lb) weight of sample from 100 sub-samples]; [22 lbs. @ $2.75 per pound = $60.50].
Shipping Cost to Laboratory[3]	$200.00	$0.0040	Shipping cost per 10 kg sample.
Aflatoxin Testing Cost	$90.00	$0.0018	$90 lab fee to determine aflatoxin level of sample.
Total Cost	$453.20	$0.0091	
Pct. of price received by handler		0.3%	Industry estimate of AZ handler sale price per pound = $2.75.
Pct. of price received by grower		0.7%	USDA/NASS estimate of 2007 CA grower price per pound = $1.35 (AZ price not available).

[1] 12 miles each way from pistachio handler plant in Bowie, AZ, to the San Simon, AZ, location of Arizona Plant Services inspectors (certified samplers).
[2] Three lots sampled per visit over a 6-hour period.
[3] DFA laboratory in Fresno, CA; handler witness expected to use overnight shipping, estimated at $200 per 10 kg sample.
Source: Computed by USDA, based on evidence presented at pistachio federal marketing order hearing, July 29–30, 2008, in Fresno, CA.

TABLE 3—NEW MEXICO PISTACHIOS: COST SCENARIO FOR SAMPLING AND AFLATOXIN TESTING FOR REPRESENTATIVE HANDLER

	50,000-pound lots		Description of cost elements
	Dollars per lot	Dollars per pound	
Inspector Travel Time to Plant	$432.50	$0.0087	600 miles[1] @ $0.40 per mile = $240]; [Cost of sampler time: 5.5 hours[2] @ $35/hour = $192.50].
Inspector Sampling Time	$70.00	$0.0014	[Cost of sampler time: 2 hours) @ $35/hour = $70]; [2 hours to draw 100 samples for one lot].
Value of Pistachio Sample	$44.00	$0.0009	[10 kg (22-lb) weight of sample from 100 sub-samples]; [22 lbs. @ $2.00 per pound = $44].
Shipping Cost to Laboratory[3]	$105.00	$0.0021	Shipping cost per 10 kg sample.[4]
Aflatoxin Testing Cost	$90.00	$0.0018	$90 lab fee to determine aflatoxin level of sample.
Total Cost	$741.50	$0.0148	
Pct. of price received by handler		0.7%	Industry estimate of NM handler sale price per pound = $2.00.
Pct. of price received by grower		1.1%	USDA/NASS estimate of 2007 CA grower price per pound = $1.35 (NM price not available).

[1] Average of round trip travel distances to Alamagordo, NM, pistachio handler plant from two NM inspector (certified sampler) locations—Portales (416 miles round trip) and Farmington (782 miles).
[2] Average of driving time estimates to two inspector locations: (4 + 7)/2 = 5.5 hours.
[3] DFA laboratory in Fresno, CA.
[4] Average of estimated range of shipping costs = ($90 + $120)/2 = $105.
Source: Computed by USDA, based on evidence presented at pistachio federal marketing order hearing, July 29–30, 2008, in Fresno, CA.

Two cost elements that are uniform across the three states are sampling time and testing cost. The estimated time that it takes an inspector to draw a 10 kg (22 pound) sample for aflatoxin testing of a 50,000 pound lot, based on 100 sub-samples, is 2 hours. At a standard hourly rate of $35 per hour, two hours of sampling time will cost the handler $70. The testing cost for a laboratory to determine the aflatoxin level from a sample is $90.

Witnesses indicated that the cost for the 22 pounds of pistachios used in the sample (handler sales revenue foregone) was $2.00 per pound ($44 total) in California and New Mexico and $2.75 in Arizona (about $61 total).

Given all of the assumptions that went into developing the cost summary in Table 1, the estimated cost per lot for a California handler for aflatoxin certification is $204, which is less than one half cent per pound (about four tenths of a cent). This represents 0.2 percent of the $2.00 pistachio value per pound at the handler level (estimate provided by industry witnesses) and 0.3 percent of the 2007 grower price per pound for California pistachios, estimated by NASS at $1.35 per pound. A California pistachio industry witness pointed out that the unit price would be even lower with larger lot sizes and that the average lot size for ''failed lots'' in a recent year under the marketing order (those that exceeded the maximum aflatoxin tolerance) was nearly 67,000 pounds.

Table 2 shows that a representative Arizona handler would pay twice as much as a California handler—$453 per lot, or nearly one cent per pound (about nine tenths of a cent). The data in Table 3 indicated that a New Mexico handler would pay even more for aflatoxin certification—$742 per 50,000 pound lot, or about 1.5 cents per pound. Thus the certification costs for the smaller plants in Arizona and New Mexico would be between two and four times higher, if lot sizes were the same.

Typical lot sizes may be smaller in Arizona and New Mexico; witnesses indicated that lot sizes could vary between 10,000 and 50,000 pounds. An Arizona handler witness presented evidence indicating that 40,000 pounds would be a more likely typical lot size, and that the sample size and related cost factors would be the same. With a smaller lot size, the Arizona handler cost per pound rises from nine tenths of a cent (50,000 pound lot) to 1.1 cents (40,000 pound lot). This cost per pound is nearly 3 times higher than the cost for a California handler with a 50,000 pound lot, but the percentage of the estimated handler sales price remains under one half of one percent (0.4%).

A New Mexico handler witness characterized their own operation as being quite a bit smaller than the main Arizona handler and most California handlers. If the typical lot size for a small New Mexico handler was 10,000 pounds, then the sample size would be smaller (13.2 pounds) and the inspector sampling time declines from two hours to one hour. The total cost would decline modestly, from $742 for a 50,000 pound lot to $689 for a 10,000 pound lot. However, since the costs are spread over fewer pounds, the unit cost for certification would rise to nearly seven cents per pound, about 3 percent of the handler sales price. If the small handler had a typical lot size of 30,000 pounds (the midpoint between 10,000 and 50,000 pounds) the certification cost would be about 2.5 cents per pound, just over one percent of the handler sale price.

However, the New Mexico handler witness indicated that they would try to organize their pistachio handling operation to keep the lot sizes for sampling and testing large enough to keep costs down. The 50,000 pound lot example shown in Table 3 therefore provides a reasonable representation of small handler certification costs. The higher costs are due largely to the less developed aflatoxin testing infrastructure than is available in California, and related issues such as greater distances for inspector travel.

Additional costs are incurred if a lot exceeds the maximum aflatoxin tolerance. Witnesses estimated that in all three states the cost for reworking a lot to remove the contaminated nuts would be 25 cents per pound. After reworking the lot a handler would incur another round of the sampling and testing costs highlighted in the tables.

Grower witnesses stated that the aflatoxin certification costs as presented by handler and other industry witnesses, and illustrated by the three tables, appeared to be reasonable representations of the cost of compliance with the aflatoxin requirements under the marketing order.

Proposed Reimbursement To Account for Handler Cost Differences

The significant cost differences highlighted above is the reason that pistachio industry witnesses from all three states supported a proposed amendment to authorize the Committee to reimburse handlers in more remote locations within the production area for the excess costs due to lack of access to inspection and certification services. Reimbursing handlers for the excess costs would eliminate any differential impact and would equalize the aflatoxin certification costs across the proposed expanded production area.

Although the precise details of reimbursement would be established through the informal rulemaking process upon recommendation of the Committee if such authority were granted, the following example illustrates one way to estimate the amount of reimbursement that may occur. With a 50,000 pound lot size, Table 3 shows the cost per lot for a New Mexico handler is about $742. The New Mexico handler would be expected to pay only the portion of the costs that are the same across the three states ($70 for inspector sampling, plus $90 testing cost, plus $44 in revenue foregone from destroyed pistachios, for a total cost per lot of $204). The handler represented by Table 3 would receive a reimbursement per lot of $538 ($742 minus $204).

Using different cost assumptions, a pistachio industry witness provided an example with a somewhat higher estimate of the likely cost ($605 per lot) that the Committee would reimburse New Mexico handlers. The witness estimated that with ten sampling trips per year, and one lot sampled per trip, the New Mexico reimbursements would total $6,050. With an anticipated total of 100 lots tested in Arizona in the example presented by the witness, and with a reimbursement rate of $235 per lot, the total Arizona cost would be $23,500. The sum for the two states would be about $30,000.

Based on similar assumptions used in developing the tables, the total current cost of marketing order aflatoxin certification for California handlers (excluding the Committee assessment) was estimated by an industry witness to be $530,000. Based on this example, a $30,000 reimbursement would be issued by the Committee to the Arizona and New Mexico handlers. The reimbursement would represent about a 6 percent increase above the $530,000 currently paid by the California handlers. The witness also stated that when the reimbursement system is implemented, all handlers of like-size operations would have comparable inspection costs.

All California handler and grower witnesses expressed their support for such a reimbursement provision. In addition, all of the Arizona and New Mexico handler and grower witnesses also testified in favor of such a reimbursement.

Handler and grower witnesses indicated that the expected benefits from the operation of the expanded

marketing order would substantially exceed costs.

Other Proposed Amendments

The addition of production, post harvest, and nutrition research authority to the order would have no immediate cost impact on the industry. If the proposal is adopted, it would allow the Committee to recommend research activities to USDA. If approved, the projects would be funded through handler assessments. It is likely that program assessments would increase in order to fund any projects recommended, which would increase costs to handlers. However, the order limits the total assessment that can be implemented under the order so that the entire assessment cannot exceed one half of one percent of the average price received by producers in the preceding crop year. To the extent that funds for research would only represent a portion of the assessment funds, the cost of any research that may be conducted would necessarily be less than one half of one percent of the average price received by producers. In addition, since assessments are collected from handlers based on the volume of pistachios handled, any cost associated with research projects would be proportionate to the size of the handlers.

Witnesses testified that the Committee would not undertake any research activities unless they expected the benefits to outweigh the costs. One witness testified that a presentation at a Symposium for Agricultural Research held on June 18 and 19, 2008, in Sacramento, California indicated that a benefit/cost ratio for agricultural research in California has been estimated at 30.7 to 1.

Handler and grower witnesses made positive comments in support of other proposed order amendments, including the granting of broad authority for aflatoxin standards and for other quality regulations. Witnesses stated that there would be no immediate impact from the granting of these authorities, because there are no industry plans for changes in regulations. However, handler and grower witnesses stated that having such authority would be quite helpful to the future of the pistachio industry, and that if the authorities were exercised in the future, they expected that it would be done in a way that assured that benefits would outweigh costs. Since unanimity of the Committee would generally be required to make such changes, they expressed confidence that only regulations would be established that had very broad industry consensus. They expected additional improvements in product quality and improved returns to growers and handlers from the use of any such future regulations.

One other proposed amendment, relating to interhandler transfers, merits discussion in the context of economic impact on handlers and growers, particularly small ones. When the marketing order was promulgated in 2004, authority was given for interhandler transfers of noncertified pistachios. Evidence presented at the hearing indicates that the proposed amendment formalizes that authority and expands it to include other marketing order requirements, including the payment of assessments on hulled and dried pistachios, when that processing is done by the producer. Under the marketing order, the entity which hulls and dries pistachios is responsible for assessments and inspections. This provision was included because in California producers normally deliver pistachios to a handler (processor) for hulling and drying as well as the subsequent handling functions.

However, conditions in Arizona and New Mexico are different due to the limited processing capacity of some handlers, the lack of processing access of producers, and the small size of some producing operations. It is necessary in these conditions for some producers to process (hull and dry) their pistachios prior to delivery to a handler. The hulling and drying is part of the harvest process, and it is not the intent of these producers to perform any other handling functions. The proposal would therefore allow the transfer the responsibility for assessments, inspections and other marketing order requirements to the handler who places the pistachios into the stream of commerce.

According to evidence presented at the hearing, this amendment would allow a small number of producers who hull and dry their own production, but perform no additional handling functions (estimated at less than ten), to limit their responsibility to filing a form at the time of pistachio delivery. This proposal would more clearly delineate the responsibilities of handlers and the small number of affected producers. Both would continue their current practices in virtually all cases, and the proposal would neither increase nor decrease returns. If the proposal is not accepted, small grower/handlers would assume an additional paperwork burden associated with the role of a handler, according to testimony. This proposal has the effect of assisting small business operations by removing them from paperwork and other burdens.

Handler Assessment Costs

Under the marketing order, handlers pay assessments to the Committee for costs associated with administering the program. Following is an evaluation of the impact these costs would have on handlers in Arizona and New Mexico if they are included under the order.

The assessment rate authorized under the order is limited to one-half of one percent (.005) of the average grower price received in the preceding crop year. The current assessment rate under the order is $.0007 per pound, or .07 cents per pound. This compares to an estimated average grower price for the 2007 crop year of $1.35 per pound. The assessment rate for the 2007 crop year was .05 percent (5/100ths of one percent) of the grower price.

Although there are no NASS data available regarding New Mexico pistachio production, information presented by witnesses at the hearing indicates average annual production in New Mexico could be in the range of 300,000 to 350,000 pounds. At an assessment rate of $.0007, this would equate to a total annual assessment ranging from $210 to $245 for all New Mexico handlers combined. Production from Arizona was 7 million pounds in 2007, according to NASS data. At the $.0007 per pound assessment rate, this would equate to a total annual assessment of $4,900 for all Arizona handlers combined. Assessments under the order present a cost to handlers, but as can be seen from the foregoing example, the cost is minimal. In addition, the costs are applied to handlers in proportion to the quantity of pistachios handled, so there is no differential impact anticipated for small and large handlers.

Paperwork Reduction Act

Information collection requirements for Part 983 are currently approved by the Office of Management and Budget (OMB) under OMB No. 0581–0215, ''Pistachios Grown in California.'' The reporting changes generated by the proposed amendments would result in an increase in burden and will be submitted to OMB under OMB No. 0581–NEW. Upon approval, we will request that this collection be merged into OMB No. 0581–0215.

Title: Pistachios Grown in California, Marketing Order No. 983.

OMB Number: 0581–NEW.

Expiration Date of Approval: 3 years from date of approval.

Type of Request: Approval of the collection of a new information collection.

Abstract: Marketing order programs provide an opportunity for producers of

fresh fruits, vegetables and specialty crops, in a specified production area, to work together to solve marketing problems that cannot be solved individually. Order regulations help ensure adequate supplies of high quality product and adequate returns to producers. Under the Agricultural Marketing Agreement Act of 1937 [7 U.S.C. 601–674], (AMAA), as amended, industries enter into marketing order programs. The Secretary of Agriculture is authorized to oversee the orders' operations and issue regulations recommended by a committee of representatives from each commodity industry.

The information collection requirements in this request are essential to carry out the intent of the AMAA, to provide the respondents the type of service they request, and to administer the pistachio marketing order program.

If the proposed amendments to the pistachio marketing order are implemented to expand the production area to include the States of Arizona and New Mexico, the reporting requirements in effect under the order would be applied to handlers and producers in those states, thus increasing burden.

Once implemented, producers and handlers of pistachios located in the States of Arizona and New Mexico would be required to complete forms relating to committee nominations, background questionnaires, referendum and nomination ballots, and handler reports. This would result in a burden of 29 hours. Additionally, handlers would have to maintain related records and documentation for three full years following the end of the crop year.

The information collected is used only by authorized representatives of the Department of Agriculture (USDA), including AMS, Fruit and Vegetable Programs regional and headquarters staff, and authorized employees of the Committee. AMS is the primary user of the information and authorized committee employees are the secondary user.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average .225 hours per response.

Respondents: Producers and handlers of pistachios grown in Arizona and New Mexico.

Estimated Number of Respondents: 85.

Estimated Number of Responses per Respondent: 1.51.

Estimated Total Annual Burden on Respondents: 29 hours.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the functioning of the pistachio marketing order program and USDA's oversight of that program; (2) the accuracy of the collection burden estimate and the validity of methodology and assumptions used in estimating the burden on respondents; (3) ways to enhance the quality, utility, and clarity of the information requested; and (4) ways to minimize the burden, including use of automated or electronic technologies.

Comments should reference OMB No. 0581–NEW and the Marketing Order for Pistachios Grown in California, and should be sent to the USDA in care of the Docket Clerk at the previous mentioned address or at *http://www.regulations.gov.*

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record and will be available for public inspection during regular business hours at the same address or at *http://www.regulations.gov.*

As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule. All of these amendments are designed to enhance the administration and functioning of the marketing order to the benefit of the industry.

While the implementation of these requirements may impose some additional costs on handlers, the costs are minimal and uniform on all handlers. Some of these costs may be passed on to growers. However, these costs would be offset by the benefits derived by the operation of the marketing order. In addition, the meetings regarding these proposals as well as the hearing date were widely publicized throughout the existing and proposed addition to the pistachio production area and all interested persons were invited to attend the meetings and the hearing and participate in Committee deliberations on all issues. All Committee meetings and the hearing were public forums and all entities, both large and small, were able to express views on these issues. The Committee itself is composed of members representing handlers and producers. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

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

Civil Justice Reform

The amendments to Marketing Order 983 proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect. If adopted, the proposed amendments would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this proposal.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United Sates in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed no later than 20 days after the date of the entry of the ruling.

Rulings on Briefs of Interested Persons

Briefs, proposed findings and conclusions, and the evidence in the record were considered in making the findings and conclusions set forth in this recommended decision. To the extent that the suggested findings and conclusions filed by interested persons are inconsistent with the findings and conclusions of this recommended decision, the requests to make such findings or to reach such conclusions are denied.

General Findings

The findings hereinafter set forth are supplementary to the findings and determinations which were previously made in connection with the issuance of the marketing order; and all said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

1. The marketing agreement and order, as amended, and as hereby proposed to be further amended, and all

of the terms and conditions thereof, would tend to effectuate the declared policy of the Act;

2. The marketing agreement and order, as amended, and as hereby proposed to be further amended, regulates the handling of pistachios grown in the production area in the same manner as, and is applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing order upon which a hearing has been held;

3. The marketing agreement and order, as amended, and as hereby proposed to be further amended, is limited in its application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

4. The marketing agreement and order, as amended, and as hereby proposed to be further amended, prescribes, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of pistachios grown in the production area; and

5. All handling of pistachios grown in the production area as defined in the marketing agreement and order, is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

A 30-day comment period is provided to allow interested persons to respond to this proposal. Thirty days is deemed appropriate because these proposed changes have been widely publicized and implementation of the changes, if adopted, would be desirable to benefit the industry as soon as possible. All written exceptions timely received will be considered and a grower referendum will be conducted before any of these proposals are implemented.

List of Subjects in 7 CFR Part 983

Pistachios, Marketing agreements and orders, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 983 is proposed to be amended as follows:

PART 983—PISTACHIOS GROWN IN CALIFORNIA

1. The authority citation for 7 CFR part 983 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Revise § 983.1 to read as follows:

§ 983.1 Accredited laboratory.

An *accredited laboratory* is a laboratory that has been approved or accredited by the U.S. Department of Agriculture.

3. Lift the December 10, 2007, suspension of § 983.6, and revise the section to read as follows:

§ 983.6 Assessed weight.

Assessed weight means pounds of inshell pistachios, with the weight computed at 5 percent moisture, received for processing by a handler within each production year: *Provided,* That for loose kernels, the actual weight shall be multiplied by two to obtain an inshell weight; *Provided further,* That the assessed weight may be based upon quality requirements for inshell pistachios that may be recommended by the Committee and approved by the Secretary.

4. Lift the December 10, 2007, suspension of § 983.7, and revise the section to read as follows:

§ 983.7 Certified pistachios.

Certified pistachios are those that meet the inspection and certification requirements under this part.

5. Revise § 983.8 to read as follows:

§ 983.8 Committee.

Committee means the Administrative Committee for Pistachios established pursuant to § 983.41.

6. Amend § 983.11 by adding a paragraph (a)(4) to read as follows:

§ 983.11 Districts.

(a) * * *

(4) *District 4* consists of the States of Arizona and New Mexico.

* * * * *

§ 983.19 [Removed]

7. Lift the December 10, 2007, suspension of § 983.19, and remove the section.

§ 983.20 [Removed]

8a. Lift the December 10, 2007, suspension of § 983.20, and remove the section.

§ 983.21 [Redesignated as § 983.20]

8b. Redesignate § 983.21 as § 983.20, and revise it to read as follows:

§ 983.20 Part and subpart.

Part means the order regulating the handling of pistachios grown in the States of California, Arizona and New Mexico, and all the rules, regulations and supplementary orders issued thereunder. The aforesaid order regulating the handling of pistachios grown in California, Arizona and New Mexico shall be a subpart of such part.

§ 983.22 [Redesignated as § 983.21]

9. Redesignate § 983.22 as § 983.21.

§ 983.23 [Redesignated as § 983.22]

10. Redesignate § 983.23 as § 983.22, and revise it to read as follows:

§ 983.22 Pistachios.

Pistachios means the nuts of the pistachio tree of the genus and species *Pistacia vera* grown in the production area, whether inshell or shelled.

§ 983.24 [Redesignated as § 983.23]

11. Redesignate § 983.24 as § 983.23.

§ 983.25 [Redesignated as § 983.24]

12. Redesignate § 983.25 as § 983.24.

§ 983.26 [Redesignated as § 983.25]

13. Redesignate § 983.26 as § 983.25, and revise it to read as follows:

§ 983.25 Production area.

Production Area means the States of California, Arizona, and New Mexico.

§§ 983.27 through 983.30 [Redesignated as §§ 983.26 through 983.29]

14. Redesignate §§ 983.27 through 983.30 as §§ 983.26 through 983.29, respectively.

§ 983.31 [Redesignated as § 983.30]

15. Lift the December 10, 2007, suspension of § 983.31, redesignate § 983.31 as § 983.30, and revise the section to read as follows:

§ 983.30 Substandard pistachios.

Substandard pistachios means pistachios, inshell or shelled, which do not meet regulations established pursuant to §§ 983.50 and 983.51.

§ 983.53 [Redesignated as § 983.71]

16. Redesignate § 983.53 as § 983.71, and revise paragraph (a) to read as follows:

§ 983.71 Assessments.

(a) Each handler who receives pistachios for processing in each production year, except as provided in § 983.58, shall pay the committee on demand, an assessment based on the *pro rata* share of the expenses authorized by the Secretary for that year attributable to the assessed weight of pistachios received by that handler in that year.

* * * * *

§ 983.54 [Redesignated as § 983.72]

17. Redesignate § 983.54 as § 983.72, and revise the section to read as follows:

§ 983.72 Contributions.

The committee may accept voluntary contributions but these shall only be used to pay for committee expenses unless specified in support of research

under § 983.46. Furthermore, research contributions shall be free of additional encumbrances by the donor and the committee shall retain complete control of their use.

§ 983.55 [Redesignated as § 983.73]

18. Redesignate § 983.55 as § 983.73.

§ 983.56 [Redesignated as § 983.74]

19. Redesignate § 983.56 as § 983.74, and amend it by removing the reference to ''§ 983.53'' and adding in its place ''§ 983.71'' in paragraph (a)(1).

§ 983.57 [Redesignated as § 983.75]

20. Redesignate § 983.57 as § 983.75, and revise it to read as follows:

§ 983.75 Implementation and amendments.

The Secretary, upon the recommendation of a majority of the committee, may issue rules and regulations implementing or modifying §§ 983.64 through 983.74 inclusive.

§§ 983.58 through 983.64 [Redesignated as §§ 983.80 through 983.86]

21. Redesignate §§ 983.58 through 983.64 as §§ 983.80 through 983.86, respectively.

22. Move the undesignated center heading ''MISCELLANEOUS PROVISIONS'' to precede § 983.80.

§ 983.65 [Redesignated as § 983.87]

23. Redesignate § 983.65 as § 983.87, and revise it to read as follows:

§ 983.87 Effective time.

The provisions of this part, as well as any amendments, shall become effective at such time as the Secretary may declare, and shall continue in force until terminated or suspended in one of the ways specified in § 983.88 or § 983.89.

§§ 983.66 through 983.69 [Redesignated as §§ 983.88 through 983.91]

24. Redesignate §§ 983.66 through 983.69 as §§ 983.88 through 983.91, respectively.

§ 983.70 [Redesignated as § 983.92]

25. Redesignate § 983.70 as § 983.92, and revise it to read as follows:

§ 983.92 Exemption.

Any handler may handle pistachios within the production area free of the requirements in §§ 983.50 through 983.58 and § 983.71 if such pistachios are handled in quantities not exceeding 5,000 dried pounds during any production year. The Secretary, upon recommendation of the committee, may issue rules and regulations changing the 5,000 pound quantity applicable to this exemption.

§ 983.41 [Redesignated as § 983.53]

26. Lift the December 10, 2007, suspension of § 983.41, redesignate § 983.41 as § 983.53, and revise the section to read as follows:

§ 983.53 Testing of minimal quantities.

(a) *Aflatoxin.* Handlers who handle less than 1 million pounds of assessed weight per year have the option of utilizing both of the following methods for testing for aflatoxin:

(1) The handler may have an inspector sample and test his or her entire inventory of hulled and dried pistachios for the aflatoxin certification before further processing.

(2) The handler may segregate receipts into various lots at the handler's discretion and have an inspector sample and test each specific lot. Any lots that are found to have less aflatoxin than the level established by the Committee and approved by the Secretary can be certified by an inspector to be negative as to aflatoxin. Any lots that are found to have aflatoxin exceeding the level established by the Committee and approved by the Secretary may be tested after reworking in the same manner as specified in § 983.50.

(b) *Quality.* The committee may, with the approval of the Secretary, establish regulations regarding the testing of minimal quantities of pistachios for quality.

§ 983.42 [Redesignated as § 983.54]

27. Lift the December 10, 2007, suspension of § 983.42, redesignate § 983.42 as § 983.54, and revise the section to read as follows:

§ 983.54 Commingling.

Certified lots may be commingled with other certified lots, but the commingling of certified and uncertified lots shall cause the loss of certification for the commingled lots.

§ 983.43 [Redesignated as § 983.55]

28. Redesignate § 983.43 as § 983.55.

§ 983.44 [Redesignated as § 983.56]

29. Redesignate § 983.44 as § 983.56, and revise it to read as follows:

§ 983.56 Inspection, certification and identification.

Upon recommendation of the committee and approval of the Secretary, all pistachios that are required to be inspected and certified in accordance with this part shall be identified by appropriate seals, stamps, tags, or other identification to be affixed to the containers by the handler. All inspections shall be at the expense of the handler, *Provided,* That for handlers making shipments from facilities located in an area where inspection costs for inspector travel and shipment of samples for aflatoxin testing would otherwise exceed the average of those same inspection costs for comparable handling operations located in Districts 1 and 2, such handlers may be reimbursed by the committee for the difference between their respective inspection costs and such average, or as otherwise recommended by the committee and approved by the Secretary.

§ 983.45 [Redesignated as § 983.57]

30. Lift the December 10, 2007, suspension of § 983.45, redesignate § 983.45 as § 983.57, and revise the section to read as follows:

§ 983.57 Substandard pistachios.

The committee shall, with the approval of the Secretary, establish such reporting and disposition procedures as it deems necessary to ensure that pistachios which do not meet the aflatoxin and quality requirements established pursuant to §§ 983.50 and 983.51 shall not be shipped for domestic human consumption.

§ 983.46 [Redesignated as § 983.59]

31. Redesignate § 983.46 as § 983.59, and revise it to read as follows:

§ 983.59 Modification or suspension of regulations.

(a) In the event that the committee, at any time, finds that by reason of changed conditions, any regulations issued pursuant to §§ 983.50 through 983.58 should be modified or suspended, it shall, pursuant to § 983.43, so recommend to the Secretary.

(b) Whenever the Secretary finds from the recommendations and information submitted by the committee or from other available information, that a regulation should be modified, suspended, or terminated with respect to any or all shipments of pistachios in order to effectuate the declared policy of the Act, the Secretary shall modify or suspend such provisions. If the Secretary finds that a regulation obstructs or does not tend to effectuate the declared policy of the Act, the Secretary shall suspend or terminate such regulation.

(c) The Secretary, upon recommendation of committee, may issue rules and regulations implementing §§ 983.50 through 983.58.

§§ 983.47 through 983.51 [Redesignated as §§ 983.64 through 983.68]

32. Redesignate §§ 983.47 through 983.51 as §§ 983.64 through 983.68, respectively.

33. Move the undesignated center heading ''REPORTS, BOOKS, AND RECORDS'' to precede § 983.64.

§ 983.52 [Redesignated as § 983.70]

34. Redesignate § 983.52 as § 983.70.

35. Move the undesignated center heading ''EXPENSES AND ASSESSMENTS'' to precede § 983.70.

36. Add a new § 983.58 to read as follows:

§ 983.58 Interhandler Transfers.

Within the production area, any handler may transfer pistachios to another handler for additional handling, and any assessments, inspection requirements, aflatoxin testing requirements, and any other marketing order requirements with respect to pistachios so transferred may be assumed by the receiving handler. The committee, with the approval of the Secretary, may establish methods and procedures, including necessary reports, to maintain accurate records for such transfers.

§ 983.32 [Redesignated as § 983.41]

37. Redesignate § 983.32 as § 983.41, amend the section by removing the words ''eleven (11)'' from the introductory paragraph and adding in their place the words ''twelve (12),'' and by revising paragraph (b) to read as follows:

§ 983.41 Establishment and membership.

(a) * * *

(b) *Producers.* Nine members shall represent producers. Producers within the respective districts shall nominate four producers from District 1, three producers from District 2, one producer from District 3, and one producer from District 4. The Secretary, upon recommendation of the committee, may reapportion producer representation among the districts to ensure proper representation.

* * * * *

§ 983.33 [Redesignated as § 983.42]

38. Redesignate § 983.33 as § 983.42, and amend the section by removing the word ''grower'' and adding in its place the word ''producer'' in paragraph (a), removing the reference to ''§ 983.32'' and adding in its place ''§ 983.41'' in paragraph (j), and by removing the reference to ''§§ 983.32, 983.33, and 983.34'' and adding in its place ''§§ 983.41, 983.42, and 983.43'' in paragraph (n).

§ 983.34 [Redesignated as § 983.43]

39. Redesignate § 983.34 as § 983.43, and revise paragraph (a) of that section to read as follows:

§ 983.43 Procedure.

(a) *Quorum.* A quorum of the committee shall be any seven voting committee members. The vote of a majority of members present at a meeting at which there is a quorum shall constitute the act of the committee: *Provided,* That actions of the committee with respect to the following issues shall require twelve (12) concurring votes of the voting members regarding any recommendation to the Secretary for adoption or change in:

(1) Quality regulation;

(2) Aflatoxin regulation;

(3) Research under § 983.46; and

Provided further, That actions of the committee with respect to the following issues shall require eight (8) concurring votes of the voting members regarding recommendation to the Secretary for adoption or change in:

(4) Inspection programs;

(5) The establishment of the committee.

* * * * *

§ 983.35 [Redesignated as § 983.44]

40. Redesignate § 983.35 as § 983.44.

§ 983.36 [Redesignated as § 983.45]

41. Redesignate § 983.36 as § 983.45.

§ 983.37 [Redesignated as § 983.47]

42. Redesignate § 983.37 as § 983.47.

43. Move the undesignated center heading ''MARKETING POLICY'' to precede § 983.47.

§ 983.38 [Redesignated as § 983.50]

44. Lift the December 10, 2007, suspension of § 983.38, redesignate § 983.38 as § 983.50, and revise the section to read as follows:

§ 983.50 Aflatoxin regulations.

The committee shall establish, with the approval of the Secretary, such aflatoxin sampling, analysis, and inspection requirements applicable to pistachios to be shipped for domestic human consumption as will contribute to orderly marketing or be in the public interest. No handler shall ship, for human consumption, pistachios that exceed an aflatoxin level established by the committee with approval of the Secretary. All domestic shipments must be covered by an aflatoxin inspection certificate.

45. Move the undesignated center heading ''REGULATIONS'' to precede § 983.50.

§ 983.39 [Redesignated as § 983.51]

46. Lift the December 10, 2007, suspension of § 983.39, redesignate § 983.39 as § 983.51, and revise the section to read as follows:

§ 983.51 Quality regulations.

For any production year, the committee may establish, with the approval of the Secretary, such quality and inspection requirements applicable to pistachios to be shipped for domestic human consumption as will contribute to orderly marketing or be in the public interest. In such production year, no handler shall ship pistachios for domestic human consumption unless they meet the applicable requirements as evidenced by certification acceptable to the committee.

§ 983.40 [Redesignated as § 983.52]

47. Lift the December 10, 2007, suspension of § 983.40, redesignate § 983.40 as § 983.52, and revise the section to read as follows:

§ 983.52 Failed lots/rework procedure.

(a) *Substandard pistachios.* Each lot of substandard pistachios may be reworked to meet aflatoxin or quality requirements. The committee may establish, with the Secretary's approval, appropriate rework procedures.

(b) *Failed lot reporting.* If a lot fails to meet the aflatoxin and/or the quality requirements of this part, a failed lot notification report shall be completed and sent to the committee within 10 working days of the test failure. This form must be completed and submitted to the committee each time a lot fails either aflatoxin or quality testing. The accredited laboratories shall send the failed lot notification reports for aflatoxin tests to the committee, and the handler, under the supervision of an inspector, shall send the failed lot notification reports for the lots that do not meet the quality requirements to the committee.

48. Add a new § 983.46, preceded by an undesignated center heading, to read as follows:

Research

§ 983.46 Research.

The committee, with the approval of the Secretary, may establish or provide for the establishment of projects involving research designed to assist or improve the efficient production and postharvest handling of quality pistachios. The committee, with the approval of the Secretary, may also establish or provide for the establishment of projects designed to determine the effects of pistachio consumption on human health and nutrition. Pursuant to § 983.43(a), such research projects may only be established with 12 concurring votes of the voting members of the committee. The expenses of such projects shall be

paid from funds collected pursuant to §§ 983.71 and 983.72.

Dated: April 29, 2009.

Robert C. Keeney,

Acting Associate Administrator, Agricultural Marketing Service.

[FR Doc. E9–10150 Filed 5–4–09; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF COMMERCE

Economic Development Administration

13 CFR Parts 313 and 315

[Docket No.: 090429810–9808–01]

RIN 0610–AA65

Revisions to the Trade Adjustment Assistance for Firms Program Regulations and Implementation Regulations for Community Trade Adjustment Assistance Program

AGENCY: Economic Development Administration, Department of Commerce.

ACTION: Notice of proposed rulemaking.

SUMMARY: On February 17, 2009, President Barack Obama signed into law the American Recovery and Reinvestment Act of 2009 (Pub.L. No. 111–5, 123 STAT. 115). Included in that omnibus measure was the Trade and Globalization Adjustment Assistance Act of 2009 (''TGAAA''), which contains specific amendments to chapters 3 and 4 of the Trade Act of 1974, as amended (19 U.S.C. 2341 *et seq.*) (''Trade Act''). See Subtitle I (letter ''I'') of Title I of Division B of Public Law No. 111–5, 123 Stat. 367, at 396–436. Chapter 3 of the Trade Act authorizes the Trade Adjustment Assistance for Firms (''TAAF'') Program, under which a national network of eleven Trade Adjustment Assistance Centers provide technical assistance to firms that have lost domestic sales and employment due to increased imports of similar or competitive goods. Chapter 4 of the Trade Act establishes the Community Trade Adjustment Assistance (''Community TAA'') Program, which is designed to help local economies adjust to changing trade patterns through the coordination of federal, State, and local resources and the creation and implementation of community-based development strategies to help address trade impacts. As a result of the enactment of the TGAAA, EDA is publishing this notice of proposed rulemaking (''NPRM'') to request comments on the promulgation of the Community TAA Program regulations and specific proposed changes to the TAAF Program regulations, both of which implement the amendments to the Trade Act made by the TGAAA. In large part, the revisions to the existing TAAF Program regulations propose to make service sector firms potentially eligible for assistance and include longer ''look back'' time periods for which Firms may present data for certification purposes.

DATES: Comments on this NPRM must be received by EDA's Office of Chief Counsel no later than 5 p.m. Eastern Time on June 4, 2009.

ADDRESSES: Comments on this NPRM may be submitted through any of the following:

- *Federal eRulemaking Portal: http://www.Regulations.gov.*
- *Mail:* Economic Development Administration, Office of Chief Counsel, Room 7005, Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230.

Commenters are advised that U.S. Department of Commerce mail security measures may delay receipt of United States Postal Service mail for up to two weeks. Commenters may wish to use the facsimile or e-mail options.

- *Facsimile:* (202) 482–5671, *Attention:* Office of Chief Counsel. Please indicate ''Comments on the NPRM'' on the cover page.
- *E-mail: edaregs@eda.doc.gov.* Please state ''Comments on the NPRM'' in the subject line.

FOR FURTHER INFORMATION CONTACT: Jamie Lipsey, Economic Development Administration, Department of Commerce, Room 7005, 1401 Constitution Avenue, NW., Washington, DC 20230; *telephone:* (202) 482–4687.

SUPPLEMENTARY INFORMATION:

Background

EDA's mission is to lead the federal economic development agenda by promoting innovation and competitiveness, preparing American regions for growth and success in the worldwide economy. In implementing this mission, EDA administers the TAAF Program under the Trade Act, which was enacted in part to provide adequate procedures to safeguard American industry and labor against unfair or injurious import competition and assist industries, firms, workers, and communities in adjusting to changes in international trade flows. The responsibility for administering both the TAAF and Community TAA Programs is delegated from the Secretary of Commerce to EDA.

EDA is publishing proposed revisions to its TAAF Program regulations to reflect the TGAAA amendments made to chapter 3 of the Trade Act. Under the TAAF Program, EDA funds a national network of eleven non-profit or university-affiliated organizations, each known as a Trade Adjustment Assistance Center (''TAAC''). The TAACs provide technical assistance to Firms that have lost domestic sales and employment due to increased imports of similar or competitive goods.

In addition, the TGAAA amended chapter 4 of the Trade Act to establish the Community TAA Program. The purpose of this program is to assist communities impacted by trade with economic adjustment through the coordination of federal, State and local resources and the creation of community-based development strategies. EDA sets out in detail below proposed Community TAA Program regulations.

Proposed Community TAA Program Regulations

Set out below are EDA's proposed regulations for the Community TAA Program, which would be codified at 13 CFR part 313. In addition to implementing the amendments to the Trade Act made by TGAAA, the proposed regulations reflect EDA's practices and policies in administering the Community TAA Program similar to its administration of programs under the Public Works and Economic Development Act of 1965, as amended (42 U.S.C. 3121 *et seq.*). The discussion below presents the proposed regulations by section number and explains each proposed regulatory provision.

Part 313—Community Trade Adjustment Assistance

Authority Section

The authority for the Community TAA Program regulations derives from the Trade Act, inclusive of the amendments made by TGAAA.

Section 313.1—Purpose and Scope

This section introduces the Community TAA Program to the reader, including a reference to the TGAAA. It also provides the purpose of the program and a brief overview for its administration, including EDA's certification of Communities, provision of technical assistance, and assistance in the creation and implementation of Strategic Plans.

Section 313.2—Definitions

This section proposes definitions for key terms to be used in part 313. It includes terms provided in the TGAAA as well as new terms to increase clarity and to assist with the efficient

administration of the Community TAA Program.

The following discussion traces the definition of ''Agricultural Commodity Producer'' as provided in the TGAAA. The TGAAA states that '' 'Agricultural Commodity Producer' has the meaning given that term in section 291.'' Section 291 of the Trade Act states that ''[t]he term 'agricultural commodity producer' has the same meaning prescribed by regulations promulgated under section 1308(e) of Title 7 (before the amendment made by section 1703(a) of the Food, Conservation, and Energy Act of 2008).'' Before it was amended by section 1703(e) of the Food Conservation, and Energy Act of 2008, section 1308(e) of Title 7 provided that the Secretary of Agriculture would issue regulations defining the term ''person'' and required that for the purposes of the regulations ''the term 'person' means—(i) an individual, including any individual participating in a farming operation as a partner in a general partnership, a participant in a joint venture, a grantor of a revocable trust, or a participant in a similar entity (as determined by the Secretary; (ii) a corporation, joint stock company, association, limited partnership, charitable organization, or other similar entity (as determined by the Secretary), including any such entity or organization participating in the farming operation as a partner in a general partnership, a participant in a joint venture, a grantor of a revocable trust, or as a participant in a similar entity (as determined by the Secretary); and (iii) a State, political subdivision, or agency thereof.'' The Trade Adjustment Assistance for Farmers regulations promulgated under section 1308(e) of Title 7 state: ''*Person* means an individual, partnership, joint stock owner, corporation, association, trust, estate, or any other legal entity as defined in 7 CFR 1400.3.''

The term *Community* is defined in accordance with the TGAAA. The definition of *Impacted Community* combines and replaces the terms *Community Impacted By Trade* and *Eligible Community* as defined in the TGAAA. These terms were combined because they are essentially identical and merging them helps clarify the regulations and is consistent with the intent of the TGAAA.

In addition, this section includes a definition for a *Cognizable Certification*. In accordance with the TGAAA, a Cognizable Certification may be a certification from the (i) Secretary of Labor that a group of workers in the Community is eligible for TAA for Workers benefits; (ii) Secretary of Commerce that a Firm in the Community is eligible for TAA for Firms benefits; or (iii) Secretary of Agriculture that a group of Agricultural Commodity Producers is eligible for TAA for Farmers and Fishermen benefits. Further, *Strategic Plan* is defined, and the concept of a Strategic Plan is fully described in proposed section 313.6.

Section 313.3—Overview of Community Trade Adjustment Assistance

This section provides a more detailed roadmap for the administration of and participation in the Community TAA Program. First, a Community must petition for assistance and EDA must make an affirmative determination that the Community is impacted by trade; second, once an affirmative determination has been made, EDA will provide technical assistance to the Impacted Community to address that impact; third, EDA may provide an impacted Community with assistance in developing a Strategic Plan to the trade impacts; and fourth, EDA may provide assistance to implement certain projects described in the EDA-approved Strategic Plan.

Section 313.4—Affirmative Determinations

This section would implement section 273 of chapter 4 of the Trade Act, as amended by the TGAAA, which relates to the process and requirements for a Community's petition for EDA's affirmative determination that it is trade-impacted under the Community TAA Program. A Community's completed petition for an affirmative determination is the first step toward receiving assistance in the form of an implementation grant under proposed part 313. Sections 313.4(a) and (b) explain which Communities may petition for assistance. Section 313.4(c) details what type of information a Community must provide to EDA in a petition and provides the criteria that EDA will use to make an affirmative determination that a Community is import-impacted. For EDA to make an affirmative determination about a Community, a Cognizable Certification must have been made with respect to the Community. As specified at Section 313.4(c), EDA will obtain applicable Cognizable Certifications from publicly available sources. However, to expedite a petition, a Community may choose to provide EDA with a copy of any applicable Cognizable Certification. In addition, the petitioning Community must provide information about the impact(s) on the Community from the actual or threatened loss of jobs attributable to the effects of competition by imports that led to the applicable Cognizable Certification(s) made by the Secretaries of Labor, Commerce or Agriculture, in order to allow EDA to determine that the Community is significantly affected. EDA will measure such impacts against the petitioning Community's most recent Civilian Labor Force statistics as reported by the Bureau of Labor Statistics, U.S. Department of Labor, effective at the time of petition for affirmative determination.

Upon receiving appropriations for the Community TAA Program, EDA will publish guidance regarding the determination of the significance of the impact when it posts the announcement of federal funding opportunity online at eda.doc.gov. EDA anticipates that it will establish a threshold level for an impact to be considered ''significant'' based on unemployment and the size of the Community.

Once EDA makes an affirmative determination that a Community is trade-impacted, the Community becomes an Impacted Community, as defined in Section 313.2. Section 313.4(d) implements section 273(c) of the Trade Act as amended by TGAAA, which provides that EDA will promptly notify the Impacted Community and the Governor of the State in which the Impacted Community is located upon making an affirmative determination.

Section 313.5—Technical Assistance

This section would implement subsections 274(a) and (b) of chapter 4 of the Trade Act, as amended by the TGAAA, which provides the types of technical assistance an Impacted Community may receive. Upon an affirmative determination that a Community is an Impacted Community and subject to the availability of funding, EDA will provide technical assistance to the Impacted Community. Section 313.5(a) provides that an Impacted Community will receive technical assistance for certain purposes, which are to improve the Impacted Community's economy, identify impact-related economic challenges within the Impacted Community, and develop or update a Strategic Plan to address import impacts. Section 313.5(b) provides that EDA will coordinate the provision of technical assistance with other federal, State, and local resources to ensure the effective delivery of services and better leverage assistance.

Section 313.6—Strategic Plans

Section 313.6 would implement section 276 of chapter 4 of the Trade

Act, as amended by the TGAAA, which relates to the development of a Strategic Plan to assist an Impacted Community. Under the TGAAA, the development of an EDA-approved Strategic Plan to address trade impacts is one type of technical assistance that an Impacted Community may receive under the Community TAA Program. An EDA-approved Strategic Plan is required before a Community may receive an implementation grant, as provided in Section 313.6(a). Section 313.6(b) provides that the Strategic Plan should be developed to the extent possible with participation from local, county, and State governments; local Firms (as defined under title II, chapter 3, section 259 of the Trade Act, as amended (*see also* the definition of Firm at 13 CFR 315.2)); local workforce investment boards; labor organizations; and educational institutions. Section 313.6(c) sets out the technical requirements of a Strategic Plan by which EDA will evaluate and approve the Strategic Plan. These requirements include an analysis of the economic development challenges facing the Impacted Community and the Community's capacity to achieve economic adjustment to these challenges; an assessment of the Community's long-term commitment to the Strategic Plan (including how it will be integrated with any existing Comprehensive Economic Development Strategy (CEDS) developed under EDA's economic development assistance programs as provided under Section 303.7) and the participation of Community members; a description of educational opportunities and future employment needs in the Community; an assessment of the funding required to implement the Strategic Plan, including a timeline and methods of financing; and a strategy for continuing the Impacted Community's economic adjustment after the projects in the Strategic Plans have been completed. Section 313.6(d) provides that EDA's cost share of a Strategic Plan will not exceed 75 percent. To ensure that as many merit-worthy projects as possible are funded, EDA may base the Community's required cost share of developing a Strategic Plan on the Impacted Community's Civilian Labor Force statistics.

Section 313.7—Implementation Grants for Impacted Communities

Section 313.7 would implement section 275 of chapter 4 of the Trade Act, as amended by the TGAAA, which relates to grants for implementing projects and programs included in an EDA-approved Strategic Plan. Section 313.7(a) provides that EDA may assist an Impacted Community in implementing a Strategic Plan project or program. Paragraphs (1)–(6) under Section 313.7(a) are a list of examples of projects that may be undertaken, including infrastructure projects; market or industry research and analysis; technical assistance; public services; training; and other activities justified in the Strategic Plan. Section 313.7(b) provides information on the application for an implementation grant and how an Impacted Community's application for assistance will be evaluated. Section 313.7(c) provides for maximum coordination of implementation grants among the Impacted Community's existing grant programs. Section 313.7(d) explains the cost-sharing requirements applicable to implementation grants. The federal share may not exceed 95 percent and, as mentioned earlier, to ensure that as many merit-worthy projects as possible are funded, EDA may base the Community's required share of implementing a Strategic Plan on the Impacted Community's Civilian Labor Force statistics. Section 313.7(e) specifies the statutory funding limitation that an Impacted Community may not receive more than $5,000,000 in implementation grant funding under the Community TAA Program.

Section 313.8—Competitive Process

In accordance with EDA's economic development assistance programs and to ensure effective expenditure of federal funds, this section proposes that EDA will review all applications for the development of a Strategic Plan and for an implementation grant under the Community TAA Program in accord with a competitive process, as set out in an applicable Federal Funding Opportunity (''FFO'') announcement, provided monies are appropriated for the program. Paragraph (b) implements section 275(e) of chapter 4 of the Trade Act, as amended by the TGAAA, which provides for priority for the implementation grant applications received from small- and medium-sized Communities. Paragraph (c) implements section 277(c)(3) of chapter 4 of the Trade Act, as amended by the TGAAA, which provides that the Community TAA Program shall supplement and not supplant other federal, State, and local assistance to Communities.

Section 313.9—Records

This section provides that a Community that receives assistance under the Community TAA Program is subject to the records requirements set out at 13 CFR 302.14.

Section 313.10—Conflicts of Interest

This section clarifies that a Community that receives assistance under the Community TAA Program is subject to the conflicts-of-interest provisions set out at 13 CFR 302.17.

Section 313.11—Other Requirements

This section clarifies that a Community that receives assistance under the proposed part 313 is subject to certain other award requirements set out in EDA's regulations at 13 CFR part 302, including terms and conditions relating to environmental, post-disaster assistance, public information, relocation assistance and land acquisitions, federal policies and procedures, amendments and changes, pre-approval costs, intergovernmental project review, attorneys' and consultants' fees and the employment of expediters, the economic development information clearinghouse, project administration, operation and maintenance, post-approval requirements, indemnification, civil rights and property management. The section provides the citations for all of these requirements.

Discussion of Changes to the TAAF Program Regulations

EDA proposes revisions to 13 CFR part 315 to implement provisions of the TGAAA that expand the scope of the TAAF Program to include service sector firms, modify the requirements for certification, and make conforming changes to other related provisions in the regulations.

EDA provides below a discussion of all substantive revisions according to section number. Where substantive and non-substantive changes are made in one part, they are discussed together. Non-substantive edits may include grammatical changes and are intended to clarify or make a specific provision easier to understand. Additional non-substantive changes also update the regulations in light of developments since EDA's publication of an interim final rule on October 22, 2008 (73 FR 62858). Capitalized terms used but not otherwise defined in the discussion below have the meanings ascribed to them in 13 CFR 315.2. For convenience and ease of reading, EDA sets forth the revised regulatory text for the program in its entirety.

Part 315—Trade Adjustment Assistance for Firms

Authority Section

The authority from which the TAAF Program regulations derive is the Trade Act, as amended by the TGAAA.

Section 315.2—Definitions

In the definition of *Decreased Absolutely,* EDA proposes to replace the word ''irrespective'' in paragraph (1) with the word ''independent'', for increased clarity and ease of understanding. This change does not in any way alter the definition of the term Decreased Absolutely or EDA's current administration of the TAAF Program.

EDA proposes to revise the definition of *Directly Competitive* to include services to take into account the TGAAA's inclusion of ''service sector firms'' as eligible for trade adjustment assistance. In addition, EDA revised the definition with respect to Firms engaged in exploring, drilling, or producing oil or natural gas to ensure that the definition hues closely to the statutory treatment set out in section 251(c)(2)(B) of the Trade Act.

A significant change to this section involves the TGAAA's expansion of the definition of *Firm* to include a ''service sector firm.'' Accordingly, the first sentence of the definition is revised to include service sector entities. A statement is included following this sentence to direct the reader to the new definition of *Service Sector Firm* found later in this section. Similarly, the definition of *Like Articles* is expanded to include services.

The definition of *Increase in Imports* is revised to include a discussion of the type of evidence EDA may consider in determining whether an increase in imports has occurred in a particular situation. The proposed revision adds the new requirement from section 1863 of the TGAAA to permit EDA to determine that an Increase in Imports exists if customers accounting for a significant percentage of the decline in a Firm's sales or production certify that their purchases of imported Like Articles or Services have increased absolutely or relative to the acquisition of such Like Articles or Services from suppliers in the United States.

EDA proposes to include a new term in this section to define ''*Service Sector Firm*'' as a Firm engaged in the business of supplying services. The definition also includes language similar to that contained in the definition of Firm to make clear that for purposes of receiving benefits under 13 CFR part 315, when a Service Sector Firm owns or controls other Service Sector Firms, the Service Sector Firm and such other Service Sector Firms may be considered a single Service Sector Firm when they furnish like or Directly Competitive services or are exerting essential economic control over one or more servicing facilities.

Section 315.5—TAAC Scope, Selection, Evaluation and Awards

For increased clarity, EDA deletes the last sentence in paragraph (a) because an FFO announcement typically is not published in connection with administering the TAAF Program. Also for increased clarity and consistency, EDA replaces the words ''and/or'' with ''or'' in paragraph (b)(1). In Section 315(b)(2), EDA replaces the words ''TAAC proposals'' with ''applications,'' and deletes the second sentence because EDA no longer has a two-step application process. An application would be submitted on EDA's Form ED–900. In Section 315.5(c)(2)(iv), the word ''funding'' is replaced with ''funds'' for consistency with the phrase ''availability of funds'' in Section 315.5(c)(1)(iii). Finally, in Section 315.5(d)(1), EDA clarifies that it funds a TAAC for a three-year project period that consists of three 12-month ''funding periods.'' This revision is made to bring the regulation in line with current administration of the TAAF Program.

Section 315.7—Certification Requirements

This section would be revised to reflect changes made by the TGAAA to the time periods that Firms may use to demonstrate injury due to an Increase in Imports. As set out in the certification thresholds at Section 315.7(b) and defined at Section 315.2, for certification under the TAAF Program, a Firm must present data to demonstrate three basic items: that its sales or production have Declined Absolutely, a Significant Number of Workers became or are threatened to be totally or partially separated, and increased imports Contributed Importantly to the decline in sales or production and workforce. Before the enactment of the TGAAA, a Firm was permitted to present data for certification from the 12 months immediately preceding the most recent 12-month period for which data are available, to demonstrate that imports adversely impacted its business under one of the thresholds. The amendments to the Trade Act expand this ''look back'' period so that a Firm may use the average of one, two, or three years of sales or production data, or both, preceding the most recent 12-month period for which data are available to demonstrate that the Firm's sales or production have Decreased Absolutely or that the Firm's sales, production, or both of an article or service that accounts for at least 25 percent of its total production or sales has Decreased Absolutely as a result of increased imports. Therefore, EDA proposes to revise paragraph (b) to include the new 24-, and 36-month ''look back'' or comparison time periods to the existing 12-month, interim sales or production decline, and interim employment decline thresholds. For clarity and ease of reading, EDA has set out each certification threshold separately, and the inclusion of the 24- and 36-month comparison periods increases the number of certification thresholds from three to five. EDA, however, is not proposing to change the certification requirement beyond expanding the allowable comparison periods. EDA will continue to accept petitions that are able to demonstrate six months of sales or production data or six months of employment data for an interim sales or production decline or employment decline in accordance with Sections 315.7(b)(4) and (5). For each of the five certification thresholds listed in paragraph (b), the required Increase in Imports is revised to make clear that any such Increase in Imports must have Contributed Importantly to the applicable Total or Partial Separation or Threat of Total or Partial Separation, and to the applicable decline in sales or production or supply of services as required by section 251 of the Trade Act.

Section 315.8—Processing Petitions for Certification

EDA revises Section 315.8 to implement the expansion of the TAAF Program to include ''service section firms'' pursuant to the TGAAA. Paragraphs (b)(2) and (b)(3), which discuss the scope of information required in Form ED–840P, would be revised to include information on services. In addition, paragraph (b)(4) would be revised to include 24-, 36-, and 48-month periods in line with the additional ''look back'' time periods proposed in Section 315.7(b). In accordance with the amendments to the Trade Act made by the TGAAA, EDA would amend paragraph (g)(1) to reduce the maximum time period in which EDA is allowed to make its determination from 60 days to 40 days.

Section 315.10—Loss of Certification Benefits

In paragraph (d) of this section, EDA proposes to change the length of the time period that a Firm has to diligently pursue an approved Adjustment Proposal after the date of certification from two years to five years. This revision would make this provision consistent with EDA's current practice that allows Certified Firms to have five, not two, years from the date of EDA's approval of an Adjustment Proposal to

complete work on that Adjustment Proposal. It has been EDA's experience that it generally takes Certified Firms longer than two years to diligently implement an Adjustment Proposal. This may occur for a variety of reasons, generally time needed to gather the capacity and resources to implement the goals of the Adjustment Proposal and some projects may have extended time horizons. This change would therefore implement current practice.

Section 315.14—Certifications

In order to track the Trade Act more accurately in this section, EDA proposes to amend this section to clarify that the certification must be provided to EDA.

Classification

Prior notice and opportunity for public comment are not required for rules concerning public property, loans, grants, benefits, and contracts (5 U.S.C. 553(a)(2)). Because prior notice and an opportunity for public comment are not required pursuant to 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis has not been prepared.

Paperwork Reduction Act

This NPRM contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA). The use of Form ED–900 (*Application for Investment Assistance*) has been approved by the Office of Management and Budget (OMB) under the Control Number 0610–0094. To estimate burden, EDA examined its experience with its public works and economic adjustment assistance programs. The potential demand for those programs is of course much greater because eligibility is based on general economic distress and is not restricted to trade impact. EDA estimates that demand from trade impacted areas would constitute a small fraction of all areas experiencing economic distress. Nonetheless, to a certain extent that demand will be elastic depending on the amount of appropriations Congress and the President approve for the program. Because the *respondent* burden will be similar for applications under trade program as it is for applications under EDA's traditional programs, if the Community TAA Program is funded at its authorized level of $150,000,000, EDA estimates that it may receive about 350 responses for a petition for affirmative determination and 300 responses for an implementation grant. EDA estimates that the total annual paperwork burden for a petition for affirmative determination would be about 550 hours and the total annual paperwork burden for an implementation grant application would be about 6,500 hours. The use of Form ED–840P (*Petition by a Firm for Certification of Eligibility to Apply for Trade Adjustment Assistance*) has been approved by OMB under the Control Number 0610–0091. In light of the expansion of the TAAF Program to service firms and the expansion of the ''look back'' period, EDA estimates responses related to certifications of eligibility will increase more than 100 percent to about 500 responses and that the total annual paperwork burden would be about 4,100 hours.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

Executive Order No. 12866

It has been determined that this NPRM is significant for purposes of Executive Order 12866.

Congressional Review Act

This NPRM is not ''major'' under the Congressional Review Act (5 U.S.C. 801 *et seq.*)

Executive Order No. 13132

Executive Order 13132 requires agencies to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in Executive Order 13132 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.'' It has been determined that this NPRM does not contain policies that have federalism implications.

List of Subjects

13 CFR Part 313

Impacted community, Implementation grant, Petition and affirmative determination requirements, Strategic plan, Trade adjustment assistance for communities.

13 CFR Part 315

Adjustment proposals, Administrative practice and procedure, Certification requirements, Eligible petitioner, Firm selection, Recordkeeping and audit requirements, Trade adjustment assistance.

Regulatory Text

For reasons stated in the preamble, EDA amends chapter III of title 13 of the *Code of Federal Regulations* to add new part 313, and to amend part 315 as follows:

1. Add new part 313 to read as follows:

PART 313—COMMUNITY TRADE ADJUSTMENT ASSISTANCE

Subpart A—General Provisions

Sec.
313.1 Purpose and Scope.
313.2 Definitions.

Subpart B—Participation in the Community Trade Adjustment Assistance Program

313.3 Overview of Community Trade Adjustment Assistance.
313.4 Affirmative Determinations.
313.5 Technical Assistance.
313.6 Strategic Plans.
313.7 Implementation Grants for Impacted Communities.
313.8 Competitive Process.

Subpart C—Administrative Provisions

313.9 Records.
313.10 Conflicts of Interest.
313.11 Other Requirements.

Authority: 19 U.S.C. 2341 *et seq.,* as amended by Division B, Title I, Subtitle I, Part II of Pub. L. No. 111–5; 42 U.S.C. 3211; Department of Commerce Organizational Order 10–4.

Subpart A—General Provisions

§ 313.1 Purpose and scope.

The regulations in this part set forth the responsibilities of the Secretary of Commerce under chapter 4 of title II of the Trade Act concerning Community Trade Adjustment Assistance (''*Community TAA*''). The Community TAA Program is designed to assist communities impacted by trade with economic adjustment through the coordination of federal, State, and local resources, the creation of community-based development strategies, and the development and provision of programs that meet the training needs of workers. The statutory authority and responsibilities of the Secretary of Commerce relating to Community TAA are delegated to EDA. EDA certifies Communities as eligible to apply for assistance under the Community TAA Program, provides technical assistance to Impacted Communities, and provides implementation assistance to Impacted Communities in preparing and carrying out Strategic Plans.

§ 313.2 Definitions.

In addition to the defined terms set forth in § 300.3 of this chapter, the terms used in this part shall have the following meanings:

Agricultural Commodity Producer has the same meaning given to that term in title II, chapter 6, section 291 of the Trade Act.

Cognizable Certification means a certification:

(1) By the Secretary of Labor that a group of workers in the Community is eligible to apply for assistance under chapter 2, section 223 of the Trade Act;

(2) By the Secretary of Commerce that a Certified Firm (as defined at § 315.2 of this chapter) located in the Community is eligible to apply for Adjustment Assistance in accordance with chapter 3, sections 251–253 of the Trade Act; or

(3) By the Secretary of Agriculture that a group of agricultural commodity producers in the Community is eligible to apply for assistance under chapter 6, section 293 of the Trade Act.

Community means a city, county, or other political subdivision of a State or a consortium of political subdivisions of a State.

Community Adjustment Assistance means technical and implementation assistance provided to a Community under chapter 4 of title II of the Trade Act.

Impacted Community means a Community that is affected by trade to such a degree that the Secretary has made an affirmative determination that it is eligible to apply for assistance under this part.

Strategic Plan means an Impacted Community's plan for improving its economic situation developed in accordance with § 313.6.

Subpart B—Participation in the Community Trade Adjustment Assistance Program

§ 313.3 Overview of Community Trade Adjustment Assistance.

The Community TAA Program is designed to assist Communities impacted by trade to adjust to that impact. The Community TAA Program will be administered in accordance with the following process:

(a) *Determination of eligibility.* First, EDA must make an affirmative determination that the Community is impacted by trade in accordance with § 313.4.

(b) *Provision of technical assistance.* After an affirmative determination is made, EDA will provide the Impacted Community with technical assistance in accordance with § 313.5.

(c) *Strategic Plan development.* An Impacted Community that intends to apply for an implementation grant in accordance with § 313.7 must develop, in accordance with § 313.6, an EDA-approved Strategic Plan.

(d) *Implementation grant.* In accordance with § 313.7, EDA may award an implementation grant to assist an Impacted Community in carrying out a project or program included in a Strategic Plan.

§ 313.4 Affirmative Determinations.

(a) *General.* Subject to the availability of funds, a Community may apply for an affirmative determination if:

(1) On or after August 1, 2009, one or more Cognizable Certifications are made with respect to the Community; and

(2) The Community submits the petition at least 180 days after the date of the most recent Cognizable Certification.

(b) *Grandfathered Communities.* If one or more Cognizable Certifications were made with respect to a Community on or after January 1, 2007, and before August 1, 2009, the Community may submit a petition to EDA for an affirmative determination under this section not later than February 1, 2010.

(c) *Affirmative determination petition requirements.* (1) The Community must submit a complete petition to the applicable regional office (or regional offices in the event the Community crosses multiple geographic boundaries) serving the geographic area in which the Community is located. A complete petition for an affirmative determination shall contain the following:

(i) The *Application for Federal Assistance* (Form SF–424) and sections A1–A10 of the *Application for Investment Assistance* (Form ED–900 or any successor form);

(ii) The applicable Cognizable Certification(s) upon which the Community bases its petition; and

(iii) Such other information as EDA considers material.

(2) The petition for affirmative determination must contain information about the impact(s) on the Community from the actual or threatened loss of jobs attributable to the effects of competition by imports that led to the applicable Cognizable Certification(s) made by the Secretaries of Labor, Commerce or Agriculture, in order for EDA to determine that the Community is significantly affected. EDA shall measure such impact(s) using the petitioning Community's most recent Civilian Labor Force statistics as reported by the Bureau of Labor Statistics, U.S. Department of Labor, effective at the time of petition for affirmative determination. EDA will obtain the applicable Cognizable Certification from publicly available resources. However, a petitioning Community may also provide copies of the applicable Cognizable Certification to EDA.

(d) *Notification to Community.* Upon making an affirmative determination, EDA shall notify promptly the Community and the Governor of the State in which the Community is located of the means for obtaining assistance under this part and other appropriate economic assistance that may be available to the Community. Such notification will identify the appropriate EDA regional office that will provide technical assistance under § 313.6.

§ 313.5 Technical Assistance.

(a) *General.* Once EDA has made an affirmative determination that a Community is an Impacted Community and subject to the availability of funds, EDA shall provide comprehensive technical assistance to:

(1) Diversify and strengthen the economy in the Impacted Community;

(2) Identify significant impediments to economic development that result from the impact of trade on the Impacted Community; and

(3) Develop or update a Strategic Plan in accordance with § 313.6 to address economic adjustment and workforce dislocation in the Impacted Community, including unemployment among agricultural commodity producers.

(b) *Coordination of federal response.* EDA will coordinate the federal response to an Impacted Community by:

(1) Identifying federal, State, and local resources that are available to assist the Impacted Community in responding to economic distress; and

(2) Assisting the Impacted Community in accessing available federal assistance and ensuring that such assistance is provided in a targeted, integrated manner.

§ 313.6 Strategic Plans.

(a) *General.* An Impacted Community that intends to apply for a grant for implementation assistance under § 313.7 shall develop and submit a Strategic Plan to EDA for evaluation and approval. EDA shall evaluate the Strategic Plan based on the technical requirements set forth in paragraph (c) of this section.

(b) *Involvement of private and public entities.* To the extent practicable, an Impacted Community shall consult with the following entities in developing a Strategic Plan:

(1) Federal, local, county, or State government agencies serving the Impacted Community;

(2) Firms, as defined in § 315.2 of this chapter, including small- and medium-sized Firms, within the Impacted Community;

(3) Local workforce investment boards established under section 117 of the Workforce Investment Act of 1998 (29 U.S.C. 2832);

(4) Labor organizations, including State labor federations and labor-management initiatives, representing workers in the Impacted Community; and

(5) Educational institutions, local educational agencies, or other training providers serving the Impacted Community.

(c) *Technical requirements.* EDA shall evaluate the Strategic Plan based on the following minimum requirements:

(1) An analysis of the capacity of the Impacted Community to achieve economic adjustment to the impact(s) of trade;

(2) An analysis of the economic development challenges and opportunities facing the Impacted Community as well as the strengths, weaknesses, opportunities, and threats facing the Impacted Community;

(3) An assessment of the commitment of the Impacted Community to the Strategic Plan over the long term and the participation and input of members of the Community affected by economic dislocation, including how the Strategic Plan will be integrated effectively with one or more applicable Comprehensive Economic Development Strategies (CEDS) that have been developed in connection with EDA's economic development assistance programs as set out at § 303.7 of this chapter;

(4) A description of the role and the participation of the entities described in paragraph (b) of this section in developing the Strategic Plan;

(5) A description of the projects to be undertaken by the Impacted Community under its Strategic Plan and how such projects will facilitate the Impacted Community's economic adjustment;

(6) A description of the educational and training programs available to workers in the Impacted Community and the future employment needs of the Community;

(7) An assessment of the cost of implementing the Strategic Plan, including the timing of funding required by the Impacted Community to implement the Strategic Plan and the method of financing to be used to implement the Strategic Plan; and

(8) A strategy for continuing the economic adjustment of the Impacted Community after the completion of the projects described in paragraph (c)(5) of this section.

(d) *Cost sharing limitation.* Assistance awarded to an Impacted Community to develop a Strategic Plan under this section shall not exceed 75 percent of the cost of developing the Strategic Plan. In order to provide funding to as many merit-worthy Impacted Communities as feasible, EDA may base the amount of the Community's required share on the relative distress caused by the actual or threatened decline in the most recent Civilian Labor Force statistics effective on the date EDA receives an application to develop a Strategic Plan.

§ 313.7 Implementation Grants for Impacted Communities.

(a) *General.* EDA may provide assistance in the form of a grant under this section to an Impacted Community to help the Community carry out a project or program that is included in a Strategic Plan developed in accordance with § 313.6. Such assistance may include:

(1) Infrastructure improvements, such as site acquisition, site preparation, construction, rehabilitation and equipping of facilities;

(2) Market or industry research and analysis;

(3) Technical assistance, including organizational development such as business networking, restructuring or improving the delivery of business services, or feasibility studies;

(4) Public services;

(5) Training; and

(6) Other activities justified by the Strategic Plan that satisfy applicable statutory and regulatory requirements.

(b) *Application evaluation criteria.* (1) An Impacted Community that seeks to receive an implementation grant under this section shall submit a completed *Application for Investment Assistance* (Form ED–900 or any successor form) to the applicable regional office (or regional offices in the event the Community crosses multiple geographic boundaries) serving the geographic area in which the Community is located. A complete application also shall include:

(i) The EDA-approved Strategic Plan that meets the requirements of § 313.6; and

(ii) A description of the project or program included in the Strategic Plan with respect to which the Impacted Community seeks assistance.

(2) EDA will evaluate all applications for the feasibility of the budget presented and conformance with statutory and regulatory requirements. EDA also will consider the degree to which an implementation grant in the Impacted Community will satisfy the evaluation criteria set forth in the applicable Federal Funding Opportunity (''FFO'') announcement.

(c) *Coordination among grant programs.* If an entity in an Impacted Community seeks or plans to seek a Community College and Career Training Grant under section 278 of the Trade Act or a Sector Partnership Grant under section 279A of the Trade Act while the Impacted Community seeks assistance under this section, the Impacted Community shall include in the application for assistance a description of how the Impacted Community will integrate any projects or programs carried out using assistance provided under this section with any projects or programs that may be implemented with other federal assistance.

(d) *Cost sharing requirement.* (1) If an Impacted Community is awarded an implementation grant under this section, the following requirements shall apply:

(i) *Federal share.* The federal share of a project or program for which a grant is awarded may not exceed 95 percent of the cost of implementing the project or program; and

(ii) *Community's share.* The Impacted Community must contribute at least five percent of the amount of the implementation grant towards the cost of implementing the project or program for which the grant is awarded.

(2) In order to provide funding to as many merit-worthy Impacted Communities as feasible, EDA may base the amount of the Community's required share on the relative distress caused by the actual or threatened decline in the most recent Civilian Labor Force statistics effective on the date EDA receives an application for an implementation grant.

(e) *Limitation.* An Impacted Community may not be awarded more than $5,000,000 in implementation grant assistance under this section.

§ 313.8 Competitive Process.

(a) Applications for assistance to develop a Strategic Plan or for an implementation grant shall be reviewed by EDA in accord with a competitive process as set forth in the applicable FFO, to ensure that EDA awards funds to the most merit-worthy projects.

(b) *Priority for grants to small- and medium-sized Communities.* EDA shall give priority to an application submitted under this part by an Impacted Community that is a small- or medium-sized Community.

(c) *Supplement, not supplant.* The Community TAA Program and any

funds appropriated to implement its provisions shall be used to supplement and not supplant other federal, State, and local public funds expended to provide economic development assistance for Communities.

Subpart C—Administrative Provisions

§ 313.9 Records.

Communities that receive assistance under this part are subject to the records requirements set out in § 302.14 of this chapter.

§ 313.10 Conflicts of interest.

Communities that receive assistance under this part are subject to the conflicts of interest provisions as set out in § 302.17 of this chapter.

§ 313.11 Other requirements.

Communities that receive assistance under this part are subject to the general terms and conditions for Investment Assistance set out in part 302 of this chapter relating to requirements involving the environment (§ 302.1); post-disaster assistance (§ 302.2); public information (§ 302.4); relocation assistance and land acquisition (§ 302.5); federal policies and procedures (§ 302.6); amendments and changes to awards (§ 302.7); pre-approval costs (§ 302.8); intergovernmental project reviews (§ 302.9); attorneys' and consultants' fees or the employment of expediters (§ 302.10); EDA's economic development information clearinghouse (§ 302.11); project administration, operation, and maintenance (§ 302.12); post-approval requirements (§ 302.18); indemnification (§ 302.19); and civil rights (§ 302.20). In addition, any Property (defined in § 314.1) acquired in connection with Investment Assistance is subject to the property management regulations set out in part 314 of this chapter.

2. Revise part 315 to read as follows:

PART 315—TRADE ADJUSTMENT ASSISTANCE FOR FIRMS

Subpart A—General Provisions

Sec.
315.1 Purpose and scope.
315.2 Definitions.
315.3 Confidential Business Information.
315.4 Eligible applicants.
315.5 TAAC scope, selection, evaluation and awards.
315.6 Firm eligibility for Adjustment Assistance.

Subpart B—Certification of Firms

315.7 Certification requirements.
315.8 Processing petitions for certification.
315.9 Hearings.
315.10 Loss of certification benefits.
315.11 Appeals, final determinations and termination of certification.

Subpart C—Protective Provisions

315.12 Recordkeeping.
315.13 Audit and examination.
315.14 Certifications.
315.15 Conflicts of interest.

Subpart D—Adjustment Proposals

315.16 Adjustment Proposal Requirements.

Subpart E—Assistance to Industries

315.17 Assistance to Firms in import-impacted industries.

Authority: 19 U.S.C. 2341 *et seq.*, as amended by Division B, Title I, Subtitle I, Part II of Pub. L. No. 111–5; 42 U.S.C. 3211; Department of Commerce Organization Order 10–4.

Subpart A—General Provisions

§ 315.1 Purpose and scope.

The regulations in this part set forth the responsibilities of the Secretary of Commerce under chapter 3 of title II of the Trade Act concerning Trade Adjustment Assistance for Firms. The statutory authority and responsibilities of the Secretary of Commerce relating to Adjustment Assistance are delegated to EDA. EDA certifies Firms as eligible to apply for Adjustment Assistance, provides technical Adjustment Assistance to Firms and other recipients, and provides assistance to organizations representing trade injured industries.

§ 315.2 Definitions.

In addition to the defined terms set forth in § 300.3 of this chapter, the following terms used in this part shall have the following meanings:

Adjustment Assistance means technical assistance provided to Firms or industries under chapter 3 of title II of the Trade Act.

Adjustment Proposal means a Certified Firm's plan for improving its economic situation.

Certified Firm means a Firm which has been determined by EDA to be eligible to apply for Adjustment Assistance.

Confidential Business Information means any information submitted to EDA or a TAAC by a Firm that concerns or relates to trade secrets for commercial or financial purposes, which is exempt from public disclosure under 5 U.S.C. 552(b)(4), 5 U.S.C. 552b(c)(4) and 15 CFR part 4.

Contributed Importantly, with respect to an Increase in Imports, refers to a cause which is important but not necessarily more important than any other cause. Imports will not be considered to have Contributed Importantly if other factors were so dominant, acting singly or in combination, that the worker separation or threat thereof or decline in sales or production would have been essentially the same, irrespective of the influence of imports.

Decreased Absolutely means a Firm's sales or production has declined by a minimum of five percent relative to its sales or production during the applicable prior time period,

(1) Independent of industry or market fluctuations; and

(2) Relative only to the previous performance of the Firm, unless EDA determines that these limitations in a given case would not be consistent with the purposes of the Trade Act.

Directly Competitive means imported articles or services that compete with and are substantially equivalent for commercial purposes (i.e., are adapted for the same function or use and are essentially interchangeable) as the Firm's articles or services. Any Firm that engages in exploring or drilling for oil or natural gas, or otherwise produces oil or natural gas, shall be considered to be producing articles directly competitive with imports of oil and with imports of natural gas.

Firm means an individual proprietorship, partnership, joint venture, association, corporation (includes a development corporation), business trust, cooperative, trustee in bankruptcy or receiver under court decree, and includes fishing, agricultural or service sector entities and those which explore, drill or otherwise produce oil or natural gas. *See also* the definition of Service Sector Firm. Pursuant to section 261 of chapter 3 of title II of the Trade Act (19 U.S.C. 2351), a Firm, together with any predecessor or successor firm, or any affiliated firm controlled or substantially beneficially owned by substantially the same person, may be considered a single Firm where necessary to prevent unjustifiable benefits. For purposes of receiving benefits under this part, when a Firm owns or controls other Firms, the Firm and such other Firms may be considered a single Firm when they produce or supply like or Directly Competitive articles or services or are exerting essential economic control over one or more production facilities. Accordingly, such other Firms may include a(n):

(1) *Predecessor*—see the following definition for Successor;

(2) *Successor*—a newly established Firm (that has been in business less than two years) which has purchased substantially all of the assets of a previously operating company (or in some cases a whole distinct division)

(such prior company, unit or division, a ''Predecessor'') and is able to demonstrate that it continued the operations of the Predecessor which has operated as an autonomous unit, provided that there were no significant transactions between the Predecessor unit and any related parent, subsidiary, or affiliate that would have affected its past performance, and that separate records are available for the Predecessor's operations for at least two years before the petition is submitted. The Successor Firm must have continued virtually all of the Predecessor Firm's operations by producing the same type of products or services, in the same plant, utilizing most of the same machinery and equipment and most of its former workers, and the Predecessor Firm must no longer be in existence;

(3) *Affiliate*—a company (either foreign or domestic) controlled or substantially beneficially owned by substantially the same person or persons that own or control the Firm filing the petition; or

(4) *Subsidiary*—a company (either foreign or domestic) that is wholly owned or effectively controlled by another company.

Increase in Imports means an increase of imports of Directly Competitive or Like Articles or Services with articles produced or services supplied by such Firm. EDA may consider as evidence of an Increase in Imports a certification from the Firm's customers that account for a significant percentage of the Firm's decrease in sales or production that they have increased their purchase of imports of Directly Competitive or Like Articles or Services from a foreign country, either absolutely or relative to their acquisition of such Like Articles or Services from suppliers located in the United States.

Like Articles or Services means any articles or services, as applicable, which are substantially identical in their intrinsic characteristics.

Partial Separation means, with respect to any employment in a Firm, either:

(1) A reduction in an employee's work hours to 80 percent or less of the employee's average weekly hours during the year of such reductions as compared to the preceding year; or

(2) A reduction in the employee's weekly wage to 80 percent or less of his/her average weekly wage during the year of such reduction as compared to the preceding year.

Person means an individual, organization or group.

Record means any of the following:

(1) A petition for certification of eligibility to qualify for Adjustment Assistance;

(2) Any supporting information submitted by a petitioner;

(3) The report of an EDA investigation with respect to petition; and

(4) Any information developed during an investigation or in connection with any public hearing held on a petition.

Service Sector Firm means a Firm engaged in the business of supplying services. For purposes of receiving benefits under this part, when a Service Sector Firm owns or controls other Service Sector Firms, the Service Sector Firm and such other Service Sector Firms may be considered a single Service Sector Firm when they furnish like or Directly Competitive services or are exerting essential economic control over one or more servicing facilities. Such other Service Sector Firm may be a Predecessor, Successor, Affiliate or Subsidiary, each as defined in the definition of Firm.

Significant Number or Proportion of Workers means five percent of a Firm's work force or 50 workers, whichever is less, unless EDA determines that these limitations in a given case would not be consistent with the purposes of the Trade Act. An individual farmer or fisherman is considered a Significant Number or Proportion of Workers.

Substantial Interest means a direct material economic interest in the certification or non-certification of the petitioner.

TAAC means a Trade Adjustment Assistance Center, as more fully described in § 315.5.

Threat of Total or Partial Separation means, with respect to any group of workers, one or more events or circumstances clearly demonstrating that a Total or Partial Separation is imminent.

Total Separation means, with respect to any employment in a Firm, the laying off or termination of employment of an employee for lack of work.

§ 315.3 Confidential Business Information.

EDA will follow the procedures set forth in 15 CFR 4.9 for the submission of Confidential Business Information. Submitters should clearly mark and designate as confidential any Confidential Business Information.

§ 315.4 Eligible applicants.

(a) The following entities may apply for assistance to operate a TAAC:

(1) Universities or affiliated organizations;

(2) States or local governments; or

(3) Non-profit organizations.

(b) For purposes of § 315.17 and to the extent funds are appropriated to implement section 265 of the Trade Act, organizations assisting or representing industries in which a substantial number of Firms or workers have been certified as eligible to apply for Adjustment Assistance under sections 223 and 251 of the Trade Act, include:

(1) Existing agencies;

(2) Private individuals;

(3) Firms;

(4) Universities;

(5) Institutions;

(6) Associations;

(7) Unions; or

(8) Other non-profit industry organizations.

§ 315.5 TAAC scope, selection, evaluation and awards.

(a) *TAAC purpose and scope.*

(1) TAACs are available to assist Firms in obtaining Adjustment Assistance in all 50 U.S. States, the District of Columbia and the Commonwealth of Puerto Rico. TAACs provide Adjustment Assistance in accordance with this part either through their own staffs or by arrangements with outside consultants. Information concerning TAACs serving particular areas may be obtained from the TAAC Web site at *http://www.taacenters.org* or from EDA at *http://www.eda.gov*.

(2) Prior to submitting a petition for Adjustment Assistance to EDA, a Firm should determine the extent to which a TAAC can provide the required Adjustment Assistance. EDA will provide Adjustment Assistance through TAACs whenever EDA determines that such assistance can be provided most effectively in this manner. Requests for Adjustment Assistance will normally be made through TAACs.

(3) A TAAC generally provides Adjustment Assistance by providing assistance to a:

(i) Firm in preparing its petition for eligibility certification; and

(ii) Certified Firm in diagnosing its strengths and weaknesses, and developing and implementing an Adjustment Proposal.

(b) *TAAC selection.*

(1) EDA invites currently funded TAACs to submit either new or amended applications, provided they have performed in a satisfactory manner and complied with previous or current conditions in their Cooperative Agreements with EDA and contingent upon availability of funds. Such TAACs shall submit an application on a form approved by OMB, as well as a proposed budget, narrative scope of work, and such other information as requested by EDA. Acceptance of an application or amended application for a Cooperative Agreement does not ensure funding by EDA.

(2) EDA may invite new applications through a Federal Funding Opportunity (''FFO'') announcement. An application will require a narrative scope of work, proposed budget and such other information as requested by EDA. Acceptance of an application does not ensure funding by EDA.

(c) *TAAC evaluation.*

(1) EDA generally evaluates currently funded TAACs based on:

(i) Performance under Cooperative Agreements with EDA and compliance with the terms and conditions of such Cooperative Agreements;

(ii) Proposed scope of work, budget and application or amended application; and

(iii) Availability of funds.

(2) EDA generally evaluates new TAACs based on:

(i) Competence in administering business assistance programs;

(ii) Background and experience of staff;

(iii) Proposed scope of work, budget and application; and

(iv) Availability of funds.

(d) *TAAC award requirements.*

(1) EDA generally funds a TAAC for a three-year project period consisting of three separate funding periods of 12 months each.

(2) There are no matching share requirements for Adjustment Assistance provided by the TAACs to Firms for certification or for administrative expenses of the TAACs.

§ 315.6 Firm eligibility for Adjustment Assistance.

(a) Firms participate in the Trade Adjustment Assistance for Firms program in accordance with the following:

(1) Firms apply for certification through a TAAC by completing a petition for certification. The TAAC will assist Firms in completing such petitions (at no cost to the Firms);

(2) Firms certified in accordance with the procedures described in §§ 315.7 and 315.8 must prepare an Adjustment Proposal for Adjustment Assistance from the TAAC (''Adjustment Proposal'') and submit it to EDA for approval; and

(3) EDA determines whether the Adjustment Assistance requested in the Adjustment Proposal is eligible based upon the evaluation criteria set forth in subpart D of this part. A Certified Firm may submit a request to the TAAC for Adjustment Assistance to implement an approved Adjustment Proposal.

(b) For certification, EDA evaluates Firms' petitions strictly on the basis of fulfillment of the requirements set forth in § 315.7.

(c) (1) Certified Firms generally receive Adjustment Assistance over a two-year period.

(2) The matching share requirements are as follows:

(i) Each Certified Firm must pay at least 25 percent of the cost of preparing its Adjustment Proposal. Each Certified Firm requesting $30,000 or less in total Adjustment Assistance in its approved Adjustment Proposal must pay at least 25 percent of the cost of that Adjustment Assistance. Each Certified Firm requesting more than $30,000 in total Adjustment Assistance in its approved Adjustment Proposal must pay at least 50 percent of the cost of that Adjustment Assistance.

(ii) Organizations representing trade-injured industries must pay at least 50 percent of the total cash cost of the Adjustment Assistance, in addition to appropriate in-kind contributions.

Subpart B—Certification of Firms

§ 315.7 Certification requirements.

(a) *General.* EDA may certify a Firm as eligible to apply for Adjustment Assistance under section 251(c) of the Trade Act if it determines that the petition for certification meets one of the minimum certification thresholds set forth in paragraph (b) of this section. In order to be certified, a Firm must meet the criteria listed under any one of the 5 circumstances described in paragraph (b) of this section.

(b) *Minimum certification thresholds.*

(1) *Twelve-month decline.* Based upon a comparison of the most recent 12-month period for which data are available and the immediately preceding twelve-month period:

(i) A Significant Number or Proportion of Workers in the Firm has undergone Total or Partial Separation or a Threat of Total or Partial Separation;

(ii) Either sales or production, or both, of the Firm has Decreased Absolutely; or sales or production, or both, of any article or service that accounted for not less than 25 percent of the total production or sales of the Firm during the 12-month period preceding the most recent 12-month period for which data are available have Decreased Absolutely; and

(iii) An Increase in Imports has Contributed Importantly to the applicable Total or Partial Separation or Threat of Total or Partial Separation, and to the applicable decline in sales or production or supply of services.

(2) *Twelve-month versus twenty-four month decline.* Based upon a comparison of the most recent 12-month period for which data are available and the immediately preceding 24-month period:

(i) A Significant Number or Proportion of Workers in the Firm has undergone Total or Partial Separation or a Threat of Total or Partial Separation;

(ii) Either sales or production, or both, of the Firm has Decreased Absolutely; or sales or production, or both, of any article or service that accounted for not less than 25 percent of the total production or sales of the Firm during the 24-month period preceding the most recent 12-month period for which data are available have Decreased Absolutely; and

(iii) An Increase in Imports has Contributed Importantly to the applicable Total or Partial Separation or Threat of Total or Partial Separation, and to the applicable decline in sales or production or supply of services.

(3) *Twelve-month versus thirty-six month decline.* Based upon a comparison of the most recent 12-month period for which data are available and the immediately preceding 36-month period:

(i) A Significant Number or Proportion of Workers in the Firm has undergone Total or Partial Separation or a Threat of Total or Partial Separation;

(ii) Either sales or production, or both, of the Firm has Decreased Absolutely; or sales or production, or both, of any article or service that accounted for not less than 25 percent of the total production or sales of the Firm during the 36-month period preceding the most recent 12-month period for which data are available have Decreased Absolutely; and

(iii) An Increase in Imports has Contributed Importantly to the applicable Total or Partial Separation or Threat of Total or Partial Separation, and to the applicable decline in sales or production or supply of services.

(4) *Interim sales or production decline.* Based upon an interim sales or production decline:

(i) Sales or production has Decreased Absolutely for, at minimum, the most recent six-month period during the most recent 12-month period for which data are available as compared to the same six-month period during the immediately preceding 12-month period;

(ii) During the same base and comparative period of time as sales or production has Decreased Absolutely, a Significant Number or Proportion of Workers in such Firm has undergone Total or Partial Separation or a Threat of Total or Partial Separation; and

(iii) During the same base and comparative period of time as sales or production has Decreased Absolutely,

an Increase in Imports has Contributed Importantly to the applicable Total or Partial Separation or Threat of Total or Partial Separation, and to the applicable decline in sales or production or supply of services.

(5) *Interim employment decline.* Based upon an interim employment decline:

(i) A Significant Number or Proportion of Workers in such Firm has undergone Total or Partial Separation or a Threat of Total or Partial Separation during, at a minimum, the most recent six-month period during the most recent 12-month period for which data are available as compared to the same six-month period during the immediately preceding 12-month period; and

(ii) Either sales or production of the Firm has Decreased Absolutely during the 12-month period preceding the most recent 12-month period for which data are available; and

(iii) An Increase in Imports has Contributed Importantly to the applicable Total or Partial Separation or Threat of Total or Partial Separation, and to the applicable decline in sales or production or supply of services.

§ 315.8 Processing petitions for certification.

(a) Firms shall consult with a TAAC for guidance and assistance in the preparation of their petitions for certification.

(b) A Firm seeking certification shall complete a *Petition by a Firm for Certification of Eligibility to Apply for Trade Adjustment Assistance* (Form ED–840P or any successor form) with the following information about such Firm:

(1) Identification and description of the Firm, including legal form of organization, economic history, major ownership interests, officers, directors, management, parent company, Subsidiaries or Affiliates, and production and sales facilities;

(2) Description of goods or services supplied or sold;

(3) Description of imported Directly Competitive or Like Articles or Services with those produced or supplied;

(4) Data on its sales, production and employment for the applicable 24-month, 36-month, or 48-month period, as required under § 315.7(b);

(5) One copy of a complete auditor's certified financial report for the entire period covering the petition, or if not available, one copy of the complete profit and loss statements, balance sheets and supporting statements prepared by the Firm's accountants for the entire period covered by the petition; publicly-owned corporations should submit copies of the most recent Form 10–K annual reports (or Form 10–Q quarterly reports, as appropriate) filed with the U.S. Securities and Exchange Commission for the entire period covered by the petition;

(6) Information concerning its major customers and their purchases (or its bids, if there are no major customers); and

(7) Such other information as EDA considers material.

(c) EDA shall determine whether the petition has been properly prepared and can be accepted. Promptly thereafter, EDA shall notify the petitioner that the petition has been accepted or advise the TAAC that the petition has not been accepted, but may be resubmitted at any time without prejudice when the specified deficiencies have been corrected. Any resubmission will be treated as a new petition.

(d) EDA will publish a notice of acceptance of a petition in the **Federal Register**.

(e) EDA will initiate an investigation to determine whether the petitioner meets the requirements set forth in section 251(c) of the Trade Act and § 315.7.

(f) A petitioner may withdraw a petition for certification if EDA receives a request for withdrawal before it makes a certification determination or denial. A Firm may submit a new petition at any time thereafter in accordance with the requirements of this section and § 315.7.

(g) Following acceptance of a petition, EDA will:

(1) Make a determination based on the Record as soon as possible after the petitioning Firm or TAAC has submitted all material. In no event may the determination period exceed 40 days from the date on which EDA accepted the petition; and

(2) Either certify the petitioner as eligible to apply for Adjustment Assistance or deny the petition. In either event, EDA shall promptly give written notice of action to the petitioner. Any written notice to the petitioner of a denial of a petition shall specify the reason(s) for the denial. A petitioner shall not be entitled to resubmit a petition within one year from the date of denial, provided, EDA may waive the one-year limitation for good cause.

§ 315.9 Hearings.

EDA will hold a public hearing on an accepted petition if the petitioner or any interested Person found by EDA to have a Substantial Interest in the proceedings submits a request for a hearing no later than 10 days after the date of publication of the notice of acceptance in the **Federal Register,** under the following procedures:

(a) The petitioner or any interested Person(s) shall have an opportunity to be present, to produce evidence and to be heard;

(b) A request for public hearing must be delivered by hand or by registered mail to EDA. A request by a Person other than the petitioner shall contain:

(1) The name, address and telephone number of the Person requesting the hearing; and

(2) A complete statement of the relationship of the Person requesting the hearing to the petitioner and the subject matter of the petition, and a statement of the nature of its interest in the proceedings.

(c) If EDA determines that the requesting party does not have a Substantial Interest in the proceedings, a written notice of denial shall be sent to the requesting party. The notice shall specify the reasons for the denial;

(d) EDA shall publish a notice of a public hearing in the **Federal Register,** containing the subject matter, name of petitioner, and date, time and place of the hearing; and

(e) EDA shall appoint a presiding officer for the hearing who shall respond to all procedural questions.

§ 315.10 Loss of certification benefits.

EDA may terminate a Firm's certification or refuse to extend Adjustment Assistance to a Firm for any of the following reasons:

(a) Failure to submit an acceptable Adjustment Proposal within two years after date of certification. While approval of an Adjustment Proposal may occur after the expiration of such two-year period, a Firm must submit an acceptable Adjustment Proposal before such expiration;

(b) Failure to submit documentation necessary to start implementation or modify its request for Adjustment Assistance consistent with its Adjustment Proposal within six months after approval of the Adjustment Proposal, where two years have elapsed since the date of certification. If the Firm anticipates needing a longer period to submit documentation, it should indicate the longer period in its Adjustment Proposal. If the Firm is unable to submit its documentation within the allowed time, it should notify EDA in writing of the reasons for the delay and submit a new schedule. EDA has the discretion to accept or refuse a new schedule;

(c) EDA has denied the Firm's request for Adjustment Assistance, the time period allowed for the submission of any documentation in support of such

request has expired, and two years have elapsed since the date of certification; or

(d) Failure to diligently pursue an approved Adjustment Proposal where five years have elapsed since the date of certification.

§ 315.11 Appeals, final determinations and termination of certification.

(a) Any petitioner may appeal in writing to EDA from a denial of certification, provided that EDA receives the appeal by personal delivery or by registered mail within 60 days from the date of notice of denial under § 315.8(g). The appeal must state the grounds on which the appeal is based, including a concise statement of the supporting facts and applicable law. The decision of EDA on the appeal shall be the final determination within the Department. In the absence of an appeal by the petitioner under this paragraph, the determination under § 315.8(g) shall be final.

(b) A Firm, its representative or any other interested domestic party aggrieved by a final determination under paragraph (a) of this section may, within 60 days after notice of such determination, begin a civil action in the United States Court of International Trade for review of such determination, in accordance with section 284 of the Trade Act.

(c) Whenever EDA determines that a Certified Firm no longer requires Adjustment Assistance or for other good cause, EDA will terminate the certification and promptly publish notice of such termination in the **Federal Register.** The termination will take effect on the date specified in the published notice.

(d) EDA shall immediately notify the petitioner and shall state the reasons for any termination.

Subpart C—Protective Provisions

§ 315.12 Recordkeeping.

Each TAAC shall keep records that fully disclose the amount and disposition of Trade Adjustment Assistance for Firms program funds so as to facilitate an effective audit.

§ 315.13 Audit and examination.

EDA and the Comptroller General of the United States shall have access for the purpose of audit and examination to any books, documents, papers, and records of a Firm, TAAC or other recipient of Adjustment Assistance pertaining to the award of Adjustment Assistance.

§ 315.14 Certifications.

EDA will provide no Adjustment Assistance to any Firm unless the owners, partners, members, directors or officers thereof certify to EDA:

(a) The names of any attorneys, agents, and other Persons engaged by or on behalf of the Firm for the purpose of expediting applications for such Adjustment Assistance; and

(b) The fees paid or to be paid to any such Person.

§ 315.15 Conflicts of interest.

EDA will provide no Adjustment Assistance to any Firm under this part unless the owners, partners, or officers execute an agreement binding them and the Firm for a period of two years after such Adjustment Assistance is provided, to refrain from employing, tendering any office or employment to, or retaining for professional services any Person who, on the date such assistance or any part thereof was provided, or within one year prior thereto, shall have served as an officer, attorney, agent, or employee occupying a position or engaging in activities which involved discretion with respect to the provision of such Adjustment Assistance.

Subpart D—Adjustment Proposals

§ 315.16 Adjustment Proposal Requirements.

EDA evaluates Adjustment Proposals based on the following:

(a) EDA must receive the Adjustment Proposal within two years after the date of the certification of the Firm;

(b) The Adjustment Proposal must include a description of any Adjustment Assistance requested to implement such proposal, including financial and other supporting documentation as EDA determines is necessary, based upon either:

(1) An analysis of the Firm's problems, strengths and weaknesses and an assessment of its prospects for recovery; or

(2) If EDA so determines, other available information;

(c) The Adjustment Proposal must:

(1) Be reasonably calculated to contribute materially to the economic adjustment of the Firm (*i.e.,* that such proposal will constructively assist the Firm to establish a competitive position in the same or a different industry);

(2) Give adequate consideration to the interests of a sufficient number of separated workers of the Firm, by providing, for example, that the Firm will:

(i) Give a rehiring preference to such workers;

(ii) Make efforts to find new work for a number of such workers; and

(iii) Assist such workers in obtaining benefits under available programs; and

(3) Demonstrate that the Firm will make all reasonable efforts to use its own resources for its recovery, though under certain circumstances, resources of related Firms or major stockholders will also be considered; and

(d) The Adjustment Assistance identified in the Adjustment Proposal must consist of specialized consulting services designed to assist the Firm in becoming more competitive in the global marketplace. For this purpose, Adjustment Assistance generally consists of knowledge-based services such as market penetration studies, customized business improvements, and designs for new products. Adjustment Assistance does not include expenditures for capital improvements or for the purchase of business machinery or supplies.

Subpart E—Assistance to Industries

§ 315.17 Assistance to Firms in import-impacted industries.

(a) Whenever the International Trade Commission makes an affirmative finding under section 202(B) of the Trade Act that increased imports are a substantial cause of serious injury or threat thereof with respect to an industry, EDA shall provide to the Firms in such industry assistance in the preparation and processing of petitions and applications for benefits under programs which may facilitate the orderly adjustment to import competition of such Firms.

(b) EDA may provide Adjustment Assistance, on such terms and conditions as EDA deems appropriate, for the establishment of industry-wide programs for new product development, new process development, export development or other uses consistent with the purposes of the Trade Act and this part.

(c) Expenditures for Adjustment Assistance under this section may be up to $10,000,000 annually per industry, subject to availability of funds, and shall be made under such terms and conditions as EDA deems appropriate.

Dated: April 30, 2009.

Barry Bird,

Chief Counsel, Economic Development Administration.

[FR Doc. E9–10356 Filed 5–4–09; 8:45 am]

BILLING CODE 3510–24–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–0412; Directorate Identifier 2009–NM–022–AD]

RIN 2120–AA64

Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model ERJ 170 and ERJ 190 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

It has been found the possibility of some aluminum fasteners having been installed instead of titanium ones at bulkhead 1 of the LH (left-hand) and RH (right-hand) pylons of some [Embraer ERJ 170 and] Embraer ERJ 190 aircraft models.

The unsafe condition is damage to the hydraulic lines and electrical generator power cables in the case of bird impact in the region of bulkhead 1 of the pylons, which may lead to presence of fire without indication to the flight crew. The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by June 4, 2009.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Empresa Brasileira de Aeronautica S.A. (EMBRAER), Technical Publications Section (PC 060), Av. Brigadeiro Faria Lima, 2170—Putim—12227–901 São Jose dos Campos—SP—BRASIL; *telephone:* +55 12 3927–5852 or +55 12 3309–0732; *fax:* +55 12 3927–7546; *e-mail: distrib@embraer.com.br; Internet: http://www.flyembraer.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Kenny Kaulia, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2848; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2009–0412; Directorate Identifier 2009–NM–022–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

The Agência Nacional de Aviação Civil (ANAC), which is the aviation authority for Brazil, has issued Brazilian Airworthiness Directive 2008–09–02, effective September 30, 2008; and Brazilian Airworthiness Directive 2008–10–04, effective November 10, 2008 (referred to after this as ''the MCAI''); to correct an unsafe condition for the specified products. MCAI 2008–09–02 states:

It has been found the possibility of some aluminum fasteners having been installed instead of titanium ones at bulkhead 1 of the LH (left-hand) and RH (right-hand) pylons of some Embraer ERJ 190 aircraft models. In the case of a bird strike in the pylon bulkhead 1 equipped with aluminum fasteners there is the possibility where the impact may affect some equipments installed in the region after the bulkhead 1. Damages to the hydraulic lines and electrical generator power cables may lead to presence of fire in the region, without indication to the flight crew.

* * * * *

MCAI 2008–10–04 states:

It has been found the possibility of some aluminum fasteners having been installed instead of titanium ones at bulkhead 1 of the LH and RH pylons of some Embraer ERJ 170 aircraft models. The structural integrity of the region where these fasteners are installed may be affected in case of bird impact.

* * * * *

Corrective actions include inspecting for the presence of aluminum fasteners at pylon bulkhead 1, and replacing all aluminum fasteners with titanium fasteners. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Embraer has issued Service Bulletins 170–54–0007 and 190–54–0008, both dated December 21, 2007. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making

these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a NOTE within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect 20 products of U.S. registry. We also estimate that it would take 2 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $3,200, or $160 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Empresa Brasileira de Aeronautica S.A. (EMBRAER): Docket No. FAA–2009–0412; Directorate Identifier 2009–NM–022–AD.

Comments Due Date

(a) We must receive comments by June 4, 2009.

Affected ADs

(b) None.

Applicability

(c) This AD applies to EMBRAER Model ERJ 170–100 LR, –100 STD, –100 SE, –100 SU, –200 LR, –200 STD, and –200 SU airplanes, certificated in any category, serial numbers 17000156 through 17000169 inclusive; and Model ERJ 190–100 ECJ, –100 LR, –100 IGW, –100 STD, –200 STD, –200 LR, and –200 IGW airplanes, certificated in any category, serial numbers 19000047 through 19000089 inclusive.

Subject

(d) Air Transport Association (ATA) of America Code 54: Nacelles/Pylons.

Reason

(e) Brazilian Airworthiness Directive 2008–09–02, effective September 30, 2008, states:

It has been found the possibility of some aluminum fasteners having been installed instead of titanium ones at bulkhead 1 of the LH (left-hand) and RH (right-hand) pylons of some Embraer ERJ 190 aircraft models. In the case of a bird strike in the pylon bulkhead 1 equipped with aluminum fasteners there is the possibility where the impact may affect some equipments installed in the region after the bulkhead 1. Damages to the hydraulic lines and electrical generator power cables may lead to presence of fire in the region, without indication to the flight crew.

* * * * *

Brazilian Airworthiness Directive 2008–10–04, effective November 10, 2008, states:

It has been found the possibility of some aluminum fasteners having been installed instead of titanium ones at bulkhead 1 of the LH and RH pylons of some Embraer ERJ 170 aircraft models. The structural integrity of the region where these fasteners are installed may be affected in case of bird impact.

* * * * *

Corrective actions include inspecting for the presence of aluminum fasteners at pylon bulkhead 1, and replacing all aluminum fasteners with titanium fasteners.

Actions and Compliance

(f) Unless already done, do the following actions.

(1) Within 5,000 flight cycles after the effective date of this AD: Inspect the fasteners in bulkhead 1 of the left- and right-hand pylons for the presence of aluminum fasteners, in accordance with Part I of the Accomplishment Instructions of Embraer Service Bulletins 170–54–0007 and 190–54–0008, both dated December 21, 2007; as applicable. If no aluminum fastener is found, this AD requires no further action.

(2) If any aluminum fastener is found, before further flight after the inspection required by paragraph (f)(1) of this AD: Replace any aluminum fastener with a titanium fastener in accordance with Part II of the Accomplishment Instructions of Embraer Service Bulletins 170–54–0007 and 190–54–0008, both dated December 21, 2007; as applicable.

FAA AD Differences

Note 1: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Kenny Kaulia, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2848; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act,

the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to MCAI Brazilian Airworthiness Directive 2008–09–02, effective September 30, 2008; MCAI Brazilian Airworthiness Directive 2008–10–04, effective November 10, 2008; and Embraer Service Bulletins 170–54–0007 and 190–54–0008, both dated December 21, 2007; for related information.

Issued in Renton, Washington, on April 27, 2009.

Stephen P. Boyd,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–10302 Filed 5–4–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–0411; Directorate Identifier 2008–NM–190–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing 737–600, –700, –700C, and –800 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Boeing Model 737–600, –700, –700C, and –800 series airplanes. This proposed AD would require repetitive lubrications of the right and left main landing gear (MLG) forward trunnion pins. This proposed AD also would require an inspection for discrepancies of the transition radius of the MLG forward trunnion pins, and corrective actions if necessary. For certain airplanes, this proposed AD would also require repetitive detailed inspections for discrepancies (including finish damage, corrosion, pitting, and base metal scratches) of the transition radius of the left and right MLG trunnion pins, and corrective action if necessary. Replacing or overhauling the trunnion pins would terminate the actions required by this AD. This proposed AD results from a report that the protective finishes on the forward trunnion pins for the left and right MLG might have been damaged during final assembly. We are proposing this AD to prevent stress corrosion cracking of the forward trunnion pins, which could result in fracture of the pins and consequent collapse of the MLG.

DATES: We must receive comments on this proposed AD by June 19, 2009.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P. O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; e-mail *me.boecom@boeing.com*; Internet *https://www.myboeingfleet.com*.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Nancy Marsh, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6440; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2009–0411; Directorate Identifier 2008–NM–190–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

We have received a report indicating that the protective finishes on the main landing gear (MLG) forward trunnion pins might have been damaged during final assembly of certain Boeing Model 737–600, –700, –700C, and –800 series airplanes. The protective coating could be damaged at one location because the pins were not handled correctly. The MLG forward trunnion pins may have been delivered to operators with compromised corrosion protection in one critical area: The transition radius between the chrome-plated outer diameter and the spherical ball bearing surface. Damage to the protective finish puts the base metal of the trunnion pins at risk from corrosion pitting. This condition, if not corrected, could lead to stress corrosion cracking of the forward trunnion pins, which could result in fracture of the pins and consequent collapse of the MLG.

Relevant Service Information

We have reviewed Boeing Special Attention Service Bulletin 737–32–1402, dated August 6, 2008. The service bulletin describes procedures for repetitive lubrication of the MLG forward trunnion pins. The service bulletin states that accomplishing the inspections and applicable repairs/replacements described below, or overhauling the trunnion pins, eliminates the need for the repetitive lubrication. The service bulletin also describes procedures for a detailed inspection for discrepancies (including finish damage, corrosion, pitting, and base metal scratches) of the transition radius of the left and right MLG trunnion pins, and applicable corrective actions. The corrective actions include repairing the finish if finish damage is found without corrosion, pitting, or base metal scratches, and replacing the trunnion pins. For airplanes on which the finish repair is done, the service bulletin describes procedures for repeating the detailed inspections for discrepancies of the MLG trunnion pins and doing applicable corrective actions. Replacement or overhaul of the trunnion pins eliminates need for the actions specified in the service bulletin.

The service bulletin also specifies that the corrective actions should be done before further flight. For airplanes on which the finish repair is done, the service bulletin specifies doing the detailed inspection within 24 months after doing the repair and thereafter at intervals not to exceed 24 months.

FAA's Determination and Requirements of This Proposed AD

We are proposing this AD because we evaluated all relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design. This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under ''Differences Between the Proposed AD and Service Bulletin.''

Differences Between the Proposed AD and Service Bulletin

Although Boeing Special Attention Service Bulletin 737–32–1402, dated August 6, 2008, specifies to send inspection reports to the manufacturer, this proposed AD would not require that action.

Explanation of Terminology

Although Boeing Special Attention Service Bulletin 737–32–1402, dated August 6, 2008, refers to ''stress cracking,'' this proposed AD refers to ''stress corrosion cracking.''

Costs of Compliance

We estimate that this proposed AD would affect 100 airplanes of U.S. registry. The following table provides the estimated costs for U.S. operators to comply with this proposed AD.

TABLE—ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Parts	Cost per product	Number of U.S.-registered airplanes	Fleet cost
Repetitive lubrication	1	$80	$0	$80	100	$8,000.
Inspections	8	80	0	$640 per inspection cycle	100	$64,000 per inspection cycle.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Boeing: Docket No. FAA–2009–0411; Directorate Identifier 2008–NM–190–AD.

Comments Due Date

(a) We must receive comments by June 19, 2009.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Boeing Model 737–600, –700, –700C, and –800 series airplanes, certificated in any category; as identified in Boeing Special Attention Service Bulletin 737–32–1402, dated August 6, 2008.

Subject

(d) Air Transport Association (ATA) of America Code 32: Landing gear.

Unsafe Condition

(e) This AD results from a report indicating that the protective finishes on the main landing gear (MLG) forward trunnion pins might have been damaged during final assembly. We are issuing this AD to prevent stress corrosion cracking of the forward trunnion pins, which could result in fracture of the pins and consequent collapse of the MLG.

Compliance

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

Lubrication

(g) Within 30 days after the effective date of this AD: Lubricate the left and right MLG forward trunnion pins in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–32–1402, dated August 6, 2008. Repeat the lubrication at intervals not to exceed 30 days until all applicable requirements of paragraph (h) of this AD have been accomplished.

Inspection and Corrective Actions

(h) Within 60 months after the date of issuance of the original airworthiness certificate or date of issuance of the original export certificate of airworthiness, or within 6 months after the effective date of this AD, whichever occurs later: Except as provided

by paragraph (i) of this AD, do a detailed inspection for discrepancies (including finish damage, corrosion, pitting, and base metal scratches) of the transition radius of the left and right MLG trunnion pins, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–32–1402, dated August 6, 2008. At the times specified in paragraph 1.E., ''Compliance,'' of the service bulletin, do all applicable repetitive inspections and corrective actions, in accordance with the service bulletin. Accomplishing the detailed inspections (initial and repetitive) and all applicable corrective actions specified in this paragraph terminates the repetitive lubrication requirements of paragraph (g) of this AD.

No Report Required

(i) Although Boeing Special Attention Service Bulletin 737–32–1402, dated August 6, 2008, specifies to send inspection reports to the manufacturer, this AD does not include that requirement.

Optional Terminating Action

(j) Overhauling or replacing a trunnion pin in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–32–1402, dated August 6, 2008, ends the repetitive lubrication requirements of paragraph (g) of this AD, and the actions required by paragraph (h) of this AD, for that pin. Replacement or overhaul of the left and right MLG trunnion pins in accordance with Boeing Special Attention Service Bulletin 737–32–1402, dated August 6, 2008, terminates the requirements of this AD.

Alternative Methods of Compliance (AMOCs)

(k)(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Nancy Marsh, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle ACO, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6440; fax (425) 917–6590. Or, e-mail information to *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov*.

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before *using* any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

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

Issued in Renton, Washington, on April 27, 2009.

Stephen P. Boyd,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–10303 Filed 5–4–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 601

[Docket No. FDA–2009–N–0100]

Revision of the Requirements for Publication of License Revocation; Companion Document to Direct Final Rule

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing to amend the biologics regulations to clarify the regulatory procedures for notifying the public about the revocation of a biologics license to be consistent with current practices. This proposed rule is a companion document to the direct final rule published elsewhere in this issue of the **Federal Register**.

DATES: Submit written or electronic comments on or before July 20, 2009. If FDA receives any significant adverse comments, the agency will publish a document withdrawing the direct final rule within 30 days after the comment period ends. FDA will then proceed to respond to comments under this proposed rule using the usual notice and comment procedures.

ADDRESSES: You may submit comments, identified by Docket No. FDA–2009–N–0100, by any of the following methods:

Electronic Submissions

Submit electronic comments in the following way:

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

Written Submissions

Submit written submissions in the following ways:

• FAX: 301–827–6870.

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

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

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

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

FOR FURTHER INFORMATION CONTACT: Paul E. Levine, Jr., Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448, 301–827–6210.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of January 25, 1977 (42 FR 4680), FDA issued a final rule revising, among other things, the procedures under part 601 (21 CFR part 601) for issuing, revoking, and suspending biologics licenses; and publishing license revocations. FDA revised these procedures in order to simplify and codify existing practices, establish new requirements where appropriate, and ensure that practices and procedures would be consistently applied throughout the agency.

A provision under the January 25, 1977, final rule provided that a ''Notice of revocation of a license, with statement of the cause therefor, shall be issued by the Commissioner and published in the **Federal Register**'' (§ 601.8). FDA interprets this requirement to apply only to a license which the Commissioner of Food and Drugs (the Commissioner) has found grounds to revoke under § 601.5(b). FDA has not routinely published, in the **Federal Register**, a notice of revocation of a biologics license resulting from a manufacturer's voluntary request for revocation for reasons unrelated to a finding by the Commissioner that

reasonable grounds to revoke the license exist under § 601.5(b). Examples of situations in which a manufacturer might voluntarily request that a license be revoked include economic loss, change in product marketing strategy, lack of public need, corporate reorganization, or the emergence of innovative replacement products. FDA does not consider the revocation of licenses in such circumstances to require publication in the **Federal Register**. However, FDA may publish a notice of revocation for licenses revoked at the voluntary request of a manufacturer in situations where such notice is in the interest of public health.

II. Highlights of the Proposed Rule

FDA is proposing to amend § 601.8 to read: ''The Commissioner, following revocation of a biologics license under 21 CFR 601.5(b), will publish a notice in the **Federal Register** with a statement of the specific grounds for the revocation.''

This proposed amendment revises the existing regulation to clarify that FDA will publish a notice of license revocation in cases where the Commissioner has made a finding that reasonable grounds for revocation exist under § 601.5(b). This proposed amendment also clarifies that the phrase ''with statement of the cause therefor,'' (§ 601.8) refers to the specific grounds for revocation enumerated in § 601.5(b). The proposed rule does not affect other regulations or procedures for notification of license revocation. The proposed rule does not alter existing FDA practices for publishing notices of voluntary withdrawal, including notices of voluntary withdrawal of new drug applications.

III. Legal Authority

FDA is issuing this regulation under the biological products provisions of the Public Health Service Act (42 U.S.C. 262 and 264) and the drugs and general administrative provisions of the Federal Food, Drug, and Cosmetic Act (sections 201, 301, 501, 502, 503, 505, 510, 701, and 704) (21 U.S.C. 321, 331, 351, 352, 353, 355, 360, 371, and 374). Under these provisions of the Public Health Service Act and the Federal Food, Drug, and Cosmetic Act, we have the authority to issue and enforce regulations designed to ensure that biological products are safe, pure, and potent; and prevent the introduction, transmission, and spread of communicable disease.

IV. Companion Document to Direct Final Rulemaking

In the **Federal Register** of November 21, 1997 (62 FR 62466), FDA described the agency's procedures for when and how we will employ direct final rulemaking. We have determined that the rule is appropriate for direct final rulemaking because it includes only noncontroversial amendments, and we anticipate no significant adverse comments. Consistent with our procedures on direct final rulemaking, this proposed rule is a companion to the direct final rule published elsewhere in this issue of the **Federal Register**. This companion proposed rule provides the procedural framework to finalize the rule in the event that the direct final rule receives any significant adverse comment and is withdrawn. The comment period for this companion proposed rule runs concurrently with the comment period for the direct final rule. Any comments received in response to this companion proposed rule will also be considered as comments regarding the direct final rule.

A significant adverse comment is defined as a comment that explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. In determining whether an adverse comment is significant and warrants terminating a direct final rulemaking, we will consider whether the comment raises an issue serious enough to warrant a substantive response in a notice-and-comment process in accordance with section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553). Comments that are frivolous, insubstantial, or outside the scope of the rule will not be considered significant or adverse under this procedure.

A comment recommending a regulation change in addition to that in this rule will not be considered a significant adverse comment unless the comment states why the rule would be ineffective without the additional change. In addition, if a significant adverse comment applies to an amendment, paragraph, or section of this rule that can be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of a significant adverse comment.

If any significant adverse comments are received during the comment period, FDA will publish, before the effective date of the direct final rule, a document withdrawing the direct final rule. If we withdraw the direct final rule, any comments received will be applied to the companion proposed rule and will be considered in developing a final rule using the usual notice-and-comment procedures under the APA (5 U.S.C. 552a *et seq*).

If FDA receives no significant adverse comments during the specified comment period, FDA intends to publish a document confirming the effective date within 30 days after the comment period ends. Additional information about direct rulemaking procedures is set forth in a guidance published in the **Federal Register** of November 21, 1997 (62 FR 62466).

V. Analysis of Impacts

A. Review Under Executive Order 12866, the Regulatory Flexibility Act, and the Unfunded Mandates Reform Act of 1995

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

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because the proposed rule makes current regulations consistent with existing FDA practices and procedures, the agency proposed to certify that the final rule will not have a significant economic impact on a substantial number of small entities.

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

B. Environmental Impact

The agency has determined under 21 CFR 25.31(h) that this action is of a type that does not individually or cumulatively have a significant adverse effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

C. Federalism

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

VI. Paperwork Reduction Act of 1995

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

VII. Request for Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 601

Administrative practice and procedure, Biologics, Confidential business information.

Therefore, under the Federal Food, Drug, and Cosmetic Act and the Public Health Service Act, and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 601 is amended as follows:

PART 601—LICENSING

1. The authority citation for 21 CFR part 601 continues to read as follows:

Authority: 15 U.S.C. 1451–1561; 21 U.S.C. 321, 351, 352, 353, 355, 356b, 360, 360c–360f, 360h–360j, 371, 374, 379e, 381; 42 U.S.C. 216, 241, 262, 263, 264; sec 122, Pub. L. 105–115, 111 Stat. 2322 (21 U.S.C. 355 note).

2. Revise § 601.8 to read as follows:

§ 601.8 Publication of revocation.

The Commissioner, following revocation of a biologics license under 21 CFR 601.5(b), will publish a notice in the **Federal Register** with a statement of the specific grounds for the revocation.

Dated: March 25, 2009.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E9–10243 Filed 5–4–09; 8:45 am]

BILLING CODE 4160–01–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2008–0031; FRL–8899–4]

Approval and Promulgation of Air Quality Implementation Plans; Indiana; Extended Permit Terms for Renewal of Federally Enforceable State Operating Permits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve Indiana's rule revision to extend permit terms for the renewal of Federally Enforceable State Operating Permits (FESOPs) from five years to ten years. Indiana submitted this rule revision for approval on December 19, 2007. FESOPs apply to non-major sources that obtain enforceable limits to avoid being subject to certain Clean Air Act (Act) requirements, including the Title V operating permit program. Neither the Act nor its implementing regulations specify a permit-term requirement for FESOPs. This rule revision will provide relief to Indiana's resource burden of processing permit renewals. It will also allow the Indiana Department of Environmental Management to devote more resources to major source Title V permitting actions and permit modifications for both Title V and FESOP sources.

DATES: Comments must be received on or before June 4, 2009.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2008–0031, by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *E-mail: blakley.pamela@epa.gov.*
3. *Fax:* (312) 692–2450.
4. *Mail:* Pamela Blakley, Chief, Air Permits Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
5. *Hand Delivery:* Pamela Blakley, Chief, Air Permits Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m. excluding Federal holidays.

Please see the direct final rule which is located in the Rules section of this **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Sam Portanova, Environmental Engineer, Air Permits Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–3189, *portanova.sam@epa.gov.*

SUPPLEMENTARY INFORMATION: In the Final Rules section of this **Federal Register,** EPA is approving Indiana's state implementation plan submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment. For additional information, see the direct final rule which is located in the Rules section of this **Federal Register.**

Dated: April 20, 2009.

Walter W. Kovalick, Jr.,

Acting Regional Administrator, Region 5.

[FR Doc. E9–10334 Filed 5–4–09; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 52

[FAR Case 2008–015; Docket 2009–0015; Sequence 1]

RIN: 9000–AL26

Federal Acquisition Regulation; FAR Case 2008–015, Payments Under Fixed-Price Architecture and Engineering Contracts

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council (CAAC) and the Defense Acquisition Regulations Council (DARC) propose to amend the Federal Acquisition Regulation (FAR) to revise the withholding-of-payment requirements under FAR clause 52.232–10, Payments Under Fixed-Price Architect-Engineer Contracts.

DATES: Interested parties should submit written comments to the Regulatory Secretariat on or before July 6, 2009 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAR case 2008–015 by any of the following methods:

- Regulations.gov: *http://www.regulations.gov*.

Submit comments via the Federal eRulemaking portal by inputting ''FAR Case 2008–015'' under the heading ''Comment or Submission''. Select the link ''Send a Comment or Submission'' that corresponds with FAR Case 2008–015. Follow the instructions provided to complete the ''Public Comment and Submission Form''. Please include your name, company name (if any), and ''FAR Case 2008–015'' on your attached document.

- Fax: 202–501–4067.
- Mail: General Services Administration, Regulatory Secretariat (VPR), 1800 F Street NW, Room 4041, Washington, DC 20405, ATTN: Hada Flowers.

Instructions: Please submit comments only and cite FAR case 2008–015 in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov*, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT Ms. Meredith Murphy, Procurement Analyst, at (202) 208–6925 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAR case 2008–015.

SUPPLEMENTARY INFORMATION:

A. Background

The Federal Acquisition Regulation (FAR) 52.232–10, Payments under Fixed-Price Architecture-Engineer Contracts, currently requires the contracting officer to withhold 10% of the amounts due on each voucher; however, payment may be made in full during any month in which the contracting officer determines the performance to be satisfactory. The Government retains the withhold amount until the contracting officer determines that the work has been satisfactorily completed. The contracting officer may release excess withhold amounts to the contractor when it is determined that work is substantially complete and when the contracting officer determines that the amount retained is in excess of the amount adequate for the protection of the Governments interests.

This rule proposes to revise FAR 52.232–10 to permit contracting officers to use their judgment regarding the amount of payment withhold to apply under fixed-price architecture-engineer contracts (based on an assessment of the contractor's performance under the contract) so that the withhold amount will be applied at the level necessary to protect the Government's interests. This is in contrast to the current requirement that contracting officers withhold 10 percent on all payments. Thus, the rule proposes to revise paragraphs (b) and (c) of the contract clause at FAR 52.232–10 to state that the contracting officer may (rather than shall) withhold up to 10 percent of the payment amount due and that the amount of withhold shall be determined based upon the contractor's performance record. The rule also makes several related editorial changes including one that clarifies that the contractor will be paid any unpaid balance due to include withhold amounts at the successful completion of the design work.

This case originated from a recommendation in the Small Business Administration's Regulatory Review and Reform (r3) initiative. The current withholding provisions negatively impact the cash flow of architect-engineer contractors and may, in some instances, result in the withholding of amounts that exceed reasonable amounts to protect the Government's interests.

This is not a significant regulatory action and, therefore, is not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1933. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Councils do not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, at 5 U.S.C. 601, *et seq.*, because the rule does not impose any additional requirements on small businesses. There are approximately 230,000 architect-engineer firms, many of which are small businesses. This rule actually eases the impact on such firms. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. We invite comments from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR Part 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR Case 2008–015) in correspondence.

C. Paperwork Reduction Act

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

List of Subjects in 48 CFR Part 52

Government Procurement.

Dated: April 28, 2009.

Al Matera

Director, Office of Acquisition Policy.

Therefore, DoD, GSA, and NASA propose to amend 48 CFR part 52 as set forth below:

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

1. The authority citation for 48 CFR part 52 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

2. Amend section 52.232–10 by revising the date of the clause; by revising the last sentence or paragraph (a), and by revising paragraphs (b) and (c) to read as follows:

52.232–10 Payments under Fixed-Price Architect-Engineer Contracts.

* * * * *

PAYMENTS UNDER FIXED-PRICE ARCHITECT-ENGINEER CONTRACTS (DATE)

(a) * * * The estimates, along with any supporting data required by the Contracting Officer, shall be prepared by the Contractor and submitted along with its voucher.

(b) After receipt of each substantiated voucher the Government shall pay the voucher as approved by the Contracting Officer or authorized representative. The Contracting Officer may require a withhold of up to 10 percent of the amounts due under paragraph (a) of this clause in order to protect the Government's interest and ensure satisfactory completion of the contract. The amount of withhold shall be determined based upon the contractor's performance record under this contract. Whenever the Contracting Officer determines that the work is substantially complete and that the amount retained is in excess of the amount adequate for the protection of the Government, the Contracting Officer may release the excess amount to the Contractor.

(c) Upon satisfactory completion by the Contractor and final acceptance by the Contracting Officer of all design work done by the Contractor under the ''Statement of Architect-Engineer Services'', the Contractor will be paid the unpaid balance of any money due for design work under the statement, including all withheld amounts.

* * * * *

(End of clause)

[FR Doc. E9–10351 Filed 5–4–09; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 222 and 223

[Docket No. 0809121212–81515–01]

RIN 0648–AX20

Endangered and Threatened Wildlife; Sea Turtle Conservation

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

ACTION: Proposed rule; request for comments.

SUMMARY: The National Marine Fisheries Service (NMFS) currently requires the use of chain-mat modified dredge gear in the Atlantic sea scallop fishery south of 41°9.0′ North latitude from May 1 through November 30 each year. This gear is necessary to help reduce mortality and injury to endangered and threatened sea turtles captured in this fishery and to conserve sea turtles listed under the Endangered Species Act (ESA). This proposed action would make minor modifications to the current requirements by clarifying where on the dredge the chain mat should be hung; by excluding the sweep from the requirement that the side of each opening in the chain mat be less than or equal to 14 inches (35.5 cm); and by adding definitions of the sweep and the diamonds, which are terms used to describe parts of the scallop dredge gear. Any incidental take of threatened sea turtles in Atlantic sea scallop dredge gear in compliance with the gear modification requirements and all other applicable requirements will be exempted from the ESA prohibition against takes. NMFS is requesting public comment on this action, the focus of which is the minor modifications described here. NMFS is not accepting public comment on the existing chain mat requirements through this proposed rule.

DATES: Comments on the proposed rule must be received by 5 p.m. EST on June 4, 2009.

ADDRESSES: Written comments on this action, identified by RIN 0648–AX20, may be submitted by any one of the following methods:

- *Electronic submissions:* Submit all electronic public comments via the Federal eRulemaking portal at *http://www.regulations.gov*.
- *Fax:* 978–281–9394, ATTN: Sea Turtle Conservation Measures, Proposed Rule.
- *Mail:* Mary A. Colligan, Assistant Regional Administrator for Protected Resources, NMFS, Northeast Region, 55 Great Republic Drive, Gloucester, MA 01930, *Attn:* Sea Turtle Conservation Measures, Proposed Rule.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All personal identifying information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Copies of the Draft Supplemental Environmental Assessment/Regulatory Impact Review can be obtained from *http://www.nero.noaa.gov/nero/regs/com.html* listed under the Electronic Access portion of this document or by writing to Pasquale Scida, NMFS, Northeast Region, 55 Great Republic Drive, Gloucester, MA 01930.

FOR FURTHER INFORMATION CONTACT: Pasquale Scida (ph. 978–281–9208, fax 978–281–9394, e-mail *pasquale.scida@noaa.gov*).

SUPPLEMENTARY INFORMATION:

Background

All sea turtles that occur in U.S. waters are listed as either endangered or threatened under the Endangered Species Act of 1973 (ESA). The Kemp's ridley (*Lepidochelys kempii*), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricata*) sea turtles are listed as endangered. The loggerhead (*Caretta caretta*) and green (*Chelonia mydas*) sea turtles are listed as threatened, except for breeding populations of green turtles in Florida and on the Pacific coast of Mexico that are listed as endangered. Kemp's ridley, hawksbill, loggerhead, and green sea turtles are hard-shelled sea turtles.

Under the ESA and its implementing regulations, taking sea turtles under NMFS's jurisdiction, even incidentally, is prohibited, with exceptions identified at 50 CFR 223.206. The incidental take, both lethal and non-lethal, of loggerhead, Kemp's ridley, and unidentified hard-shelled sea turtles as a result of scallop dredging has been observed in the Atlantic sea scallop fishery (Northeast Fisheries Science Center (NEFSC) Fisheries Sampling Branch (FSB), Observer Database). In addition, a non-lethal take of a green sea turtle has been observed in this fishery (NEFSC FSB, Observer Database) and one unconfirmed take of a leatherback sea turtle was reported during the experimental fishery to test the chain-mat modified gear (DuPaul *et al.*, 2004).

Sea turtles caught in scallop dredge gear often suffer injuries. The most commonly observed injury is damage to the carapace. The exact causes of these injuries are unknown, but most likely appear to be from being struck by the

dredge (during a tow or upon emptying of the dredge bag on deck), crushed by debris (e.g., large rocks) that collects in the dredge bag, or as a result of a fall during hauling of the dredge. The chain mat is a grid of horizontal and vertical chains hung over the mouth of the dredge bag to prevent sea turtles from entering the bag and to prevent injury and mortality that results from such capture (i.e., due to debris in the bag, a fall while emptying the bag, or dropping of the gear on the catch). A full description of the chain mat and the benefits to sea turtles can be found in the proposed and final rules implementing the regulations (72 FR 63537, November 9, 2007; 73 FR 18984, April 8, 2008) and the associated Environmental Assessment (NMFS 2008).

In 2008, an image analysis that calculated the length of the sides of the openings created by the intersecting horizontal and vertical chains for an 11-ft. chain-mat equipped dredge was completed. Only a single photograph was analyzed in this analysis. The analysis showed that the lengths of the sides of the openings were both greater than and less than 14 inches and that 14 inches was within the range of openings tested in the experimental fishery. Based on this information, NMFS re-evaluated the chain mat requirements and the analysis conducted for the April 2008 rule. NMFS found that the available information continues to support an opening of 14 inches or less and that the conclusions of the analysis conducted for the April 2008 rule are still valid.

This proposed rule would modify the existing chain mat regulations that apply to chain-mat modified dredges in the Atlantic sea scallop fishery. This proposed rule, if implemented, would (1) more clearly define where on the dredge gear the chain mat must be hung; (2) exclude the sweep from the requirement that each side of the opening must be 14 inches (35.5 cm) or less; and (3) define the ''sweep'' and the ''diamonds'', which are terms used to describe parts of the scallop dredge gear. This rule is being proposed under the ESA provisions authorizing the issuance of regulations to conserve threatened species and for enforcement purposes (sections 4(d) and 11(f), respectively).

Configuration of the Gear

The current regulations define a chain mat as ''* * * a device designed to be installed in a scallop dredge forward of the sweep, as described in 50 CFR 223.206, for the purpose of excluding sea turtles from the dredge.'' The regulations at 50 CFR 223.206 state, in part, that ''During the time period of May 1 through November 30, any vessel with a sea scallop dredge and required to have a Federal Atlantic sea scallop fishery permit, regardless of dredge size or vessel permit category, that enters waters south of 41°9.0′ N. latitude, from the shoreline to the outer boundary of the Exclusive Economic Zone must have on each dredge a chain mat described as follows. The chain mat must be composed of horizontal (''tickler'') chains and vertical (up-and-down) chains that are configured such that the openings formed by the intersecting chains have no more than 4 sides. The length of each side of the openings formed by the intersecting chains, including the sweep, must be less than or equal to 14 inches (35.5 cm).'' NMFS has determined that ''forward of the sweep'' does not fully describe the configuration and that more specificity would ensure that the requirements are met consistently in the manner NMFS intends. Therefore, this proposed rule would clarify that the chain mat must cover the entire opening of the dredge bag by specifying that ''The vertical and horizontal chains must be hung to cover the opening of the dredge bag such that the vertical chains extend from the back of the cutting bar to the sweep. The horizontal chains must intersect the vertical chains such that the length of each side of the openings formed by the intersecting chains is less than or equal to 14 inches (35.5 cm) * * *'' These changes simply clarify the existing requirements and would not result in any additional or different biological, physical, or socio-economic impacts.

Exclusion of the Sweep

Second, NMFS proposes to exclude the sweep from the requirement that each side of the openings formed by the intersecting chains be less than or equal to 14 inches (35.5 cm). For those openings adjacent to the sweep, the sweep chain will create one side of the opening. Under the current requirements, the length of the side created by the sweep chain must be 14 inches (35.5 cm) or less. However, NMFS has re-examined this requirement and has found that except in rare cases, the size of the openings along the sweep will be smaller (even if the length of the side created by the sweep exceeds 14 inches (35.5 cm)) than the size of the openings created by a square with 14 inches (35.5 cm) per side, the maximum opening allowed throughout the chain mat. Given the configuration of the dredge gear, it is possible that one opening at the bottom of the arc created by the sweep could be greater than the opening created by a square with 14 inches (35.5 cm) per side if the vertical chains forming the two sides of this opening were at or near 14 inches (35.5 cm) in length.

There are several reasons why this proposed change would result in inconsequential impacts on the conservation benefit of the chain mats. First, along the sweep, the openings are irregularly shaped and may be three- or four-sided (see EA for figure), generally resulting in a smaller opening than throughout the rest of the chain mat. Given the configuration of the gear and the area of the openings along the sweep, the number of openings that may be larger than the opening created by a square with 14 inches (35.5 cm) per side is limited to a single opening in the chain mat. Second, the increase in size of the one opening is only a small fraction of the size of the openings allowed throughout the chain mat due to the arc in the sweep. This increase is further limited by the fact that the sweep chain is generally a heavier chain, which would take up some of the space within the opening. Third, this slightly larger opening would only be present on a subset of the dredges used in the fishery and, where present on a dredge, would be limited to only one of the chain mat openings. In some cases, fishermen are configuring the gear such that the sides of the openings created by the intersecting chains are less than 14 inches (35.5 cm) to allow for chain stretch and wear. In these cases, the opening at the bottom of the arc created by the sweep would likely be smaller than that created by a square with 14 inches (35.5 cm) per side, and all of the openings in the chain mat would be consistent with the openings allowed under the current regulations.

Given that the slightly larger opening is limited to one opening on a subset of the dredges used in the fishery and that the increase in the size of the opening is small due to the way the gear is configured, the conservation benefit to sea turtles under this requirement is essentially the same as the current requirements. While possible, it is highly unlikely that a sea turtle that would be excluded by a square with 14 inches (35.5 cm) per side would encounter and pass through the one slightly larger opening that may be present on some dredges.

Chain mats are currently required in certain areas and times. This rule would not change the spatial or temporal extent of the requirements. It would make minor modifications to how the gear is configured. However, given that the modifications are minor and that the gear would continue to be required in the same areas and times, this action

would not result in any additional impacts to the physical environment or to habitat. This change would also not result in any additional economic costs (*see* Classification section).

Definition of the Sweep and the Diamonds

As the modifications above specifically exclude the sweep from the requirement that the openings in the chain mat be 14 inches (35.5 cm) per side, NMFS would add a definition of the sweep to the regulations. NMFS is proposing to define the sweep as ''A chain extending, usually in an arc, from one end of the dredge frame to the other to which the ring bag, including the diamonds, is attached. The sweep forms the edge of the opening of the dredge bag.'' NMFS would also add a definition of the ''diamonds'' to the regulations. NMFS is proposing to define the diamonds as ''the triangular shaped portions of the ring bag on the 'dredge bottom' as defined at 50 CFR 648.2.'' This definition is necessary as the term diamonds is used to define the sweep.

Classification

This proposed rule has been determined to be not significant for purposes of Executive Order 12866. A description of the action, why it is being considered, and the legal basis for this action are contained in the preamble. No reporting, recordkeeping, or other compliance requirements are proposed. No duplicative, overlapping, or conflicting Federal rules have been identified.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. As a result, an initial regulatory flexibility analysis is not required and none has been prepared.

The small entities affected by the chain mat regulations are Atlantic sea scallop fishermen entering waters south of 41° 9.0′ N. latitude from the shoreline to the outer boundary of the Exclusive Economic Zone. These regulations apply to all vessels with a sea scallop dredge(s) and required to have a Federal Atlantic sea scallop fishery permit, regardless of the dredge size or vessel permit category.

The final rule (73 FR 18984, April 8, 2008) and Final Environmental Assessment/Final Regulatory Flexibility Act Analysis/Regulatory Impact Review (EA/FRFA/RIR) (NMFS 2008) implementing the chain-mat modified dredge requirements identified 314 vessels that would be affected by the chain mat requirements. The economic impacts of the minor changes proposed here are described below.

Under the current requirements, the length of each side of the opening created by the intersecting chains, including the side created by the sweep chain, must be 14 inches (35.5 cm) or less. NMFS has identified two alternate ways to configure the gear to comply with the regulation as currently written. Fishermen could create smaller openings (approximately 9–10 inches (27.9–25.4 cm) per side) throughout the mat to ensure that the length of the side created by the sweep was less than or equal to 14 inches (35.5 cm). However, it was never the intention that the requirement result in openings in the chain mat of 9–10 inches (27.9–25.4 cm) per side. Alternatively, fishermen could add a small piece of chain to any opening where the length of the side created by the sweep is greater than 14 inches (35.5 cm). The number of openings that would require a piece of additional chain is expected to be limited to that area along the sweep that is curved. This short piece of chain would divide the sweep, creating two smaller openings. The pieces of chain would be no more than 14 inches (35.5 cm), and in many cases, the segments are likely to be much less than 14 inches (35.5 cm). As described in the EA (NMFS 2008) for the final rule (73 FR 18984, April 8, 2008) requiring the use of chain-mat modified dredge gear, a 15-ft (4.57-m) dredge with frame, bag, and club stick weighs approximately 4500 pounds (2041 kg). The weight of the chain mat was estimated to be between 67 pounds (30.1 kg) for a 10-ft (3.05-m) dredge and 176 pounds (79.8 kg) for a 15-ft (4.57-m) dredge (NMFS 2008). In the economic analysis for the 2008 regulations, a conservative estimate (20 percent) of the additional chain required to comply with the 14-inch (35.5-cm) requirement was used. Therefore, it is likely that the costs of these additional small segments were subsumed in that analysis. However, some additional information on the amount of chain required to divide these openings is provided here. The estimated cost for the chain was $2.00 to $3.00 per foot. Therefore, given that the additional chain required is only a short segment added to a limited number of openings, it is expected that the economic costs would be minimal. This amount of chain is also not expected to affect the weight of the gear or its efficiency.

The proposed action would not result in any additional costs, and, under this action, the vessel would not incur the costs associated with adding small lengths of additional chain to ensure that the sweep segments do not exceed 14 inches (35.5 cm). Therefore, the differences in cost between a chain mat configured under the current requirements and one configured as proposed here are minimal. This action would not affect the profitability of the vessel. As this action is not expected to result in any additional costs or to affect the profitability of the vessel, it will not contribute to cumulative economic impacts.

With the exception of the rare cases described in the preamble, the size of the openings along the sweep will be smaller (even if the length of the side created by the sweep exceeds 14 inches (35.5 cm)) than the size of the openings created by a square with 14 inches (35.5 cm) per side, the maximum opening allowed throughout the chain mat. Therefore, the proposed action would only result in inconsequential impacts on the conservation benefit of the chain mats (*see* preamble). In addition, the clarification as to the configuration of the gear and the additional definitions would not result in any socio-economic impacts.

Literature Cited

DuPaul, W.D., D.B. Rudders, and R.J. Smolowitz. 2004a. Industry trials of a modified sea scallop dredge to minimize the catch of sea turtles. Final Report. November 2004. VIMS Marine Resources Report, No. 2004–12. 35 pp.

NMFS (National Marine Fisheries Service). 2008. Final Environmental Assessment and Regulatory Impact Review/Regulatory Flexibility Act Analysis of Sea Turtle Conservation Measures for the Atlantic Sea Scallop Dredge Fishery. 152 pp.

Dated: April 29, 2009.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

List of Subjects in 50 CFR Parts 222 and 223

Endangered and threatened species.

For the reasons set forth in the preamble, 50 CFR parts 222 and 223 are proposed to be amended as follows:

PART 222—GENERAL ENDANGERED AND THREATENED MARINE SPECIES

1. The authority citation for part 222 continues to read as follows:

Authority: 16 U.S.C. 1531 *et seq.*; 16 U.S.C. 742a *et seq.*; 31 U.S.C. 9701.

2. In § 222.102, the definition of ''Diamonds'' and ''Sweep'' are added in alphabetical order to read as follows:

§ 222.102 Definitions.

* * * * *

Diamonds, with respect to dredge or dredge gear as defined in this section, means the triangular shaped portions of the ring bag on the ''dredge bottom'' as defined in 50 CFR 648.2.

* * * * *

Sweep, with respect to dredge or dredge gear as defined in this section, means a chain extending, usually in an arc, from one end of the dredge frame to the other to which the ring bag, including the diamonds, is attached. The sweep forms the edge of the opening of the dredge bag.

* * * * *

PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

3. The authority citation for part 223 continues to read as follows:

Authority: 16 U.S.C. 1531–1543; subpart B, § 223.12 also issued under 16 U.S.C. 1361 *et seq.*; 16 U.S.C. 5503(d) for § 223.206(d)(9).

4. In § 223.206, paragraph (d)(11)(i) is revised to read as follows:

§ 223.206 Exemptions to prohibitions relating to sea turtles.

* * * * *

(11) *Restrictions applicable to sea scallop dredges in the mid-Atlantic*—(i) Gear Modification. During the time period of May 1 through November 30, any vessel with a sea scallop dredge and required to have a Federal Atlantic sea scallop fishery permit, regardless of dredge size or vessel permit category, that enters waters south of 41°9.0′ N. latitude, from the shoreline to the outer boundary of the Exclusive Economic Zone must have on each dredge a chain mat described as follows. The chain mat must be composed of horizontal (''tickler'') chains and vertical (''up-and-down'') chains that are configured such that the openings formed by the intersecting chains have no more than 4 sides. The vertical and horizontal chains must be hung to cover the opening of the dredge bag such that the vertical chains extend from the back of the cutting bar to the sweep. The horizontal chains must intersect the vertical chains such that the length of each side of the openings formed by the intersecting chains is less than or equal to 14 inches (35.5 cm) with the exception of the side of any individual opening created by the sweep. The chains must be connected to each other with a shackle or link at each intersection point. The measurement must be taken along the chain, with the chain held taut, and include one shackle or link at the intersection point and all links in the chain up to, but excluding, the shackle or link at the other intersection point.

* * * * *

[FR Doc. E9–10311 Filed 4–30–09; 4:15 pm]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 74, No. 85
Tuesday, May 5, 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 COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: U.S. Census Bureau.

Title: Quarterly Financial Report.

Form Number(s): QFR–200(MT), QFR–300(S), QFR–201(MG).

OMB Control Number: 0607–0432.

Type of Request: Revision of a currently approved collection.

Burden Hours: 92,268.

Number of Respondents: 10,707.

Average Hours per Response: 2 hours and 9 minutes.

Needs and Uses: The QFR program has published up-to-date aggregate statistics on the financial results and position of U.S. corporations since 1947. The program currently collects and publishes financial data for manufacturing, mining, wholesale and retail trade corporations. The survey is a principal economic indicator that provides financial data essential to calculation of key U.S. government measures of national economic performance. The importance of this data collection is reflected by the granting of specific authority to conduct the program in Title 13 of the United States Code, section 91, which requires that financial statistics of business operations be collected and published quarterly. Public Law 109–79, section 91 extended the authority of the Secretary of Commerce to conduct the QFR program through September 30, 2015.

This request is for a revision of the currently approved collection. The change from the previous QFR authorization is to collect data for selected services industries beginning with data for the third quarter of 2009. The proposed expansion includes all 3-digit industries in the Information sector, and all 4-digit industries, with the exception of legal services, in the Professional, Scientific, and Technical Services sector. The services sector is the largest sector in the Gross Domestic Product (GDP), representing about 55 percent of the economy. By expanding to selected service industries, the QFR program can begin providing statistics on the financial results and position for important parts of the services sector for which no data are currently available.

The survey forms used to conduct the QFR are: QFR–200 (MT) Long Form (manufacturing, mining, wholesale trade, and retail trade); QFR–201 (MG) Short Form (manufacturing); and a new form, QFR–300 (S) Long Form (services). The QFR–200 (MT) and QFR–201 (MG) have been updated to improve usability for respondents.

The primary purpose of the QFR is to provide timely, accurate data on business financial conditions for use by Government and private-sector organizations and individuals.

Affected Public: Business or other for-profit.

Frequency: Quarterly.

Respondent's Obligation: Mandatory.

Legal Authority: Title 13 U.S.C., section 91; Public Law 109–79, section 91.

OMB Desk Officer: Brian Harris-Kojetin, (202) 395–7314.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 7845, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dhynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Brian Harris-Kojetin, OMB Desk Officer either by fax (202–395–7245) or e-mail (*bharrisk@omb.eop.gov*).

Dated: April 29, 2009.

Glenna Mickelson,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E9–10249 Filed 5–4–09; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–943]

Oil Country Tubular Goods From the People's Republic of China: Initiation of Antidumping Duty Investigation

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

DATES: *Effective Date:* May 5, 2009.

FOR FURTHER INFORMATION CONTACT: Eugene Degnan or Paul Stolz, AD/CVD Operations, Office 8, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; *telephone:* (202) 482–0414 and (202) 482–4474, respectively.

SUPPLEMENTARY INFORMATION:

The Petition

On April 8, 2009, the Department of Commerce (''the Department'') received an antidumping duty (''AD'') petition concerning imports of certain oil country tubular goods (''OCTG'') from the People's Republic of China (''PRC'') filed in proper form by Maverick Tube Corporation, United States Steel Corporation, TMK IPSCO, V&M Star L.P., V&M Tubular Corporation of America, Wheatland Tube Corp., Evraz Rocky Mountain Steel, and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO–CLC, (collectively, ''Petitioners'').[1] On April 17, 2009, the Department issued a request for additional information and clarification of certain areas of the Petition. Based on the Department's request, Petitioners filed supplements to the Petition on April 22, 2009 (''Supplement to the Petition''). The Department requested further clarifications from Petitioners by phone on April 23, 2009, regarding scope, industry support and U.S. price.[2] On

[1] *See* the Petition for the Imposition of Antidumping and Countervailing Duties Pursuant to Sections 701 and 731 of the Tariff Act of 1930, As Amended (''Petition''), filed on April 8, 2009.

[2] *See* Memorandum to the File from Matthew Glass, ''Petition for the Imposition of Antidumping and Countervailing Duties on Certain Oil Country Tubular Goods From the People's Republic of China (A–570–943) (C–357–819): Conference Call with Petitioners.''

April 24, 2009, Petitioners filed the requested information, including a revised scope.[3]

In accordance with section 732(b) of the Tariff Act of 1930, as amended (''the Act''), Petitioners allege that imports of OCTG from the PRC are being, or are likely to be, sold in the United States at less than fair value, within the meaning of section 731 of the Act, and that such imports materially injure, or threaten material injury to, an industry in the United States.

The Department finds that Petitioners filed this Petition on behalf of the domestic industry because Petitioners are interested parties as defined in section 771(9)(C) of the Act, and they have demonstrated sufficient industry support with respect to the investigation that they are requesting the Department to initiate (*see* ''Determination of Industry Support for the Petition'' below).

Scope of Investigation

The products covered by this investigation are certain OCTG from the PRC. For a full description of the scope of the investigation, please see the ''Scope of the Investigation'' in Appendix I of this notice.

Comments on Scope of Investigation

During our review of the Petition, we discussed the scope with Petitioners to ensure that it is an accurate reflection of the products for which the domestic industry is seeking relief. Moreover, as discussed in the preamble to the regulations (*Antidumping Duties; Countervailing Duties; Final Rule,* 62 FR 27296, 27323 (May 19, 1997)), we are setting aside a period for interested parties to raise issues regarding product coverage. The Department encourages all interested parties to submit such comments by May 18, 2009, twenty calendar days from the signature date of this notice. Comments should be addressed to Import Administration's APO/Dockets Unit, Room 1117, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. The period of scope consultations is intended to provide the Department with ample opportunity to consider all comments and to consult with parties prior to the issuance of the preliminary determinations.

Comments on Product Characteristics for Antidumping Duty Questionnaires

We are requesting comments from interested parties regarding the appropriate physical characteristics of OCTG to be reported in response to the Department's antidumping questionnaires. This information will be used to identify the key physical characteristics of the subject merchandise in order to more accurately report the relevant factors and costs of production, as well as to develop appropriate product comparison criteria.

Interested parties may provide any information or comments that they feel are relevant to the development of an accurate listing of physical characteristics. Specifically, they may provide comments as to which characteristics are appropriate to use as (1) general product characteristics and (2) the product comparison criteria. We note that it is not always appropriate to use all product characteristics as product comparison criteria. We base product comparison criteria on meaningful commercial differences among products. In other words, while there may be some physical product characteristics utilized by manufacturers to describe OCTG, it may be that only a select few product characteristics take into account commercially meaningful physical characteristics. In addition, interested parties may comment on the order in which the physical characteristics should be used in product matching. Generally, the Department attempts to list the most important physical characteristics first and the least important characteristics last.

In order to consider the suggestions of interested parties in developing and issuing the antidumping duty questionnaires, we must receive comments at the above-referenced address by May 18, 2009. Additionally, rebuttal comments must be received by May 25, 2009.

Determination of Industry Support for the Petition

Section 732(b)(1) of the Act requires that a Petition be filed on behalf of the domestic industry. Section 732(c)(4)(A) of the Act provides that a Petition meets this requirement if the domestic producers or workers who support the Petition account for: (i) At least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petition. Moreover, section 732(c)(4)(D) of the Act provides that, if the Petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, the Department shall: (i) Poll the industry or rely on other information in order to determine if there is support for the Petition, as required by subparagraph (A), or (ii) determine industry support using a statistically valid sampling method to poll the industry.

Section 771(4)(A) of the Act defines the ''industry'' as the producers as a whole of a domestic like product. Thus, to determine whether a Petition has the requisite industry support, the statute directs the Department to look to producers and workers who produce the domestic like product. The International Trade Commission (''ITC''), which is responsible for determining whether ''the domestic industry'' has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both the Department and the ITC must apply the same statutory definition regarding the domestic like product (section 771(10) of the Act), they do so for different purposes and pursuant to a separate and distinct authority. In addition, the Department's determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law.[4]

Section 771(10) of the Act defines the domestic like product as ''a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this subtitle.'' Thus, the reference point from which the domestic like product analysis begins is ''the article subject to an investigation,'' (*i.e.,* the class or kind of merchandise to be investigated, which normally will be the scope as defined in the Petition).

With regard to the domestic like product, Petitioners do not offer a definition of domestic like product distinct from the scope of the investigation. Based on our analysis of the information submitted on the record, we have determined that OCTG constitute a single domestic like product

[3] *See* Letter from Petitioners, ''*Certain Oil Country Tubular Goods from the People's Republic of China;* Response to Department of Commerce Questions Regarding Volume I and II of the Petitions for Imposition of Antidumping and Countervailing Duties,'' dated April 24, 2009.

[4] *See USEC, Inc.* v. *United States,* 132 F. Supp. 2d 1, 8 (CIT 2001), citing *Algoma Steel Corp. Ltd.* v. *United States,* 688 F. Supp. 639, 644 (CIT 1988), *aff'd* 865 F.2d 240 (Fed. Cir. 1989), *cert. denied* 492 U.S. 919 (1989).

and we have analyzed industry support in terms of that domestic like product.[5]

With regard to section 732(c)(4)(A), in determining whether Petitioners have standing, (*i.e.,* those domestic workers and producers supporting the Petition account for: (1) At least 25 percent of the total production of the domestic like product; and (2) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petition), we considered the industry support data contained in the Petition with reference to the domestic like product as defined in the ''Scope of Investigation'' section above. To establish industry support, Petitioners provided their production of the domestic like product for the year 2008, and compared this to an estimate of production of the domestic like product for the entire domestic industry.[6] To estimate 2008 production of the domestic like product, the Petitioners used an industry publication which reports data in shipments. Petitioners approximated domestic production of OCTG by inflating the volume of domestic shipments reported by the ratio of the difference between Petitioners' production and shipments in the applicable calendar year.[7]

Our review of the data provided in the Petition, supplemental submissions, and other information readily available to the Department indicates that Petitioners have established industry support. First, the Petition established support from domestic producers (or workers) accounting for more than 50 percent of the total production of the domestic like product and, as such, the Department is not required to take further action in order to evaluate industry support (*e.g.,* polling).[8] Second, the domestic producers (or workers) have met the statutory criteria for industry support under section 732(c)(4)(A)(i) of the Act because the domestic producers (or workers) who support the Petitions account for at least 25 percent of the total production of the domestic like product.[9] Finally, the domestic producers (or workers) have met the statutory criteria for industry support under section 732(c)(4)(A)(ii) of the Act because the domestic producers (or workers) who support the Petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petition. Accordingly, the Department determines that the Petition was filed on behalf of the domestic industry within the meaning of section 732(b)(1) of the Act.[10]

The Department finds that Petitioners filed the Petition on behalf of the domestic industry because they are interested parties as defined in section 771(9)(C) of the Act and they have demonstrated sufficient industry support with respect to the antidumping investigation that they are requesting the Department initiate.[11]

Allegations and Evidence of Material Injury and Causation

Petitioners allege that the U.S. industry producing the domestic like product is being materially injured, or is threatened with material injury, by reason of the imports of the subject merchandise sold at less than normal value (''NV''). In addition, Petitioners allege that subject imports exceed the negligibility threshold provided for under section 771(24)(A) of the Act.

Petitioners contend that the industry's injured condition is illustrated by reduced market share, increased import penetration, underselling and price depressing and suppressing effects, lost sales and revenue, reduced production and capacity utilization, reduced shipments and increased inventories, reduced employment, and an overall decline in financial performance. We have assessed the allegations and supporting evidence regarding material injury, threat of material injury, and causation, and we have determined that these allegations are properly supported by adequate evidence and meet the statutory requirements for initiation.[12]

Critical Circumstances

Petitioners have alleged that critical circumstances exist with regard to imports of OCTG from the PRC, and have supported their allegations with the following information.

Section 733(e)(1) of the Act states that, if a Petitioner alleges critical circumstances, the Department will find that such circumstances exist, at any time after the date of initiation, when there is a reasonable basis to believe or suspect that, under subparagraph (A)(i), there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise, or (ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there was likely to be material injury by reason of such sales, and, under subparagraph (B), there have been massive imports of the subject merchandise over a relatively short period. Section 351.206(h) of the Department's regulations defines ''massive imports'' as imports that have increased by at least 15 percent over the imports during an immediately preceding period of comparable duration. Section 351.206(i) of the regulations states that ''relatively short period'' will normally be defined as the period beginning on the date the proceeding begins and ending at least three months later.

Petitioners allege that there is a history of dumping and material injury by reason of dumped imports as there is currently an order in place in Canada against imports of seamless OCTG from China. Petitioners cite to Canada's Semi-Annual report to the World Trade Organization's Committee on Anti-dumping Practices, which demonstrates that as of March 10, 2008, Canada imposed definitive duties on the PRC against imports of seamless carbon or alloy steel oil and gas well casings. Further, Petitioners allege that importers knew, or should have known, that OCTG was being sold at less than its fair value. Specifically, Petitioners allege margins, as adjusted by the Department, of between 36.94 and 99.14 percent, a level high enough to impute importer knowledge that merchandise was being sold at less than its fair value.

Petitioners also have alleged that imports from the PRC have been massive over a relatively short period. Alleging that there was sufficient pre-filing notice of these countervailing duty Petitions, Petitioners contend that the Department should compare imports during January through June 2008 to imports during July through December 2008 for purposes of this determination. Specifically, Petitioners supported this allegation with copies of news articles discussing the likelihood of filing unfair trade complaints against producers of OCTG. For example, Petitioners cite to an international news article in July 2008 discussing the likelihood that U.S. steel producers would file unfair trade

[5] For a discussion of the domestic like product analysis in this case, *see* Antidumping Duty Investigation Initiation Checklist: OCTG from the PRC (''Initiation Checklist'') at Attachment II (''Industry Support''), dated concurrently with this notice and on file in the Central Records Unit (''CRU''), Room 1117 of the main Department of Commerce building.

[6] *See* Volume I of the Petition at, pages 3–4 and Exhibit I–3a.

[7] *See* Volume I of the Petition, at page 3 and Exhibits I–3b and I–3c, and Supplement to the Petition, at pages 10–11 and Exhibit Supp. I–6. For further discussion, *see* Initiation Checklist at Attachment II.

[8] *See* section 732(c)(4)(D) of the Act.

[9] *See* Initiation Checklist at Attachment II.

[10] *See Id.*

[11] *See Id.*

[12] *See* Initiation Checklist at Attachment III (Analysis of Allegations and Evidence of Material Injury and Causation for the Petition).

cases related to seamless pipe, and explaining that OCTG makes up approximately half of total exports of Chinese seamless pipe. In addition, Petitioners cite to a number of other news articles, ITC decisions on other pipe and tube products and recent cases on the same or similar product in other countries. Petitioners argue that the most definitive example of prior knowledge was contained within the July 2008 article and used this as the basis for their comparison periods. Their comparison of the six month period prior to that article (January–June 2008) with the six month period immediately following (July–December 2008) showed that the U.S. imports of OCTG from China increased 165 percent.

Although the ITC has not yet made a preliminary decision with respect to injury, Petitioners note that in the past the Department has also considered the extent of the increase in the volume of imports of the subject merchandise as one indicator of whether a reasonable basis exists to impute knowledge that material injury was likely. In this case involving the PRC, Petitioners note that the increase in imports far exceeds the amount considered ''massive.''

Taking into consideration the foregoing, we find that Petitioners have alleged the elements of critical circumstances and supported them with information reasonably available for purposes of initiating a critical circumstances inquiry. For these reasons, we will investigate this matter further and will make a preliminary determination at the appropriate time, in accordance with section 735(e)(1) of the Act and Department practice.[13]

Period of Investigation

In accordance with 19 CFR 351.204(b), because this Petition was filed on April 8, 2009, the anticipated period of investigation (''POI'') is October 1, 2008, through March 31, 2009, the two most recently completed fiscal quarters, as of the month preceding the month in which the petition was filed.

Allegations of Sales at Less Than Fair Value

The following is a description of the allegations of sales at less than fair value upon which the Department has based its decision to initiate an investigation with respect to the PRC. The sources of data for the deductions and adjustments relating to U.S. price and NV are discussed in the Initiation Checklist. Should the need arise to use any of this information as facts available under section 776 of the Act, we may reexamine the information and revise the margin calculations, if appropriate.

Export Price

Petitioners calculated export prices (''EPs'') for both welded and seamless OCTG based on an offer for sale (for four welded OCTG products) and two invoices and corresponding purchase orders, and an offer for sale (for seamless OCTG). Petitioner presented affidavits for the offers for sale attesting that the offers were made during the POI.[14]

To calculate the net U.S. EP, Petitioners deducted from the U.S. prices a trader markup, the costs associated with exporting and delivering the product, which included foreign inland freight, ocean freight, insurance expenses, foreign port charges (stevedoring, wharfage and handling charges), foreign brokerage and handling, and U.S. port expenses (security fee, unloading fee, and wharfage).

We have not made separate adjustments to U.S. price for foreign port charges (stevedoring, wharfage and handling charges) or the U.S. port expenses of unloading fee and wharfage because evidence on the record indicates these expenses are already included in ocean freight or insurance expenses. Petitioners calculate per-unit ocean freight and insurance using U.S. Census Bureau data, by deducting the reported customs value of OCTG landed in a certain U.S. port from the reported CIF value and dividing it by the total import quantity.[15] The U.S. Census defines CIF data as the sum of import charges and customs value.[16] Accordingly, when customs value is deducted from the CIF value, what is left is import charges. The U.S. Census Bureau defines import charges as ''the aggregate cost of all freight, insurance, and other charges (excluding U.S. import duties) incurred in bringing the merchandise from alongside the carrier at the port of exportation in the country of exportation and placing it alongside the carrier at the first port of entry in the United States.''[17] Thus it is clear that import charges, the basis for ocean freight and insurance, include the expenses associated with loading the merchandise from the wharf to the carrier, and those expenses associated with unloading the merchandise from the vessel to wharf, *i.e.,* stevedoring, wharfage and handling.

Normal Value

Petitioners state that in every previous less-than-fair value investigation involving merchandise from the PRC, the Department has concluded that the PRC is a non-market economy country (''NME'') and, as the Department has not revoked this determination, its NME status remains in effect today.[18] The Department has previously examined the PRC's market status and determined that NME status should continue for the PRC.[19] In addition, in recent investigations, the Department has continued to determine that the PRC is an NME country.[20]

In accordance with section 771(18)(C)(i) of the Act, the presumption of NME status remains in effect until revoked by the Department. The presumption of NME status for the PRC has not been revoked by the Department and, therefore, remains in effect for purposes of the initiation of this investigation. Accordingly, the NV of the product is appropriately based on factors of production valued in a surrogate market economy country, in accordance with section 773(c) of the Act. In the course of this investigation, all parties will have the opportunity to provide relevant information related to the issues of the PRC's NME status and the granting of separate rates to individual exporters.

Petitioners argue that India is the appropriate surrogate country for the PRC because it is at a comparable level of economic development and it is a significant producer of tubular steel products.[21] Petitioners state that the Department has determined in previous investigations and administrative reviews that India is at a level of development comparable to the PRC.[22]

[13] *See* Policy Bulletin 98/4 (63 FR 55364, October 15, 1998).

[14] *See* Initiation Checklist for further discussion.

[15] *See* Volume II–A of the Petition at pages 11–12 and Exhibit II–7; Supplement to the PRC AD Petition, dated April 22, 2009, at pages 4–7.

[16] *See http://www.census.gov/foreigntrade/www/sec2.html#valcusimports.*

[17] *Id.*

[18] *See* Volume II–A of the Petition, at page 2.

[19] *See* Memorandum from the Office of Policy to David M. Spooner, Assistant Secretary for Import Administration, regarding The People's Republic of China Status as a Non-Market Economy, dated May 15, 2006. This document is available online at *http://ia.ita.doc.gov/download/prc-nme-status/prc-nme-status-memo.pdf.*

[20] *See Certain Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China: Final Determination of Sales at Less Than Fair Value,* 74 FR 14514 (March 31, 2009); *Frontseating Service Valves from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances,* 74 FR 10886 (March 13, 2009); *1-Hydroxyethylidene-1, 1-Diphosphonic Acid From the People's Republic of China: Final Determination of Sales at Less Than Fair Value,* 74 FR 10545 (March 11, 2009).

[21] *See* Volume II–A of the Petition, at page 4.

[22] *See id.*

Petitioners also assert that in 2006 India produced 1,027,000 metric tons of tubular steel products, indicating it is a significant producer of tubular steel products.[23]

Based on the information provided by Petitioners, the Department believes that the use of India as a surrogate country is appropriate for purposes of initiation. However, after initiation of the investigation, interested parties will have the opportunity to submit comments regarding surrogate country selection and, pursuant to 19 CFR 351.301(c)(3)(i), will be provided an opportunity to submit publicly available information to value factors of production within 40 days after the date of publication of the preliminary determination.

Petitioners provided dumping margin calculations using the Department's NME methodology as required by 19 CFR 351.202(b)(7)(i)(C) and 19 CFR 351.408. Petitioners calculated four NVs for welded OCTG and three NVs for seamless OCTG.

Petitioners valued the factors of production using reasonably available, public surrogate country data, including India import data from the Monthly Statistics of the Foreign Trade of India from the period May 2008 through October 2008, the most current WTA data available.[24]

Petitioners state that they valued hot-rolled steel coil and steel scrap using Indian import data from the Monthly Statistics of the Foreign Trade of India, under Indian HTS numbers 7208.36, 7208.37, and 7208.38 for hot-rolled steel coil and Indian HTS number 7204.49.00 for steel scrap.[25]

Petitioners valued electricity using Indian electricity rates disseminated by the Central Electricity Authority in India.[26]

Petitioners valued labor using the wage rate data published on the Department's Web site, at *http://ia.ita.doc.gov/wages/04wages/04wages-010907.html.*[27]

Petitioners included a value for ''production equipment tires'' in its NV calculation for seamless OCTG. Consistent with Department practice we did not include a value for ''production equipment tires'' in the calculation of NV. The Department has, in previous proceedings, found that materials consumed for the purpose of manufacturing subject merchandise, are properly considered factors of production. However, in the instant investigation, there is no evidence on the record indicating what ''production equipment tires'' are, or how they are consumed in the production of OCTG. Therefore, for purposes of initiation, we are not including production equipment tires in the calculation of normal value.[28]

Where Petitioners were unable to find input prices contemporaneous with the POI, Petitioners adjusted for inflation using the wholesale price index for India, as published in ''International Financial Statistics'' by the International Monetary Fund.[29] Petitioners used exchange rates, as provided on the Department's Web site, to convert Indian Rupees to U.S. Dollars.[30]

Petitioners based factory overhead, selling, general and administrative expenses (''SG&A''), and profit, on the financial ratios of Maharashtra Seamless Ltd. (''MSL''), Ratnamani Metals & Tubes Ltd. (''Ratnamani''), Steel Authority of India, Ltd. (''SAIL''), Tata Steel Limited (''Tata''), and Welspun Gujarat Stahl Rohen Ltd. (''Welspun''), Indian producers of pipe and tube, with adjustments as requested by the Department.[31] However, MSL'S financial statements demonstrated that the company received subsidies that the Department had previously determined to be countervailable,[32] and Petitioners removed MSL from the pool of companies used as the source of surrogate financial ratio calculations.[33] Thus, Petitioners based their calculations on the annual reports as of March 31, 2008, of Ratnamani, SAIL, Tata and Welspun. Although these financial statements do not overlap the POI, they represent the most current information reasonably available to Petitioners at the time they filed the Petition.

Petitioners calculated separate financial ratios for seamless and welded OCTG. Petitioners based the ratios for seamless OCTG on the simple average of SAIL's and Tata's overhead, SG&A, and profit ratios, asserting that SAIL and Tata are large integrated steel producers like Baosteel Group Shanghai Steel Tube (''Baosteel'') and Baotou Iron & Steel (''Baotou''), and produce comparable merchandise.[34] Petitioners based ratios for welded OCTG on the simple average of Ratnamani's and Welspun's overhead, SG&A, and profit ratios, asserting that Ratnamani and Welspun produce a range of pipe products which match the production experience of Huludao City Steel Pipe Industrial Co. (''Huludao'').[35]

We made no changes to Petitioners' calculations for Tata. We made changes to Petitioners' calculations for Ratnamani, Welspun and SAIL as follows.[36]

Ratnamani

- We excluded the value of opening and closing stock of finished goods from our calculations.

Welspun

- We excluded the increase (or decrease) on excise on finished goods from our calculations.
- We reclassified coating and other job charges from materials to manufacturing overhead.
- We reclassified repairs—other from SG&A to manufacturing overhead.
- We excluded interest received gross from our calculations.
- We applied the value of depreciation as recorded on the income statement in our calculations (the value used by Petitioners did not reflect the value in the income statement).

SAIL

- We reclassified grants in aid received from the government of Kamataka and travel concession from

[23] *See id.*

[24] *See* Supplement to the PRC AD Petition, dated April 22, 2009, at page 1.

[25] *See* Volume II–A of the Petition, at page 20–21, and Exhibit 20. *See also* Supplement to the PRC AD Petition, dated April 22, 2009, at Exhibit II–7.

[26] *See* Volume II–A of the Petition, at page 21, and Exhibit 21. *See also* Supplement to the PRC AD Petition, dated April 22, 2009, at Exhibit II–41.

[27] *See* Volume II–A of the Petition, at page 21, and Exhibit II–22.

[28] *See, e.g., Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances,* 73 FR 33977 (June 16, 2008); *Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China,* 71 FR 29303 (May 22, 2006).

[29] *See* Volume II–A of the Petition, at pages 18–19, and Exhibit 8.

[30] *See* Supplement to the PRC AD Petition, dated April 22, 2009, at page 15 and Exhibits II–33 and II–34.

[31] *See* Volume II–A of the Petition, at pages 22–23 and Exhibit 23, and Volume II–B of the Petition, at pages 3, 13–15 and Exhibits 32–LL, –MM, –NN, –OO, –PP and –QQ(1) and –QQ(2); *see also* Supplement to the PRC AD Petition, dated April 22, 2009, at pages 16–19 and Exhibits Supp. II–50 and Supp. II–51.

[32] *See* letter to Petitioners, ''Re: Petitions for the Imposition of Antidumping and Countervailing Duties on Oil Country Tubular Goods Imported from the People's Republic of China,'' dated April 17, 2009.

[33] *See* Supplement to the PRC AD Petition, dated April 22, 2009, at page 16.

[34] *See* Volume II–B of the Petition, at page 3, Exhibits 32–LL, –MM, –NN, –OO, –PP and –QQ(1) and –QQ(2); *see also* Supplement to the PRC AD Petition, dated April 22, 2009, at Exhibit Supp. II–50.

[35] *See* Volume II–A of the Petition, at page 22, Exhibit 23; *see also* Supplement to the PRC AD Petition, dated April 22, 2009, at Exhibit Supp. II–51.

[36] *See* Attachment V to the Initiation Checklist for all calculations.

SG&A to labor, to correspond with their treatment in the financial statements.

- We reclassified handling expenses for raw materials and scrap from SG&A to raw materials.
- We reclassified conversion charges, water charges & cess on water pollution and provisions: stores, spares and sundries from SG&A to manufacturing overhead.
- We excluded handling expenses for finished goods from our calculations.
- We reclassified power and fuel expense from raw materials to energy.
- We excluded adjustments pertaining to earlier years and fringe benefits tax from our calculations.

Fair-Value Comparisons

Based on the data provided by Petitioners, there is reason to believe that imports of OCTG from the PRC are being, or are likely to be, sold in the United States at less than fair value. Based on comparisons of EP to NV as revised above, the estimated dumping margins for the PRC range from 36.94 percent to 99.14 percent.

Initiation of Antidumping Investigation

Based upon the examination of the Petition concerning OCTG from the PRC and other information reasonably available to the Department, the Department finds that this Petition meets the requirements of section 732 of the Act. Therefore, we are initiating an antidumping duty investigation to determine whether imports of OCTG from the PRC are being, or are likely to be, sold in the United States at less than fair value. In accordance with section 733(b)(1)(A) of the Act, unless postponed, we will make our preliminary determinations no later than 140 days after the date of this initiation.

Targeted-Dumping Allegations

On December 10, 2008, the Department issued an interim final rule for the purpose of withdrawing 19 CFR 351.414(f) and (g), the regulatory provisions governing the targeted-dumping analysis in antidumping duty investigations, and the corresponding regulation governing the deadline for targeted-dumping allegations, 19 CFR 351.301(d)(5).[37] The Department stated that ''{w}ithdrawal will allow the Department to exercise the discretion intended by the statute and, thereby, develop a practice that will allow interested parties to pursue all statutory avenues of relief in this area.'' [38]

In order to accomplish this objective, if any interested party wishes to make a targeted-dumping allegation in any of these investigations pursuant to section 777A(d)(1)(B) of the Act, such allegations are due no later than 45 days before the scheduled date of the preliminary determination.

Respondent Selection

For the PRC, the Department will request quantity and value information from all known exporters and producers identified, with complete contact information, in the Petition. The quantity and value data received from NME exporters/producers will be used as the basis to select the mandatory respondents.

The Department requires that the respondents submit a response to both the quantity and value questionnaire and the separate-rate application by the respective deadlines in order to receive consideration for separate-rate status.[39] Appendix II of this notice contains the quantity and value questionnaire that must be submitted by all NME exporters/producers no later than May 19, 2009. In addition, the Department will post the quantity and value questionnaire along with the filing instructions on the Import Administration Web site, at *http://ia.ita.doc.gov/ia-highlights-and-news.html.* The Department will send the quantity and value questionnaire to those PRC companies identified in the Petition, Volume I, at Exhibit I–6.

Separate Rates

In order to obtain separate-rate status in an NME investigation, exporters and producers must submit a separate-rate status application.[40] The specific requirements for submitting the separate-rate application in this investigation are outlined in detail in the application itself, available on the Department's Web site at *http://ia.ita.doc.gov/ia-highlights-and-news.html* on the date of publication of this initiation notice in the **Federal Register.** The separate-rate application will be due sixty (60) days from the date of publication of this initiation notice in the **Federal Register**.

Use of Combination Rates in an NME Investigation

The Department will calculate combination rates for certain respondents that are eligible for a separate rate in this investigation. The Separate Rates/Combination Rates Bulletin [41] states: {w}hile 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 applies 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 exported by the firm in question and produced by a firm that supplied the exporter during the period of investigation.[42]

Distribution of Copies of the Petition

In accordance with section 732(b)(3)(A) of the Act and 19 CFR 351.202(f), a copy of the public version of the Petition has been provided to the representatives of the Government of the PRC. Because of the particularly large number of producers/exporters identified in the Petition, the Department considers the service of the public version of the Petition to the foreign producers/exporters satisfied by the delivery of the public version to the Government of the PRC, consistent with 19 CFR 351.203(c)(2).

International Trade Commission (''ITC'') Notification

We have notified the ITC of our initiation, as required by section 732(d) of the Act.

[37] *See Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations,* 73 FR 74930 (December 10, 2008).

[38] *Id.* at 74931.

[39] *See Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Initiation of Antidumping Duty Investigation,* 73 FR 10221, 10225 (February 26, 2008); and *Initiation of Antidumping Duty Investigation: Certain Artist Canvas From the People's Republic of China,* 70 FR 21996, 21999 (April 28, 2005).

[40] *See Certain Circular Welded Carbon Quality Steel Line Pipe from the Republic of Korea and the People's Republic of China: Initiation of Antidumping Duty Investigations,* 73 FR 23188, 23193 (April 29, 2008) (''*Certain Circular Welded Carbon Quality Steel Line Pipe from the PRC*'').

[41] *See* Import Administration Policy Bulletin, Number: 05.1, ''Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries,'' dated April 5, 2005, available on the Department's Web site at *http://ia.ita.doc.gov/policy/bull05-1.pdf.*

[42] *See also Certain Circular Welded Carbon Quality Steel Line Pipe from the PRC,* 73 FR 23188, 23193.

Preliminary Determination by the International Trade Commission

The ITC will preliminarily determine, no later than May 26, 2009,[43] whether there is a reasonable indication that imports of OCTG from the PRC materially injure, or threaten material injury to, a U.S. industry. A negative ITC determination covering all classes or kinds of merchandise covered by the Petition would result in the investigation being terminated. Otherwise, this investigation will proceed according to statutory and regulatory time limits.

This notice is issued and published pursuant to section 777(i) of the Act.

Dated: April 28, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

Appendix I

Scope of the Investigation

The merchandise covered by the investigation consists of certain oil country tubular goods (''OCTG''), which are hollow steel products of circular cross-section, including oil well casing and tubing, of iron (other than cast iron) or steel (both carbon and alloy), whether seamless or welded, regardless of end finish (*e.g.*, whether or not plain end, threaded, or threaded and coupled) whether or not conforming to American Petroleum Institute (''API'') or non-API specifications, whether finished (including limited service OCTG products) or unfinished (including green tubes and limited service OCTG products), whether or not thread protectors are attached. The scope of the investigation also covers OCTG coupling stock. Excluded from the scope of the investigation are casing or tubing containing 10.5 percent or more by weight of chromium; drill pipe; unattached couplings; and unattached thread protectors.

The merchandise covered by the investigation is currently classified in the Harmonized Tariff Schedule of the United States (''HTSUS'') under item numbers: 7304.29.10.10, 7304.29.10.20, 7304.29.10.30, 7304.29.10.40, 7304.29.10.50, 7304.29.10.60, 7304.29.10.80, 7304.29.20.10, 7304.29.20.20, 7304.29.20.30, 7304.29.20.40, 7304.29.20.50, 7304.29.20.60, 7304.29.20.80, 7304.29.31.10, 7304.29.31.20, 7304.29.31.30, 7304.29.31.40, 7304.29.31.50, 7304.29.31.60, 7304.29.31.80, 7304.29.41.10, 7304.29.41.20, 7304.29.41.30, 7304.29.41.40, 7304.29.41.50, 7304.29.41.60, 7304.29.41.80, 7304.29.50.15, 7304.29.50.30, 7304.29.50.45, 7304.29.50.60, 7304.29.50.75, 7304.29.61.15, 7304.29.61.30, 7304.29.61.45, 7304.29.61.60, 7304.29.61.75, 7305.20.20.00, 7305.20.40.00, 7305.20.60.00, 7305.20.80.00, 7306.29.10.30, 7306.29.10.90, 7306.29.20.00, 7306.29.31.00, 7306.29.41.00, 7306.29.60.10, 7306.29.60.50, 7306.29.81.10, and 7306.29.81.50.

The OCTG coupling stock covered by the investigation may also enter under the following HTSUS item numbers: 7304.39.00.24, 7304.39.00.28, 7304.39.00.32, 7304.39.00.36, 7304.39.00.40, 7304.39.00.44, 7304.39.00.48, 7304.39.00.52, 7304.39.00.56, 7304.39.00.62, 7304.39.00.68, 7304.39.00.72, 7304.39.00.76, 7304.39.00.80, 7304.59.60.00, 7304.59.80.15, 7304.59.80.20, 7304.59.80.25, 7304.59.80.30, 7304.59.80.35, 7304.59.80.40, 7304.59.80.45, 7304.59.80.50, 7304.59.80.55, 7304.59.80.60, 7304.59.80.65, 7304.59.80.70, and 7304.59.80.80.

The HTSUS subheadings are provided for convenience and customs purposes only; the written description of the scope of the investigation is dispositive.

Appendix II

Where it is not practicable to examine all known exporters/producers of subject merchandise, section 777A(c)(2) of the Tariff Act of 1930, as amended, permits us to investigate 1) a sample of exporters, producers, or types of products that is statistically valid based on the information available at the time of selection, or 2) exporters and producers accounting for the largest volume of the subject merchandise that can reasonably be examined.

In the chart below, please provide the total quantity and total value of all your sales of merchandise covered by the scope of this investigation (*see* ''Scope of Investigation'' section of this notice), produced in the PRC, and exported/shipped to the United States during the period October 1, 2007, through March 31, 2007.

Market	Total quantity in metric tons	Terms of sale	Total value
United States 1. Export Price Sales 2. a. Exporter Name b. Address c. Contact d. Phone No e. Fax No. 3. Constructed Export Price Sales 4. Further Manufactured Total Sales			

Total Quantity

• Please report quantity on a metric ton basis. If any conversions were used, please provide the conversion formula and source.

Terms of Sales

• Please report all sales on the same terms (*e.g.,* free on board at port of export).

Total Value

• All sales values should be reported in U.S. dollars. Please indicate any exchange rates used and their respective dates and sources.

Export Price Sales

• Generally, a U.S. sale is classified as an export price sale when the first sale to an unaffiliated customer occurs before importation into the United States.

• Please include any sales exported by your company directly to the United States.

• Please include any sales exported by your company to a third-country market economy reseller where you had knowledge that the merchandise was destined to be resold to the United States.

• If you are a producer of subject merchandise, please include any sales manufactured by your company that were subsequently exported by an affiliated exporter to the United States.

• Please do not include any sales of subject merchandise manufactured in Hong Kong in your figures.

Constructed Export Price Sales

• Generally, a U.S. sale is classified as a constructed export price sale when the first sale to an unaffiliated customer occurs after importation. However, if the first sale to the unaffiliated customer is made by a person in the United States affiliated with the foreign exporter, constructed export price applies even if the sale occurs prior to importation.

• Please include any sales exported by your company directly to the United States;

• Please include any sales exported by your company to a third-country market economy reseller where you had knowledge that the merchandise was destined to be resold to the United States.

• If you are a producer of subject merchandise, please include any sales

[43] Where the deadline falls on a weekend/holiday, the appropriate date is the next business day

manufactured by your company that were subsequently exported by an affiliated exporter to the United States.

- Please do not include any sales of subject merchandise manufactured in Hong Kong in your figures.

Further Manufactured

- Sales of further manufactured or assembled (including re-packaged) merchandise is merchandise that undergoes further manufacture or assembly in the United States before being sold to the first unaffiliated customer.
- Further manufacture or assembly costs include amounts incurred for direct materials, labor and overhead, plus amounts for general and administrative expense, interest expense, and additional packing expense incurred in the country of further manufacture, as well as all costs involved in moving the product from the U.S. port of entry to the further manufacturer.

[FR Doc. E9–10346 Filed 5–4–09; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–944]

Certain Oil Country Tubular Goods from the People's Republic of China: Initiation of Countervailing Duty Investigation

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

EFFECTIVE DATE: May 5, 2009.

FOR FURTHER INFORMATION CONTACT: Yasmin Nair and Joseph Shuler, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–3813 and (202) 482–1293, respectively.

SUPPLEMENTARY INFORMATION:

The Petition

On April 8, 2009, the Department of Commerce (''Department'') received a petition filed in proper form by Maverick Tube Corporation; United States Steel Corporation; TMK IPSCO; V&M Star L.P.; Wheatland Tube Corporation; Evraz Rocky Mountain Steel; and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO-CLC (collectively, ''petitioners''), domestic producers of certain oil country tubular goods (''OCTG''). In response to the Department's requests, the petitioners provided timely information supplementing the petition on April 20, 22, and 24, 2009.

In accordance with section 702(b)(1) of the Tariff Act of 1930, as amended (''the Act''), the petitioners allege that manufacturers, producers, or exporters of OCTG in the People's Republic of China (''PRC'') receive countervailable subsidies within the meaning of section 701 of the Act, and that such imports are materially injuring, or threatening material injury to, an industry in the United States.

The Department finds that the petitioners filed the petition on behalf of the domestic industry because they are interested parties as defined in section 771(9)(C) and (D) of the Act, and the petitioners have demonstrated sufficient industry support with respect to the countervailing duty (''CVD'') investigation (*see* ''Determination of Industry Support for the Petition'' section below).

Period of Investigation

The period of investigation is January 1, 2008, through December 31, 2008.

Scope of Investigation

The products covered by this investigation are certain OCTG from the PRC. For a full description of the scope of the investigation, please see the ''Scope of the Investigation'' in Appendix I of this notice.

Comments on Scope of Investigation

During our review of the petition, we discussed the scope with the petitioners to ensure that it is an accurate reflection of the products for which the domestic industry is seeking relief. Moreover, as discussed in the preamble to the Department's regulations (*Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27323 (May 19, 1997)), we are setting aside a period for interested parties to raise issues regarding product coverage. The Department encourages all interested parties to submit such comments by May 18, 2009, twenty calendar days from the signature date of this notice. Comments should be addressed to Import Administration's APO/Dockets Unit, Room 1870, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230. The period of scope consultations is intended to provide the Department with ample opportunity to consider all comments and to consult with parties prior to the issuance of the preliminary determinations.

Consultations

Pursuant to section 702(b)(4)(A)(ii) of the Act, the Department invited representatives of the Government of the PRC for consultations with respect to the CVD petition. The Department held these consultations in Washington, DC, on April 21, 2009. *See* the Memorandum from Yasmin Nair and Joseph Shuler to the File, entitled, ''Consultations with Officials from the Government of the People's Republic of China on the Countervailing Duty Petition regarding Certain Oil Country Tubular Goods,'' (April 23, 2009), which is on file in the Central Records Unit (''CRU'') of the main Department of Commerce building, Room 1117.

Determination of Industry Support for the Petition

Section 702(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 702(c)(4)(A) of the Act provides that a petition meets this requirement if the domestic producers or workers who support the petition account for: (i) at least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 702(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, the Department shall: (i) poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A); or (ii) determine industry support using a statistically valid sampling method.

Section 771(4)(A) of the Act defines the ''industry'' as the producers as a whole of a domestic like product. Thus, to determine whether a petition has the requisite industry support, the statute directs the Department to look to producers and workers who produce the domestic like product. The U.S. International Trade Commission (''ITC''), which is responsible for determining whether ''the domestic industry'' has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both the Department and the ITC must apply the same statutory definition regarding the domestic like product (section 771(10) of the Act), they do so for different purposes and pursuant to a separate and distinct authority. In addition, the Department's determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law. *See*

USEC, Inc. v. United States, 132 F. Supp. 2d 1, 8 (CIT 2001), citing *Algoma Steel Corp. Ltd. v. United States*, 688 F. Supp. 639, 644 (CIT 1988), *aff'd* 865 F.2d 240 (Fed. Cir. 1989), *cert. denied* 492 U.S. 919 (1989).

Section 771(10) of the Act defines the domestic like product as ''a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title.'' Thus, the reference point from which the domestic like product analysis begins is ''the article subject to an investigation'' (*i.e.*, the class or kind of merchandise to be investigated, which normally will be the scope as defined in the petition).

With regard to the domestic like product, the petitioners do not offer a definition of domestic like product distinct from the scope of the investigation. Based on our analysis of the information submitted on the record, we have determined that OCTG constitute a single domestic like product and we have analyzed industry support in terms of that domestic like product. For a discussion of the domestic like product analysis in this case, *see* Countervailing Duty Investigation Initiation Checklist: Certain Oil Country Tubular Goods from the People's Republic of China (''Initiation Checklist'') at Attachment II (Analysis of Industry Support), on file in the CRU, Room 1117 of the main Department of Commerce building.

With regard to section 702(c)(4)(A), in determining whether the petitioners have standing, (*i.e.*, those domestic workers and producers supporting the petition account for: (1) at least 25 percent of the total production of the domestic like product; and (2) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition), we considered the industry support data contained in the petition with reference to the domestic like product as defined in the ''Scope of the Investigation'' at Appendix I. To establish industry support, the petitioners provided their production of the domestic like product for the year 2008, and compared this to an estimate of production of the domestic like product for the entire domestic industry. *See* Volume I of the petition, at pages 3–4 and Exhibit I–3a. To estimate 2008 production of the domestic like product Petitioners used an industry publication which reports data in shipments. The petitioners approximated domestic production of OCTG by inflating the volume of domestic shipments reported by the ratio of the difference between the petitioners' production and shipments in the applicable calendar year. *See* Volume I of the petition, at page 3 and Exhibits I–3b and I–3c, and Supplement to the petition, dated April 22, 2009, at pages 10–11 and Exhibit Supp. I–6. For further discussion, *see* Initiation Checklist at Attachment II.

The Department's review of the data provided in the petition, supplemental submissions, and other information readily available to the Department, indicates that the petitioners have established industry support. First, the petition establishes support from domestic producers (or workers) accounting for more than 50 percent of the total production of the domestic like product and, as such, the Department is not required to take further action in order to evaluate industry support (*e.g.*, polling). *See* section 702(c)(4)(D) of the Act and Initiation Checklist at Attachment II. Second, the domestic producers (or workers) have met the statutory criteria for industry support under section 702(c)(4)(A)(i) of the Act because the domestic producers (or workers) who support the petition account for at least 25 percent of the total production of the domestic like product. See Initiation Checklist at Attachment II. Finally, the domestic producers (or workers) have met the statutory criteria for industry support under section 702(c)(4)(A)(ii) of the Act because the domestic producers (or workers) who support the petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Accordingly, the Department determines that the petition was filed on behalf of the domestic industry within the meaning of section 702(b)(1) of the Act. *See* Initiation Checklist, at Attachment II.

The Department finds that the petitioners filed the petition on behalf of the domestic industry because they are interested parties as defined in section 771(9)(C) of the Act and have demonstrated sufficient industry support with respect to the CVD investigation that they are requesting the Department initiate. *See* Initiation Checklist, at Attachment II.

Injury Test

Because the PRC is a ''Subsidies Agreement Country'' within the meaning of section 701(b) of the Act, section 701(a)(2) of the Act applies to this investigation. Accordingly, the ITC must determine whether imports of the subject merchandise from the PRC materially injure, or threaten material injury to, a U.S. industry.

Allegations and Evidence of Material Injury and Causation

The petitioners allege that imports of OCTG from the PRC are benefitting from countervailable subsidies and that such imports are causing or threaten to cause, material injury to the domestic industries producing OCTG. In addition, the petitioners allege that subsidized imports exceed the negligibility threshold provided for under section 771(24)(A) of the Act.

The petitioners contend that the industry's injured condition is illustrated by reduced market share, increased import penetration, underselling and price depressing and suppressing effects, lost sales and revenue, reduced production and capacity utilization, reduced shipments and increased inventories, reduced employment, and an overall decline in financial performance. We have assessed the allegations and supporting evidence regarding material injury, threat of material injury, and causation, and we have determined that these allegations are properly supported by adequate evidence and meet the statutory requirements for initiation. *See* Initiation Checklist at Attachment III (Analysis of Allegations and Evidence of Material Injury and Causation for the Petition).

Initiation of Countervailing Duty Investigation

Section 702(b) of the Act requires the Department to initiate a CVD proceeding whenever an interested party files a petition on behalf of an industry that: (1) alleges the elements necessary for an imposition of a duty under section 701(a) of the Act; and (2) is accompanied by information reasonably available to the petitioner(s) supporting the allegations.

The Department has examined the CVD petition on OCTG from the PRC and finds that it complies with the requirements of section 702(b) of the Act. Therefore, in accordance with section 702(b) of the Act, we are initiating a CVD investigation to determine whether manufacturers, producers, or exporters of OCTG in the PRC receive countervailable subsidies. For a discussion of evidence supporting our initiation determination, *see* Initiation Checklist.

We are including in our investigation the following programs alleged in the petition to have provided countervailable subsidies to producers and exporters of the subject merchandise in the PRC:

A. Preferential Loans
1. Policy Loans
2. Export Loans
3. Treasury Bond Loans to Northeast
4. Preferential Loans for State-Owned Enterprises
5. Preferential Loans for Key Projects and Technologies
6. Loans and Interest Subsidies Provided Pursuant to the Northeast Revitalization Program

G. Equity Programs
1. Debt-to-equity Swap for Pangang
2. Equity Infusions
3. Exemptions for SOEs From Distributing Dividends to the State
4. Loan and Interest Forgiveness for SOEs

E. Tax Benefit Programs
1. Income Tax Credits for Domestically Owned Companies Purchasing Domestically Produced Equipment
2. Preferential Income Tax Policy for Enterprises in the Northeast Region
3. Forgiveness of Tax Arrears for Enterprises in the Old Industrial Bases of Northeast China

D. Tariff and Indirect Tax Programs
1. Stamp Exemption on Share Transfers Under Non-Tradable Share Reform
2. Value Added Tax (''VAT'') and Tariff Exemptions for Purchases of Fixed Assets Under the Foreign Trade Development Fund Program
3. Export Incentive Payments Characterized as ''VAT rebates''

D. Land Grants and Discounts
1. Provision of Land Use Rights for Less Than Adequate Remuneration to Huludao
2. Provision of Land to SOEs for Less Than Adequate Remuneration

C. Provision of Inputs for Less Than Adequate Remuneration
1. Provision of Hot-Rolled Steel for Less Than Adequate Remuneration
2. Provision of Steel Rounds for Less Than Adequate Remuneration
3. Provision of Electricity for Less Than Adequate Remuneration
4. Provision of Low-cost Coke through the Imposition of Export Restraints
5. Provision of Coking Coal for Less than Adequate Remuneration

F. Grant Programs
1. The State Key Technology Project Fund
2. Foreign Trade Development Fund (Northeast Revitalization Program)
3. Export Assistance Grants
4. Program to Rebate Antidumping Duties
5. Subsidies for Development of Famous Export Brands and China World Top Brands
6. Sub-central Government Programs to Promote Famous Export Brands and China World Top Brands
7. Grants to Loss-Making SOEs
8. Export Interest Subsidies

I. Other Regional Programs
1. Subsidies Provided in the Tianjin Binhai New Area and the Tianjin Economic and Technological Development Area
2. Five Points, One Line Program
3. High-Tech Industrial Development Zones

D. Subsidies for Foreign Invested Enterprises (''FIEs'')
1. ''Two Free, Three Half'' Program
2. Local Income Tax Exemption and Reduction Programs for ''Productive'' Foreign-Invested Enterprises
3. Preferential Tax Programs for Foreign-Invested Enterprises Recognized as High or New Technology Enterprises
4. Reduced Income Tax Rates for Export-Oriented FIEs

For further information explaining why the Department is investigating these programs, see Initiation Checklist.

We are not including in our investigation the following programs alleged to benefit producers and exporters of the subject merchandise in the PRC:

A. Equity Programs
1. Tradable Shares Reform Program

The petitioners allege that, in April 2005, the China Securities Regulatory Commission announced a plan that allowed certain companies to transform their non-tradable shares into tradable shares. The petitioners allege that Baoshan Iron & Steel Co., Ltd.'s (''Baosteel'') share values would have been vulnerable to decline during the transition from non-tradable to tradable stock. Citing to notes in the Baoshan Iron & Steel Co., Ltd. Third Quarter Report, the petitioners allege that Baosteel's parent company, state-owned Baosteel Group, made share purchases to prevent Baosteel's share prices from falling below a certain market price and that these purchases provided a countervailable subsidy to Baosteel. Because we found the program not countervailable in *OTR Tires from the PRC*,[1] we do not plan to investigate this program.

B. Tax Benefit Programs
1. Tax Reduction for Companies Engaging in Research and Development

The petitioners allege that according to China's World Trade Organization subsidies notification, domestic industrial enterprises whose research and development expenses increased by 10 percent from the previous year may offset 150 percent of the research expenditures from their income tax obligations. The petitioners have not sufficiently established that this tax reduction program is specific. Consequently, we do not plan to investigate this program.

C. Provision of Inputs for Less than Adequate Remuneration
1. Provision of Natural Gas for Less Than Adequate Remuneration

The petitioners allege that, in 2007, the Chinese Vice Premier indicated that the central government would increase electricity rates charged to steel enterprises that have outdated production capacities. The petitioners further assert that this increase likely resulted in OCTG producers receiving lower, preferential rates, because OCTG producers have the largest and most advanced production capabilities. The petitioners propose that OCTG producers, being among the largest and most advanced producers of high-technology steel, would have perhaps received similar benefits from the preferential provision of natural gas. The petitioners have failed to show how the provision of natural gas for less than adequate remuneration program is specific. Consequently, we do not plan to investigate this program.

2. Provision of Scrap for Less Than Adequate Remuneration

The petitioners allege that the PRC imposes export restrictions, such as export quotas, related export licensing and bidding requirements, minimum export prices and duties, on the raw materials used for producing OCTG. The petitioners contend that these restrictions have resulted in artificially suppressing raw material prices of scrap in the PRC. The petitioners have not provided sufficient pricing data for scrap. In addition, the source documents referenced by the petitioners do not provide any information that the export restraints on scrap have resulted in lower Chinese domestic scrap prices. Consequently, we do not plan to investigate this program.

Critical Circumstances

The petitioners have alleged that critical circumstances exist with regard to imports of OCTG from the PRC, and have supported their allegation with the following information.

Section 703(e)(1) of the Act states that if a petitioner alleges critical circumstances, the Department will find that such critical circumstances exist, at any time after the date of initiation,

[1] *See New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances*, 73 FR 40480 (July 15, 2008) and accompanying Issues and Decision Memorandum at pages 21 and 159-160 (''*OTR Tires from the PRC*'').

when there is a reasonable basis to believe or suspect that under paragraph (A), the alleged countervailable subsidies are inconsistent with the Subsidies Agreement, and that, under paragraph (B), there have been massive imports of the subject merchandise over a relatively short period of time. Section 351.206(h) of the Department's regulations defines ''massive imports'' as imports that have increased by at least 15 percent over the imports during an immediately preceding period of comparable duration. Section 351.206(i) of the Department's regulations states that a ''relatively short period'' will normally be defined as the period beginning on the date the proceeding begins and ending at least three months later.

As discussed above, the petitioners have provided documentation supporting allegations of countervailable subsidies which are inconsistent with the Subsidies Agreement.

The petitioners also have alleged that imports from the PRC have been massive over a relatively short period. Arguing that there was sufficient pre-filing notice of this CVD petition, the petitioners contend that the Department should compare imports of OCTG from the PRC from January through June 2008 to imports during July through December 2008 for purposes of this determination. The petitioners supported this allegation with copies of news articles discussing the likelihood of filing unfair trade complaints against producers of OCTG. In particular, the petitioners cite to an international news article from July 2008 discussing the likelihood that U.S. steel producers would file unfair trade cases related to seamless pipe, and explaining that OCTG makes up approximately half of total exports of Chinese seamless pipe. Their comparison of the six month period prior to that article (January–June 2008) with the six month period immediately following (July–December 2008) shows that U.S. imports of OCTG from the PRC increased 165 percent. In addition, the petitioners cite to a number of other news articles, ITC decisions on other pipe and tube products, and recent cases on the same or similar products in other countries.

Although the ITC has not yet made a preliminary decision with respect to injury, the petitioners note that in the past the Department has also considered the extent of the increase in the volume of imports of the subject merchandise as one indicator of whether a reasonable basis exists to impute knowledge that material injury was likely. In this case involving the PRC, the petitioners note that the increase in imports far exceeds the amount considered ''massive.''

We find that the petitioners have alleged the elements of critical circumstances and supported them with information reasonably available for purposes of initiating a critical circumstances inquiry. We will investigate this matter further and will make a preliminary determination at the appropriate time, in accordance with section 735(e)(1) of the Act and Department practice (see Policy Bulletin 98/4 (63 FR 55364, October 15, 1998)). The petitioners have also requested an expedited review, which the Department will consider.

Respondent Selection

For this investigation, the Department expects to select respondents based on U.S. Customs and Border Protection (''CBP'') data for U.S. imports during the period of investigation. We intend to make our decision regarding respondent selection within 20 days of publication of this **Federal Register** notice. The Department invites comments regarding the CBP data and respondent selection within seven calendar days of publication of this **Federal Register** notice.

Distribution of Copies of the Petition

In accordance with section 702(b)(4)(A)(i) of the Act, a copy of the public version of the petition has been provided to the Government of the PRC. As soon as and to the extent practicable, we will attempt to provide a copy of the public version of the petition to each exporter named in the petition, consistent with section 351.203(c)(2) of the Department's regulations.

ITC Notification

We have notified the ITC of our initiation, as required by section 702(d) of the Act.

Preliminary Determination by the ITC

The ITC will preliminarily determine, within 25 days after the date on which it receives notice of the initiation, whether there is a reasonable indication that imports of subsidized OCTG from the PRC are causing material injury, or threatening to cause material injury, to a U.S. industry. *See* section 703(a)(2) of the Act. A negative ITC determination will result in the investigation being terminated; otherwise, the investigation will proceed according to statutory and regulatory time limits.

This notice is issued and published pursuant to section 777(i) of the Act.

Dated: April 28, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

Appendix I

Scope of the Investigation

The merchandise covered by this investigation consists of certain oil country tubular goods (OCTG), which are hollow steel products of circular cross-section, including oil well casing and tubing, of iron (other than cast iron) or steel (both carbon and alloy), whether seamless or welded, regardless of end finish (*e.g.*, whether or not plain end, threaded, or threaded and coupled) whether or not conforming to American Petroleum Institute (API) or non-API specifications, whether finished (including limited service OCTG products) or unfinished (including green tubes and limited service OCTG products), whether or not thread protectors are attached. The scope of the investigation also covers OCTG coupling stock. Excluded from the scope of the investigation are casing or tubing containing 10.5 percent or more by weight of chromium; drill pipe; unattached couplings; and unattached thread protectors.

The merchandise covered by the investigation is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under item numbers:

7304.29.10.10, 7304.29.10.20, 7304.29.10.30, 7304.29.10.40, 7304.29.10.50, 7304.29.10.60, 7304.29.10.80, 7304.29.20.10, 7304.29.20.20, 7304.29.20.30, 7304.29.20.40, 7304.29.20.50, 7304.29.20.60, 7304.29.20.80, 7304.29.31.10, 7304.29.31.20, 7304.29.31.30, 7304.29.31.40, 7304.29.31.50, 7304.29.31.60, 7304.29.31.80, 7304.29.41.10, 7304.29.41.20, 7304.29.41.30, 7304.29.41.40, 7304.29.41.50, 7304.29.41.60, 7304.29.41.80, 7304.29.50.15, 7304.29.50.30, 7304.29.50.45, 7304.29.50.60, 7304.29.50.75, 7304.29.61.15, 7304.29.61.30, 7304.29.61.45, 7304.29.61.60, 7304.29.61.75, 7305.20.20.00, 7305.20.40.00, 7305.20.60.00, 7305.20.80.00, 7306.29.10.30, 7306.29.10.90, 7306.29.20.00, 7306.29.31.00, 7306.29.41.00, 7306.29.60.10, 7306.29.60.50, 7306.29.81.10, and 7306.29.81.50.

The OCTG coupling stock covered by the investigation may also enter under the following HTSUS item numbers:

7304.39.00.24, 7304.39.00.28, 7304.39.00.32, 7304.39.00.36,

7304.39.00.40, 7304.39.00.44, 7304.39.00.48, 7304.39.00.52, 7304.39.00.56, 7304.39.00.62, 7304.39.00.68, 7304.39.00.72, 7304.39.00.76, 7304.39.00.80, 7304.59.60.00, 7304.59.80.15, 7304.59.80.20, 7304.59.80.25, 7304.59.80.30, 7304.59.80.35, 7304.59.80.40, 7304.59.80.45, 7304.59.80.50, 7304.59.80.55, 7304.59.80.60, 7304.59.80.65, 7304.59.80.70, and 7304.59.80.80. The HTSUS subheadings are provided for convenience and customs purposes only, the written description of the scope of the investigation is dispositive.

[FR Doc. E9–10345 Filed 5–4–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 0612242720–9794–03]

RIN 0648–ZB55

Availability of Pacific Coastal Salmon Recovery Funds for Fiscal Year 2009; Amendment

AGENCY: Fisheries Northwest Region Program Office (NWRO), National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of funding availability; amended solicitation.

SUMMARY: NOAA publishes this notice to amend the Federal Funding Opportunity (NMFS-NWRO–2009–2001656) entitled ''Pacific Coastal Salmon Recovery Fund 2009'' which was originally announced in the **Federal Register** on Friday, January 2, 2009. This notice announces changes to the eligibility criteria, program priorities, funding amount, and application deadline for proposals to implement the requirements of the Omnibus Appropriations Act, 2009.

DATES: Final applications should be submitted via *www.grants.gov* and must be received no later than 11:59 p.m. PST on May 20, 2009. No facsimile or electronic mail applications will be accepted. Paper applications must be postmarked by May 20, 2009. Any application transmitted or postmarked, as the case may be, after the deadline will be considered non-responsive and will not be considered for funding in this competition.

Applications submitted through *www.grants.gov* will have a date and time indication on them. Hard copy applications will be date and time stamped when they are received. PLEASE NOTE: It may take *www.grants.gov* up to two (2) business days to validate or reject the application. Please keep this in mind in developing your submission timeline.

ADDRESSES: All application materials can be found at the Grants.gov portal at *http://www.grants.gov*. If an applicant does not have internet access, applications can be received from the following address: Nicolle Hill, NMFS Northwest Region Building #1, 7600 Sand Point Way, Seattle, WA 98115. NMFS' internet website at *http://www.nwr.noaa.gov* contains additional information on the Pacific Coastal Salmon Recovery Fund (PCSRF).

FOR FURTHER INFORMATION CONTACT: For further information on PCSRF, please contact Barry Thom, NMFS Northwest Region Acting Regional Administrator, at (503) 231–6266. Questions regarding this announcement should be directed to Nicolle Hill, NMFS Northwest Region, PCSRF Federal Program Officer, at (206) 526–4358 or *Nicolle.Hill@noaa.gov*

SUPPLEMENTARY INFORMATION: The National Oceanic and Atmospheric Administration (NOAA), National Marine Fisheries Service (NMFS), announces that it is amending the solicitation for PCSRF published on January 2, 2009 (74 FR 72), to indicate that the program supports the restoration of Pacific salmon populations, as authorized in 16 U.S.C. 3645 (d)(2) and the Omnibus Appropriations Act, 2009 (the Act), Public Law No. 111–8 (March 11, 2009). In light of the new program objectives and increased appropriations implemented though the Act, the program announces that the total amount available for awards is up to $80,000,000 through fiscal year (FY) 2009. In addition, pursuant to the Act, the State of Nevada is added as an eligible entity for projects under the program. Due to the amendments to the program, the deadline for applications has been extended until May 20, 2009.

Under this amended solicitation, NMFS allows for modifications to applications originally received under the initial announcement, and allows new applications for projects from individual eligible Indian Tribes, eligible states, and representative Tribal commissions. Any proposal that was submitted to the initial solicitation within the initial deadline is not required to be resubmitted to be considered under this amendment. However, this amendment may impact the content of proposals submitted by applicants in response to the initial announcement. Any revisions to such proposals must be submitted by the new deadline in order for the revised changes to be considered under this amended solicitation. An applicant may only submit one application to the Federal government for program funding. Application submissions, requesting any funding from both the representative Commission and a Tribe represented by that Commission will not be accepted.

The following sections of the Federal Funding Opportunity have been amended to reflect the changes announced in this notice: ''Dates,'' ''Funding Opportunity Description,'' ''Award Information,'' ''Eligibility Information,'' ''Application Review Information,'' and ''Application and Submission Information.'' All other requirements and information remain unchanged.

Electronic Access

The full text of the full funding opportunity announcement for this program can be accessed via the Grants.gov web site at *http://www.grants.gov*. The announcement will also be available by contacting the program officials identified under **FOR FUTHER INFORMATION CONTACT**. Applicants must comply with all requirements contained in the full funding opportunity announcement.

Statutory Authority

This program is administered under the authority of 16 U.S.C. 3645 (d)(2) and Public Law No. 111–8 (March 11, 2009).

Funding Availability

Up to $80,000,000 is available for FY 2009 projects. There are no restrictions on minimum funding request, but there is a limit of $30,000,000, on a maximum amount requested by any recipient. Award periods may be up to a maximum of 5 years.

Eligibility

Eligible state applicants are the States of Alaska, Washington, Oregon, Idaho, Nevada and California. Eligible tribal applicants are any federally recognized Pacific Coastal or Columbia River tribes.

Limitation of Liability

Funding for this program is limited to that provided within the FY 2009 appropriation. In no event will NOAA or the Department of Commerce be responsible for proposal preparation costs if this program fails to receive funding or is cancelled because of other agency priorities. Publication of this announcement does not oblige NOAA to

award any specific project or to obligate any available funds. Recipients and subrecipients are subject to all Federal laws and agency policies, regulations and procedures applicable to Federal financial assistance awards.

Universal Identifier

Applicants should be aware that, they are required to provide a Dun and Bradstreet Data Universal Numbering System (DUNS) number during the application process. See 67 FR 66177, October 30, 2002, for additional information. Organizations can receive a DUNS number at no cost by calling the dedicated toll-free DUNS number request line at 1–866–705–5711 or via the internet at *http://frwebgate.access.gpo.gov/cgi-bin/leaving.cgi?from=leavingFR.html&log=linklogamp;to=http://www.dunandbradstreet.com*.

National Environmental Policy Act (NEPA)

NEPA and the Council on Environmental Quality (CEQ) implementing regulations (40 CFR parts 1500 through 1508) require that an environmental analysis be completed for all major Federal actions significantly affecting the environment. NEPA applies to the actions of Federal agencies and may include a Federal agency's decision to fund non-Federal projects under grants and cooperative agreements. Detailed information on NOAA compliance with NEPA can be found at the following NOAA NEPA website: *http://nepa.noaa.gov/*, including our NOAA Administrative Order 216–6 for NEPA, *http://www.nepa.noaa.gov/NAO216__6__TOC.ped* and CEQ implementation regulations, *http://ceq.eh.doe.gov/nepa/regs/ceq/toc__ceq.htm*. Consequently, as part of all project application packages, applicants are required to provide detailed information on the activities to be conducted, locations, sites, species and habitat to be affected, possible construction activities, and any environmental concerns that may exist (e.g., the use and disposal of hazardous or toxic chemicals, introduction of non-indigenous species, impacts to endangered and threatened species, aquaculture projects, and impacts to coral reef systems). Program applications should, to the best extent, provide what they know about their projects at the time of submitting their grant applications. In addition to providing specific information that will serve as the basis for any required impact analyses, applicants may also be requested to assist NOAA in drafting of an environmental assessment, if NOAA determines an assessment is required. Applicants will also be required to cooperate with NOAA in identifying feasible measures to reduce or avoid any identified adverse environmental impacts of their proposal. The failure to do so shall be grounds for not selecting an application. In some cases if additional information is required after an application is selected, funds can be withheld by the Grants Officer under a special award condition requiring the recipient to submit additional environmental compliance information sufficient to enable NOAA to make an assessment on any impacts that a project may have on the environment.

The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements contained in the **Federal Register** notice of February 11, 2008 (73 FR 7686), are applicable to this solicitation.

Paperwork Reduction Act

This collection of information contains requirements subject to the Paperwork Reduction Act (PRA). The use of Standard Forms, 424, 424A, 424B and SF-LLL and CD–346 has been approved by the Office of Management and Budget (OMB) under the respective control numbers 0348–0043, 0348–0044, 0348–0040, 0348–0046 and 0605–0001. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA unless that collection of information displays a currently valid OMB control number.

Executive Order 12866

It has been determined that this notice is not significant for purposes of Executive Order 12866.

Executive Order 13132 (Federalism)

It has been determined that this notice does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

Administrative Procedure Act/ Regulatory Flexibility Act

Prior notice and comment are not required under 5 U.S.C. 553, or any other law, for rules relating to public property, loans, grants, benefits or contracts (5 U.S.C. 553(a)). Because prior notice and an opportunity for public comment are not required pursuant to 5 U.S.C. 553 or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis is not required and has not been prepared.

Dated: April 29, 2009.

Barry Thom,

Acting Regional Administrator, NMFS Northwest Region.

[FR Doc. E9–10341 Filed 5–4–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Malcolm Baldrige National Quality Award Board of Overseers

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice of Public Meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, 5 U.S.C. app. 2, notice is hereby given that there will be a meeting of the Board of Overseers of the Malcolm Baldrige National Quality Award on June 17, 2009. The Board of Overseers is composed of eleven members prominent in the fields of quality, innovation, and performance excellence and appointed by the Secretary of Commerce, assembled to advise the Secretary of Commerce on the conduct of the Baldrige Award. The purpose of this meeting is to discuss and review information received from the National Institute of Standards and Technology with the members of the Judges Panel of the Malcolm Baldrige National Quality Award. The agenda will include: Baldrige Program Strategic Plan, Initiation of Two Contracts, and Baldrige Collaborative and ''Trifecta'' (Baldrige Program, Baldrige Foundation, and the Alliance for Performance Excellence) Activities.

DATES: The meeting will convene June 17, 2009, at 8:30 a.m. and adjourn at 3 p.m. on June 17, 2009.

ADDRESSES: The meeting will be held at the National Institute of Standards and Technology, Administration Building, Lecture Room B, Gaithersburg, Maryland 20899. All visitors to the National Institute of Standards and Technology site will have to pre-register to be admitted. Please submit your name, time of arrival, e-mail address and phone number to Diane Harrison no later than Tuesday, June 16, 2009, and she will provide you with instructions for admittance. Ms. Harrison's e-mail address is *diane.harrison@nist.gov* and her phone number is (301) 975–2361.

FOR FURTHER INFORMATION CONTACT: Dr. Harry Hertz, Director, National Quality Program, National Institute of Standards

and Technology, Gaithersburg, Maryland 20899, telephone number (301) 975–2361.

Dated: April 29, 2009.

Patrick Gallagher,

Deputy Director.

[FR Doc. E9–10342 Filed 5–4–09; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Intent To Prepare a Draft Environmental Impact Statement for a Proposed Flood Risk Management Project on the Red River of the North in Fargo, ND & Moorhead, MN

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice of intent.

SUMMARY: The St. Paul District Corps of Engineers, in partnership with the City of Fargo, North Dakota and City of Moorhead, Minnesota is conducting a flood risk management feasibility study for the Fargo-Moorhead metropolitan area. The feasibility study will focus on reducing flood risk in the entire Fargo-Moorhead Metropolitan area and surrounding areas. The study will evaluate several alternative measures, including but not limited to; levees and floodwalls, diversion channels, non-structural flood-proofing, relocation of flood-prone structures, and flood storage.

FOR FURTHER INFORMATION CONTACT: Questions about the proposed action and Draft Environmental Impact Statement (DEIS) can be directed to: Mr. Terry J. Birkenstock, Chief, Environmental and Economic Analysis Branch, 190 Fifth Street East, St. Paul, MN 55101–1638, *telephone:* (651) 290–5264.

SUPPLEMENTARY INFORMATION: Fargo, North Dakota, and Moorhead, Minnesota, are on the west and east banks, respectively, of the Red River of the North approximately 150 miles south of the Canada/United States border. In addition to the Red River, the Wild Rice, Sheyenne, Maple and Rush Rivers in North Dakota and the Buffalo River in Minnesota also cross the study area.

The purpose of this study is to collect and evaluate pertinent engineering, economic, social, and environmental information in order to assess the potential for a federal flood risk management project in the Fargo-Moorhead Metropolitan Area. The study objective is to define a feasible and implementable project to reduce flood risk in the study area. The Fargo-Moorhead metropolitan area has a relatively high risk of flooding. The highest river stages usually occur as a result of spring snowmelt, but summer rainfall events have also caused significant flood damages. The Red River of the North has exceeded the National Weather Service flood stage of 17 feet in 51 of the past 107 years, and every year from 1993 through 2009. The study area is between the Wild Rice River, the Sheyenne River, and the Red River of the North; interbasin flows complicate the hydrology of the region and contribute to extensive flooding. Average annual flood damages in the Fargo-Moorhead metropolitan area are currently estimated at over $43 million.

Fargo and Moorhead have become accustomed to dealing with flooding. Sufficient time is usually available to prepare for flood fighting because winter snowfall can be monitored to predict unusual spring runoff. Both communities have well documented standard operating procedures for flood fights. Both communities avoided major flood damages in the historic flood of 1997 by either raising existing levees or building temporary barriers. Since the 1997 flood, both communities have implemented mitigation measures, including acquisition of almost 100 floodplain homes, raising and stabilizing existing levees, installing permanent pump stations, and improving storm sewer lift stations and the sanitary sewer system. Although emergency measures have been very successful, they may also contribute to an unwarranted sense of security that does not reflect the true flood risk in the area.

The Fargo-Moorhead Metro Feasibility Study and its associated NEPA documentation will be prepared by the Corps and the cities of Fargo, North Dakota and Moorhead, Minnesota. The Corps will act as the lead agency and the cities will act as cooperating partners.

The study will evaluate several alternative measures, including but not limited to: levees and floodwalls along the river through the towns, diversion channels either west or east of the Fargo-Moorhead Metro area, non-structural flood-proofing, relocation of flood-prone structures, and flood storage.

Significant resources and issues to be addressed in the DEIS will be determined through coordination with Federal agencies, State agencies, local governments, the general public, interested private organizations, and industry. Anyone who has an interest in participating in the development of the DEIS is invited to contact the St. Paul District, Corps of Engineers.

To date, the following areas of discussion have been identified for inclusion in the DEIS:

1. Flood damage reduction.
2. Fish and wildlife.
3. Land-use Effects (effects on agricultural land).
4. Archeological, cultural, and historic resources.
5. Social Effects.
6. Groundwater (Buffalo Aquifer).

Additional areas of interest may be identified through the scoping process, which will include public and agency meetings. A notice of those meetings will be provided to interested parties and to local news media.

The first scoping meeting will be held May 19 at Centennial Hall in Fargo, North Dakota and May 20th at the Hanson Theater on the Minnesota State University, Moorhead campus in Moorhead, Minnesota. Both meetings will begin at 5:30 for open house followed by presentation and questions and answers at 7.

An environmental review will be conducted under the NEPA of 1969 and other applicable laws and regulations. It is anticipated that the DEIS will be available for public review in the winter of 2009–2010.

Dated: April 22, 2009.

Terry J. Birkenstock,

Chief, Environmental and Economic Analysis Branch.

[FR Doc. E9–10309 Filed 5–4–09; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Withdrawal of Notice of Intent To Prepare Environmental Impact Statement for St. Charles International Airport

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Withdrawal of Notice.

SUMMARY: The Department of the Army, Army Corps of Engineers today withdraws its Notice of Intent (67 FR 65342, October 24, 2002) to prepare a Draft Environmental Impact Statement (DEIS) for the St. Charles International Airport Project.

The Department has relied upon the National Environmental Policy Act (NEPA) CEQ guidelines, to complete the actions taken in connection with this project.

FOR FURTHER INFORMATION CONTACT: For further information on the St. Charles International Airport Project or for information on the Department of Defense's NEPA process, please contact: Mr. Gib Owen at U.S. Army Corps of Engineers, PM–RS, P.O. Box 60267, New Orleans, LA 70160–0267, phone (504) 862–1337, fax number (504) 862–2572 or by E-mail at *gib.a.owen@mvn02.usace.army.mil.*

SUPPLEMENTARY INFORMATION: The U.S. Army Corps of Engineers (USACE), New Orleans District (MVN), received an application from St. Charles International Airport, LLC, 3453 Meadow Lane, Houston, TX 77027 to build an international airport facility in St. Charles Parish, in the vicinity of the highway I–10/I–310 interchange near Kenner, LA. The MVN initiated this study under the authority of 33 CFR part 320. This study was to investigate the feasibility of constructing an international airport facility in St. Charles Parish as per the Clean Water Act Section 404 permit application submitted by St. Charles International Airport, LLC.

On October 24, 2002, the Department of the Army, Army Corps of Engineers published in the **Federal Register** a Notice of Intent to prepare a draft Environmental Impact Statement (EIS) for the St. Charles International Airport Project. A letter was sent to all parties believed to have an interest in the analysis requesting their input on alternatives and issues to be evaluated. The letter also notified interested parties of a public scoping meeting held on February 18, 2003. From 2003 to 2005 the USACE–MVN coordinated with The Federal Aviation Administration (FAA), The U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS). The FAA provided guidance and comments for areas within their expertise. The USFWS assisted in the documentation of existing conditions and the assessment of effects of project alternatives through the Fish and Wildlife Coordination Act consultation procedures. Consultation with the USFWS and the NMFS concerning threatened and endangered species and their critical habitat was ongoing through 2005. NMFS consultation on the effects of the proposed action on Essential Fish Habitat was initiated. After the devastation of Hurricane Katrina the applicant withdrew his Clean Water Act section 404 application. Therefore preparation of an EIS is no longer needed and the Department of the Army, Army Corps of Engineers proposes to withdraw the Notice of Intent to prepare an EIS.

Copies of documents related to the St. Charles International Airport project are on file at, and may be obtained from U.S. Army Corps of Engineers, PM–RS, P.O. Box 60267, New Orleans, LA 70160–0267.

Dated: March 17, 2009.

Alvin B. Lee,

Colonel, U.S. Army, District Commander.

[FR Doc. E9–10316 Filed 5–4–09; 8:45 am]

BILLING CODE 3710–58–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

ACTION: Correction Notice.

SUMMARY: On April 27, 2009, the Department of Education published a comment period notice in the **Federal Register** (Page 19072, Column 1) for the information collection, ''Historically Black Colleges and Universities Masters Degree Program''. Interested persons are invited to submit comments on or before May 26, 2009. The IC Clearance Official, Regulatory Information Management Services, Office of Management, hereby issues a correction notice as required by the Paperwork Reduction Act of 1995.

Dated: April 30, 2009.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

[FR Doc. E9–10327 Filed 5–4–09; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

National Board for Education Sciences

AGENCY: Department of Education, Institute of Education Sciences.

ACTION: Notice of An Open Meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of an upcoming open meeting of the National Board for Education Sciences. The notice also describes the functions of the Committee. Notice of this meeting is required by section 10(a)(2) of the Federal Advisory Committee Act and is intended to notify the public of their opportunity to attend.

DATES: May 20 and 21, 2009.

Time: May 20, 10 a.m. to 5:30 p.m.; May 21, 8:30 a.m. to 1 p.m.

ADDRESSES: 80 F Street, NW., Room 100, Washington, DC 20208.

FOR FURTHER INFORMATION CONTACT: Norma Garza, Executive Director, National Board for Education Sciences, 555 New Jersey Ave., NW., Room 627H, Washington, DC 20208; *phone:* (202) 219–2195; *fax:* (202) 219–1466; *e-mail: Norma.Garza@ed.gov.*

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FRS) at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: The National Board for Education Sciences is authorized by section 116 of the Education Sciences Reform Act of 2002. The Board advises the Director of the Institute of Education Sciences (IES) on the establishment of activities to be supported by the Institute, on the funding for applications for grants, contracts, and cooperative agreements for research after the completion of peer review, and reviews and evaluates the work of the Institute.

On May 20 the Board will receive a briefing from the Acting Director and IES Commissioners and staff on its activities and progress reports on projects underway since January 2009. These presentations will begin at 10:15 a.m. and continue until noon.

From 1:15 p.m. to 5:30 p.m. the Board will have a presentation on the Evaluation of the Impact of the DC Choice Program by Patrick Wolf, Principal Investigator, University of Arkansas. On May 21, the Board will review the prior day's activities and current agenda from 8:30 a.m. to 8:45 a.m., followed by a presentation and discussion from 8:45 a.m. to 10:15 a.m. on the What Works Clearinghouse Practice Guides. From 10:30 a.m. to 11:15 a.m., the Board will have a presentation by Jill Constantine of Mathematica Policy Research on An Evaluation of Teachers Trained through Different Routes to Certification. Following a 15 minute break, the Board will discuss its annual report as well as its plans and agenda for the future. The meeting will adjourn at 12:30 p.m.

A final agenda will be available from Norma Garza (see contact information above) on May 13. Individuals who will need accommodations for a disability in order to attend the meeting (*e.g.,* interpreting services, assistance listening devices, or materials in alternative format) should notify Norma Garza no later than May 8. We will attempt to meet requests for accommodations after this date but cannot guarantee their availability. The meeting site is accessible to individuals with disabilities.

Records are kept of all Committee proceedings and are available for public inspection at 555 New Jersey Ave., NW., Room 627 H, Washington, DC 20208,

from the hours of 9 a.m. to 5 p.m., Eastern Standard Time Monday through Friday.

Electronic Access to This Document: You may view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fed-register/index.html.*

To use PDF, you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: http://*www.gpoaccess.gov/nara/index.html.*

Sue Betka,

Acting Director, Institute of Education Sciences.

[FR Doc. E9–10294 Filed 5–4–09; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[CFDA No. 84.363A]

School Leadership Program

AGENCY: Office of Innovation and Improvement, Department of Education.

ACTION: Notice of intent to fund down the fiscal year (FY) 2008 grant slate for the School Leadership Program.

SUMMARY: The Secretary intends to use the grant slate developed in FY 2008 for the School Leadership Program authorized by Title II, part A, subpart 5 of the Elementary and Secondary Education Act of 1965, as amended, to make new grant awards in FY 2009. The Secretary takes this action because a significant number of high-quality applications remain on last year's grant slate. We expect to use an estimated $3 million for new awards in FY 2009. The actual level of funding depends on the amount of FY 2009 program funds that are available after the Department makes 22 expected continuation awards.

FOR FURTHER INFORMATION CONTACT: Beatriz Ceja, U.S. Department of Education, 400 Maryland Avenue, SW., 4W210, Washington, DC 20202–5960. *Telephone:* (202) 205–5009 or *via Internet: beatriz.ceja@ed.gov.*

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain this document in an accessible format (*e.g.*, braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION:

Background

The Department published a notice inviting applications for new School Leadership Program awards for FY 2008 in the **Federal Register** on March 3, 2008 (73 FR 11504).

In response to the March 3 notice inviting applications, we received a significant number of high-quality applications and made 22 new grant awards. However, many applications that were awarded high scores by peer reviewers did not receive funding in FY 2008 because of insufficient appropriations.

The Department's FY 2009 appropriation is sufficient to permit the Department to make continuation awards to each of these 22 grantees and make a small number of new School Leadership Program awards. Rather than using program funds for a new peer review process, the Department has decided to use the remaining funds (after continuation awards are made) to select grantees in FY 2009 from the existing slate of applications. This slate was developed during the FY 2008 competition using the selection criteria, application requirements, and definitions referenced in the March 3 notice inviting applications (73 FR 11504).

Note: To be eligible to receive a grant under this notice all applicants being considered for funding must meet all statutory eligibility criteria (i.e., be a high-need LEA, a consortium of high-need LEAs, or a partnership that includes one or more high-need LEAs), and be able to demonstrate a commitment to implement the scope and objectives of the project proposed in the application submitted in 2008. Only applications from the 2008 slate will be considered. Our intent is to fund down the slate from the last 2008 funded application until available funds are exhausted.

Program Authority: 20 U.S.C. 6651(b).

Electronic Access to This Document: You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF), on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF, you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: April 30, 2009.

James H. Shelton, III,

Assistant Deputy Secretary for Innovation and Improvement.

[FR Doc. E9–10353 Filed 5–4–09; 8:45 am]

BILLING CODE 4000–01–P

ELECTION ASSISTANCE COMMISSION

Notice of Sunshine Act Notice

AGENCY: U.S. Election Assistance Commission.

ACTION: Notice of Virtual Public Forum for EAC Board of Advisors.

DATE AND TIME: Monday, May 11, 2009, 9 a.m. EDT through Friday, May 15, 2009, 9 p.m. EDT.

PLACE: EAC Board of Advisors Virtual Meeting Room at *www.eac.gov.* Once at the main page of EAC's Web site, viewers should click the link to the Board of Advisors Virtual Meeting Room. The virtual meeting room will open on Monday, May 11, 2009, at 9 a.m. EDT and will close on Friday, May 15, 2009, at 9 P.M. EDT. The site will be available 24 hours per day during that 5-day period.

PURPOSE: The EAC Board of Advisors will review and provide comment on Phase I of the draft Election Operations Assessment. Phase I of the project is an information gathering and modeling phase designed to create the framework for the remaining two phases of the project. The scope of the document and the project that created it are geared toward the procedures and equipment that move the ballot through the electoral process. The end goal of the election operations assessment is to create a work product that will allow the EAC to evaluate security risks to various types of voting systems (*i.e.* hand counted paper ballots, Precinct Based Optical Scan, or Remote Electronic Systems, etc.) and in order to better inform their work with future iterations of the Voluntary Voting System Guidelines. In addition, the assessment will allow policy makers and election officials to assess the potential risks to systems that they are looking to purchase in the future.

The EAC Board of Advisors Virtual Meeting Room was established to enable the Board of Advisors to conduct business in an efficient manner in a public forum, including being able to review and discuss draft documents, when it is not feasible for an in-person board meeting. The Board of Advisors will not take any votes or propose any resolutions during the 5-day forum of May 11–15, 2009.

This activity is open to the public. The public may view the proceedings of this forum by visiting the EAC Board of Advisors Virtual Meeting Room at *www.eac.gov* at any time between Monday, May 11, 2009, 9 a.m. EDT and Friday, May 15, 2009, 9 p.m. EDT. The public also may view the election operations assessment, which will be posted on EAC's Web site beginning May 11, 2009. The public may file written statements to the eac board of advisors at *boardofadvisors@eac.gov.* Data on EAC's Web site is accessible to visitors with disabilities and meets the requirements of section 508 of The Rehabilitation Act.

This meeting will be open to the public.

PERSON TO CONTACT FOR INFORMATION: Bryan Whitener; Telephone: (202) 566–3100.

Thomas R. Wilkey,

Executive Director, U.S. Election Assistance Commission.

[FR Doc. E9–10465 Filed 5–1–09; 4:15 pm]

BILLING CODE 6820–KF–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12626–002]

Northern Illinois Hydropower, LLC; Notice of Application Tendered for Filing With the Commission, Soliciting Additional Study Requests, and Establishing Procedural Schedule for Licensing and Deadline for Submission of Final Amendments

April 28, 2009.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Original License.

b. *Project No.:* P–12626–002.

c. *Date Filed:* April 1, 2009.

d. *Applicant:* Northern Illinois Hydropower, LLC.

e. *Name of Project:* Dresden Island Project.

f. *Location:* U.S. Army Corps of Engineers Dresden Island Dam on the Illinois River, in the Town of Morris, Grundy County, Illinois. The project will affect approximately 7.1 acres of Federal lands.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Damon Zdunich, Northern Illinois Hydropower, LLC, 801 Oakland Avenue, Joliet, IL 60435, (312) 320–1610.

i. *FERC Contact:* Michael Spencer, (202) 502–6093.

j. *Cooperating Agencies:* Federal, State, local, and Tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests described in item l below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. *See,* 94 FERC ¶ 61,076 (2001).

k. Pursuant to Section 4.32(b)(7) of 18 CFR of the Commission's regulations, if any resource agency, Indian Tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete analysis of the application on its merit, the resource agency, Indian Tribe, or person must file a request for a study with the Commission not later than 60 days from the date of this notice, and serve a copy of the request on the applicant.

l. *Deadline for filing additional study requests and requests for cooperating agency status:* May 27, 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.

Additional study requests and requests for cooperating agency status 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 at (*http://www.ferc.gov*) under the ''eFiling'' link. For a simpler method of submitting text only comments, click on ''Quick Comment.''

m. This application is not ready for environmental analysis at this time.

n. *Description of Project:* The Dresden Island Project utilize the Corps of Engineer's existing Dresden Island Dam and reservoir and would consist of: (1) A new 75-ft by 125-ft concrete powerhouse between headgate sections 10 through 16 containing three generating units with a total installed capacity of 10.2 MW; (2) a 50-foot by 50-foot switchyard adjacent and to the north of the powerhouse building; (3) a new .08-mile-long transmission line; and (4) appurtenant facilities. The project would have an average annual generation of about 60,000 megawatt-hours.

o. 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 three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. 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.

p. With this notice, we are initiating consultation with the Illinois State Historic Preservation Officer (SHPO), as required by section 106, National Historic Preservation Act, and the regulations of the Advisory Council on Historic Preservation, 36 CFR 800.4.

q. *Procedural schedule and final amendments:* The application will be processed according to the following Hydro Licensing Schedule. Revisions to the schedule will be made as appropriate. The Commission staff proposes to issue one environmental assessment rather than issue a draft and final EA. Comments, terms and conditions, recommendations, prescriptions, and reply comments, if any, will be addressed in an EA. Staff intends to give at least 30 days for entities to comment on the EA, and will take into consideration all comments received on the EA before final action is taken on the license application.

Issue Scoping Document 1 for comments: September 2009.

Notice of application ready for environmental analysis: February 2010.

Notice of the availability of the draft EA: May 2010.

Notice of the availability of the final EA: August 2010.

Final amendments to the application must be filed with the Commission no later than 30 days from the issuance

date of the notice of ready for environmental analysis.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–10250 Filed 5–4–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL09–49–000]

The Connecticut Department of Public Utility Control and the Connecticut Office of Consumer Counsel, Complainants v. ISO New England Inc. and Unidentified Installed Capacity Resources Committed to Import Over the Northern New York AC Interface, Respondents; Notice of Complaint

April 28, 2009.

Take notice that on April 23, 2009, pursuant to section 206 of the Rules and Practice and Procedure, 18 CFR 385.206 (2009), sections 206, 222, and 309 of the Federal Power Act, 16 U.S.C. 824(e), 824(v) and 825(h) (2006), the Connecticut Department of Public Utility Control and the Connecticut Office of Consumer Counsel (collectively, the ''Connecticut Representatives''), filed a formal complaint against ISO New England Inc. (''ISO–NE'') and Unidentified Installed Capacity Resources Committed to Import over the Northern New York AC Interface (''NNY Capacity Resources'') seeking a Commission investigation and hearing into installed capacity resources who received capacity payments but never provided any capacity services when called upon.

Connecticut Representatives certify that copies of the complaint were served on the contacts for ISO–NE and New England Power Pool, Inc (''NEPOOL''), as a representative of the NNY Capacity Resources, as listed on the Commission's list of Corporate Officials.

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. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on May 11, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–10253 Filed 5–4–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

[Case No. CAC–021]

Energy Conservation Program for Commercial Equipment: Publication of the Petition for Waiver From LG Electronics, Inc. and Granting of the Application for Interim Waiver From the Department of Energy Commercial Package Air Conditioner and Heat Pump Test Procedure

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of petition for waiver, granting of application for interim waiver, and request for comments.

SUMMARY: This notice announces receipt of and publishes a Petition for Waiver from LG Electronics, Inc. (LG). The Petition for Waiver (hereafter ''LG Petition'') requests a waiver from the Department of Energy (DOE) test procedure applicable to commercial package air-cooled central air conditioners and heat pumps. The waiver request is specific to the LG variable capacity Multi V (commercial) multi-split central air conditioners. Through this document, DOE is: (1) Soliciting comments, data, and information with respect to the LG Petition; and (2) announcing our determination to grant an Interim Waiver to LG from the applicable DOE test procedure for the subject commercial air-cooled, multi-split air conditioners and heat pumps.

DATES: DOE will accept comments, data, and information with respect to the LG Petition until, but no later than June 4, 2009.

ADDRESSES: You may submit comments, identified by case number ''CAC–021,'' by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: AS_Waiver_Requests@ee.doe.gov.* Include either the case number [CAC–021], and/or ''LG Petition'' in the subject line of the message.
- *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J/ 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–2945. Please submit one signed original paper copy.
- *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC 20024. Please submit one signed original paper copy.

Instructions: All submissions received must include the agency name and case number for this proceeding. Submit electronic comments in WordPerfect, Microsoft Word, Portable Document Format (PDF), or text (American Standard Code for Information Interchange (ASCII)) file format and avoid the use of special characters or any form of encryption. Wherever possible, include the electronic signature of the author. Absent an electronic signature, comments submitted electronically must be followed and authenticated by submitting the signed original paper document. DOE does not accept telefacsimiles (faxes).

Any person submitting written comments must also send a copy of such comments to the petitioner, pursuant to 10 CFR 431.401(d). The contact information for the petitioner is: Mr. John I. Taylor, Vice President, Government Relations, LG Electronics USA, Inc., 1750 K Street, NW., Washington, DC 20006.

According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure

should submit two copies: one copy of the document including all the information believed to be confidential, and one copy of the document with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Docket: For access to the docket to review the background documents relevant to this matter, you may visit the U.S. Department of Energy, 950 L'Enfant Plaza, SW., (Resource Room of the Building Technologies Program), Washington, DC, 20024; (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Available documents include the following items: (1) This notice; (2) public comments received; (3) the Petition for Waiver and Application for Interim Waiver; and (4) prior DOE rulemakings regarding similar central air conditioning and heat pump equipment. Please call Ms. Brenda Edwards at the above telephone number for additional information regarding visiting the Resource Room.

FOR FURTHER INFORMATION CONTACT: Dr. Michael G. Raymond, U.S. Department of Energy, Building Technologies Program, Mail Stop EE–2J, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585–0121. *Telephone:* (202) 586–9611. *E-mail: AS_Waiver_Requests@ee.doe.gov.*

Ms. Francine Pinto or Mr. Michael Kido, U.S. Department of Energy, Office of the General Counsel, Mail Stop GC–72, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585–0103. *Telephone:* (202) 586–9507. *E-mail: Francine.Pinto@hq.doe.gov* or *Michael.Kido@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Authority

Title III of the Energy Policy and Conservation Act (EPCA) sets forth a variety of provisions concerning energy efficiency, including Part A of Title III, which establishes the ''Energy Conservation Program for Consumer Products Other Than Automobiles.'' [1] (42 U.S.C. 6291–6309) Similar to the program in Part A, Part A–1 of Title III provides for an energy efficiency program titled, ''Certain Industrial Equipment,'' which includes commercial air conditioning equipment, package boilers, water heaters, and other types of commercial equipment.[2] (42 U.S.C. 6311–6317)

Today's notice involves commercial equipment under Part A–1. Part A–1 specifically includes definitions (42 U.S.C. 6311), test procedures (42 U.S.C. 6314), labeling provisions (42 U.S.C. 6315), energy conservation standards (42 U.S.C 6313), and the authority to require information and reports from manufacturers (42 U.S.C. 6316). With respect to test procedures, Part A–1 generally authorizes the Secretary of Energy (the Secretary) to prescribe test procedures that are reasonably designed to produce results which measure energy efficiency, energy use, and estimated annual operating costs, and that are not unduly burdensome to conduct. (42 U.S.C. 6314(a)(2))

For commercial package air-conditioning and heating equipment, EPCA provides that ''the test procedures shall be those generally accepted industry testing procedures or rating procedures developed or recognized by the Air-Conditioning and Refrigeration Institute [ARI] or by the American Society of Heating, Refrigerating and Air-Conditioning Engineers [ASHRAE], as referenced in ASHRAE/IES Standard 90.1 and in effect on June 30, 1992.'' (42 U.S.C. 6314(a)(4)(A)) Under 42 U.S.C. 6314(a)(4)(B), the statute further directs the Secretary to amend the test procedure for a covered commercial product if the industry test procedure is amended, unless the Secretary determines, based on clear and convincing evidence, that such a modified test procedure does not meet the statutory criteria set forth in 42 U.S.C. 6314(a)(2) and (3).

On December 8, 2006, DOE published a final rule adopting test procedures for commercial package air-conditioning and heating equipment, effective January 8, 2007. 71 FR 71340. DOE adopted ARI Standard 340/360–2004, ''Performance Rating of Commercial and Industrial Unitary Air-Conditioning and Heat Pump Equipment,'' for small and large commercial package air-cooled heat pumps with capacities ≥ 65,000 Btu/h and < 760,000 British thermal units per hour (Btu/h). *Id.* at 71371. Pursuant to this rulemaking, DOE's regulations at 10 CFR 431.95(b)(2) incorporate by reference ARI Standard 340/360–2004, and Table 1 to 10 CFR 431.96 directs manufacturers of commercial package air-cooled air conditioning and heating equipment to use the appropriate procedure when measuring energy efficiency of those products. (The cooling capacities of LG's commercial Multi V multi-split air conditioning products, which are at issue in the waiver petition filed by LG, range from 76,400 Btu/hr to 310,000 Btu/hr, thereby resulting in these products falling within the range of ARI Standard 340/360–2004, which covers products with capacities greater than 65,000 Btu/hour.)

DOE's regulations for covered products permit a person to seek a waiver from the test procedure requirements for covered commercial equipment if at least one of the following conditions is met: (1) The petitioner's basic model contains one or more design characteristics which prevent testing according to the prescribed test procedures; or (2) the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption as to provide materially inaccurate comparative data. 10 CFR 431.401(a)(1). The waiver provisions for commercial equipment are found at 10 CFR 431.401 and are substantively identical to those for covered consumer products. Petitioners must include in their petition any alternate test procedures known to evaluate the basic model in a manner representative of its energy consumption. 10 CFR 431.401(b)(1)(iii). The Assistant Secretary for Energy Efficiency and Renewable Energy (Assistant Secretary) may grant a waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 431.401(f)(4). Waivers generally terminate on the effective date of a final rule, which prescribes amended test procedures appropriate to the model series manufactured by the petitioner, thereby eliminating any need for the continuation of the waiver. 10 CFR 431.401(g).

The waiver process also permits parties submitting a Petition for Waiver to file an Application for Interim Waiver of the applicable test procedure requirements. 10 CFR 431.401(a)(2). The Assistant Secretary will grant an Interim Waiver request if it is determined that the applicant will experience economic hardship if the Application for Interim Waiver is denied, if it appears likely that the Petition for Waiver will be granted, and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination on the Petition for Waiver. 10 CFR 431.401(e)(3). An Interim Waiver remains in effect for a period of 180 days or until DOE issues its determination on the Petition for Waiver, whichever occurs first, and it

[1] This part was originally titled part B but it was redesignated as part A in the United States Code for editorial reasons.

[2] This part was originally titled Part C but it was redesignated as Part A–1 in the United States Code for editorial reasons.

may be extended by DOE for an additional 180 days, if necessary. 10 CFR 431.401(e)(4).

II. Petition for Waiver

On April 28, 2008, LG filed a Petition for Waiver from the test procedures at 10 CFR 431.96, which are applicable to commercial package air-cooled central air conditioners, and an Application for Interim Waiver. The capacities of the LG Multi V multi-split heat pumps range from 76,400 Btu/hr to 310,000 Btu/hr, making the applicable test procedure for LG's commercial Multi V Plus II and Multi V Sync II multi-split air conditioners ARI Standard 340/360–2004, which manufacturers are directed to use pursuant to Table 1 of 10 CFR 431.96.

LG seeks a waiver from the applicable test procedures under 10 CFR 431.96 on the grounds that its Multi V multi-split central air conditioners contain design characteristics that prevent testing according to the current DOE test procedures. Specifically, LG asserts that the two primary factors that prevent testing of multi-split variable speed products, regardless of manufacturer, are the same factors stated in the waivers that DOE granted to Mitsubishi Electric & Electronics USA, Inc. (Mitsubishi) for a similar line of commercial multi-split air-conditioning systems:

- Testing laboratories cannot test products with so many indoor units; and
- There are too many possible combinations of indoor and outdoor units to test. 69 FR 52661 (August 27, 2004) (Mitsubishi); 72 FR 17528 (April 9, 2007) (Mitsubishi); 72 FR 71383 (December 17, 2007) (Fujitsu); 72 FR 71387 (December 17, 2007) (Samsung).

The Multi V systems have operational characteristics similar to other commercial multi-split products manufactured by Mitsubishi, Samsung, Fujitsu and Daikin, all of which have already been granted waivers. Each of the Multi V system indoor units is designed to be used with up to 52 other indoor units, which need not be the same models. There are 70 different indoor models. In certain high-capacity applications, LG's Multi V systems have the capability to combine two outdoor units to create a larger capacity system. Accordingly, LG requests that DOE grant a waiver from the applicable test procedures for its Multi V product designs, until a suitable test method can be prescribed.

III. Application for Interim Waiver

On April 28, 2008, in addition to its Petition for Waiver, LG submitted to DOE an Application for Interim Waiver. LG's Application for Interim Waiver does not provide sufficient information to evaluate the level of economic hardship LG will likely experience if its Application for Interim Waiver is denied. However, in those instances where the likely success of the Petition for Waiver has been demonstrated, based upon DOE having granted a waiver for similar product designs, it is in the public interest to have similar products tested and rated for energy consumption on a comparable basis. DOE has previously granted Interim Waivers to Fujitsu (70 FR 5980 (Feb. 4, 2005)), Samsung (70 FR 9629 (Feb. 28, 2005)), Mitsubishi (72 FR 17533 (April 9, 2007)), and Daikin (72 FR 35986 (July 2, 2007)), for comparable commercial multi-split air conditioners and heat pumps.

Moreover, as noted above, DOE approved the Petitions for Waiver from Mitsubishi (72 FR 17528 (April 9, 2007)), Fujitsu (72 FR 71383 (Dec. 17, 2007)), Samsung (72 FR 71387 (Dec. 17, 2007)), and Daikin (73 FR 39680 (July 10, 2008)), for their comparable lines of multi-split air conditioners and heat pumps. The two principal reasons supporting the grant of these waivers also apply to LG's Multi V products: (1) Test laboratories cannot test products with so many indoor units; [3] and (2) it is impractical to test so many combinations of indoor units with each outdoor unit. Thus, DOE has determined that it is likely that LG's Petition for Waiver will be granted for its new Multi V multi-split models. Therefore, *it is ordered that:*

The Application for Interim Waiver filed by LG is hereby granted for LG's Multi V air-cooled multi-split central air conditioners, subject to the specifications and conditions below.

1. LG shall not be required to test or rate its Multi V commercial air-cooled multi-split products on the basis of the currently applicable test procedure under 10 CFR 431.96, which incorporates by reference ARI Standard 340/360–2004.

2. LG shall be required to test and rate its Multi V commercial air-cooled multi-split products according to the alternate test procedure as set forth in section IV(3), ''Alternate test procedure.''

The Interim Waiver applies to the following models:

Multi V Series Outdoor Units

Plus II 3Ø 460V 60 Hz models: ARUN076DT2, ARUN096DT2, ARUN115DT2, ARUN134DT2, ARUN154DT2, ARUN173DT2, ARUN192DT2, ARUN211DT2, ARUN230DT2, ARUN250DT2, ARUN270DT2, ARUN290DT2, and ARUN310DT2 with nominally rated cooling capacities of 76,400, 95,900, 114,700, 133,800, 152,900, 172,000, 191,100, 211,000, 230,000, 250,000, 270,000, 290,000, and 310,000 Btu/h respectively. The maximum number of connectable indoor units is 13, 16, 20, 23, 26, 29, 32, 35, 39, 42, 49, and 52 respectively.

Plus II 3Ø 230/208V 60 Hz models: ARUN076BT2, ARUN096BT2, ARUN115BT2, ARUN154BT2, ARUN173BT2, ARUN192BT2, ARUN211BT2, and ARUN230BT2 with nominally rated cooling capacities of 76,400, 95,900, 114,700, 152,900, 172,000, 191,100, 211,000, and 230,000 Btu/h respectively. The maximum number of connectable indoor units is 13, 16, 20, 26, 29, 32, 35, and 39 respectively.

Sync II 3Ø 230/208V 60 Hz models: ARUB076BT2, ARUB096BT2, ARUB115BT2, ARUB154BT2, ARUB173BT2, ARUB192BT2, ARUB211BT2, and ARUB230BT2 with nominally rated cooling capacities of 76,400, 95,900, 114,700, 152,900, 172,000, 191,000, 211,000, and 230,000 Btu/h respectively. The maximum number of connectable indoor units is 13, 16, 20, 26, 29, 32, 35, and 39 respectively.

Compatible Indoor Units for the Above-Listed Outdoor Units

Wall Mounted: ARNU073SEL2, ARNU093SEL2, ARNU123SEL2, ARNU153SEL2, ARNU183S5L2, and ARNU243S5L2 with nominally rated cooling capacities of 7,500, 9,600, 12,300, 15,400, 19,100, and 24,200 Btu/h respectively.

Art Cool Gallery: ARNU073SF*2, ARNU093SF*2, and ARNU123SF*2 with nominally rated cooling capacities of 7,500, 9,600, and 12,300 Btu/h respectively.

Art Cool Mirror: ARNU073SE*2, ARNU093SE*2, ARNU123SE*2, ARNU153SE*2, ARNU183S3*2, and ARNU243S3*2 with nominally rated cooling capacities of 7,500, 9,600, 12,300, 15,400, 19,100, and 24,200 Btu/h respectively.

4 Way Cassette: ARNU073TEC2, ARNU093TEC2, ARNU123TEC2, ARNU153TEC2, ARNU183TEC2, ARNU243TPC2, ARNU283TPC2, ARNU363TNC2, ARNU423TMC2, and

[3] According to the LG petition, up to 52 indoor units of its commercial package multi-split air conditioners may be connected in a single system. However, DOE believes that, based on communications with multi-split manufacturers and commercial testing laboratories, test room limitations at laboratory testing facilities make testing this number of indoor units extremely difficult.

ARNU483TMC2 with nominally rated cooling capacities of 7,500, 9,600, 12,300, 15,400, 19,100, 24,200, 28,000, 36,200, 42,000, and 48,100 Btu/h respectively.

2 Way Cassette: ARNU183TLC2 and ARNU243TLC2 with nominally rated capacities of 19,100 and 24,200 Btu/h respectively.

1 Way Cassette: ARNU073TJC2, ARNU093TJC2, and ARNU123TJC2 with nominally rated capacities of 7,500, 9,600, and 12,300 Btu/h respectively.

Ceiling Concealed Duct—Low Static: ARNU073B1G2, ARNU093B1G2, ARNU123B1G2, ARNU153B1G2, ARNU183B2G2, and ARNU243B2G2 with nominally rated capacities of 7,500, 9,600, 12,300, 15,400, 19,100, and 24,200 Btu/h respectively.

Ceiling Concealed Duct—Built-in: ARNU073B3G2, ARNU093B3G2, ARNU123B3G2, ARNU153B3G2, ARNU183B4G2, and ARNU243B4G2 with nominally rated capacities of 7,500, 9,600, 12,300, 15,400, 19,100, and 24,200 Btu/h respectively.

Ceiling Concealed Duct—High Static: ARNU073BHA2, ARNU093BHA2, ARNU123BHA2, ARNU153BHA2, ARNU183BHA2, ARNU243BHA2, ARNU283BGA2, ARNU363BGA2, ARNU423BGA2, ARNU483BRA2, URNU763B8A2, and URNU963B8A2 with nominally rated capacities of 7,500, 9,600, 12,300, 15,400, 19,100, 24,200, 28,000, 36,200, 42,000, 48,100, 76,400, and 95,500 Btu/h respectively.

Ceiling & Floor: ARNU093VEA2 and ARNU123VEA2 with nominally rated capacities of 9,600 and 12,300 Btu/h respectively.

Ceiling Suspended: ARNU183VJA2 and ARNU243VJA2 with nominally rated capacities of 19,100 and 24,200 Btu/h respectively.

Floor Standing with Case: ARNU073CEA2, ARNU093CEA2, ARNU123CEA2, ARNU153CEA2, ARNU183CFA2, and ARNU243CFA2 with nominally rated capacities of 7,500, 9,600, 12,300, 15,400, 19,100, and 24,200 Btu/h respectively.

Floor Standing without Case: ARNU073CEU2, ARNU093CEU2, ARNU123CEU2, ARNU153CEU2, ARNU183CFU2, and ARNU243CFU2 with nominally rated capacities of 7,500, 9,600, 12,300, 15,400, 19,100, and 24,200 Btu/h respectively.

This Interim Waiver is conditioned upon the presumed validity of statements, representations, and documents provided by the petitioner. DOE may revoke or modify this Interim Waiver at any time upon a determination that the factual basis underlying the Petition for Waiver is incorrect, or upon a determination that the results from the alternate test procedure are unrepresentative of the basic models' true energy consumption characteristics.

IV. Alternate Test Procedure

Responding to two recent Petitions for Waiver from Mitsubishi, DOE specified an alternate test procedure to provide a basis from which Mitsubishi could test and make valid energy efficiency representations for its R410A CITY MULTI products, as well as for its R22 multi-split products. Alternate test procedures related to the Mitsubishi petitions were published in the **Federal Register** on April 9, 2007. See 72 FR 17528 and 72 FR 17533. For reasons similar to those published in these prior notices, DOE believes that an alternate test procedure is needed in this instance.

In general, DOE understands that existing testing facilities have a limited ability to test multiple indoor units simultaneously, and the large number of possible combinations of indoor and outdoor units for some variable refrigerant flow zoned systems makes it impractical for manufacturers to test. We further note that subsequent to the waiver that DOE granted for Mitsubishi's R22 multi-split products, ARI formed a committee to discuss the issue and to work on developing an appropriate testing protocol for variable refrigerant flow systems. However, to date, no additional test methodologies have been adopted by the committee or submitted to DOE.

Therefore, as discussed below, as a condition for granting this Interim Waiver to LG, DOE is including an alternate test procedure similar to those granted to Mitsubishi for its R22 and R410A products. DOE plans to consider the same alternate test procedure in the context of the subsequent Decision and Order pertaining to LG's Petition for Waiver. Utilization of this alternate test procedure will allow LG to test and make energy efficiency representations for its Multi V products. More broadly, DOE is also applying a similar alternate test procedure to other waivers for similar residential and commercial central air conditioners and heat pumps. Such cases include petitions for waiver involving multi-split products manufactured by Samsung (72 FR 71387 (Dec. 17, 2007)), Fujitsu (72 FR 71383 (Dec. 17, 2007)), and Daikin (73 FR 39680 (July 10, 2008)).

The alternate test procedure developed in conjunction with the Mitsubishi waiver has two basic components. First, it permits LG to designate a ''tested combination'' for each model of outdoor unit. The indoor units designated as part of the tested combination must meet specific requirements. For example, the tested combination must have from two to eight indoor units so that it can be tested in available test facilities.[4] The tested combination must be tested according to the applicable DOE test procedure, as modified by the provisions of the alternate test procedure as set forth below.

Second, DOE believes that an alternate test procedure is needed so that manufacturers of such products can make valid and consistent representations of energy efficiency for their air-conditioning and heat pump products. In the present case, DOE is modifying the alternate test procedure taken from the above-referenced waiver granted to Mitsubishi for its R410A and R22 CITY MULTI products. DOE plans to consider inclusion of the following waiver language in the Decision and Order for LG's Multi V commercial multi-split air-cooled heat pump models:

(1) The ''Petition for Waiver'' filed by LG Electronics, Inc. is hereby granted as set forth in the paragraphs below.

(2) LG shall not be required to test or rate its Multi V variable capacity multi-split heat pump products listed above in section III, on the basis of the currently applicable test procedures, but shall be required to test and rate such products according to the alternate test procedure as set forth in paragraph (3).

(3) *Alternate test procedure.*

(A) LG shall be required to test the products listed in section III above according to the test procedures for central air conditioners and heat pumps prescribed by DOE at 10 CFR 431.96, except that LG shall test a ''tested combination'' selected in accordance with the provisions of subparagraph (B) of this paragraph. For every other system combination using the same outdoor unit as the tested combination, LG shall make representations concerning the Multi V products covered in this waiver according to the provisions of subparagraph (C) below.

(B) Tested combination. The term ''tested combination'' means a sample basic model comprised of units that are production units, or are representative of production units, of the basic model being tested. For the purposes of this

[4] The ''tested combination'' was originally defined to consist of one outdoor unit matched with between 2 and 5 indoor units. The maximum number of indoor units in a tested combination is increased in this instance from 5 to 8 to account for the fact that these larger-capacity products can accommodate a greater number of indoor units.

waiver, the tested combination shall have the following features:

(1) The basic model of a variable refrigerant flow system used as a tested combination shall consist of one outdoor unit, with one or more compressors, that is matched with between 2 and 8 indoor units; for multi-split systems, each of these indoor units shall be designed for individual operation.

(2) The indoor units shall—

(i) Represent the highest sales model family, or another indoor model family if the highest sales model family does not provide sufficient capacity (see ii);

(ii) Together, have a nominal cooling capacity that is between 95% and 105% of the nominal cooling capacity of the outdoor unit;

(iii) Not, individually, have a nominal cooling capacity that is greater than 50% of the nominal cooling capacity of the outdoor unit;

(iv) Operate at fan speeds that are consistent with the manufacturer's specifications; and

(v) All be subject to the same minimum external static pressure requirement while being configurable to produce the same static pressure at the exit of each outlet plenum when manifolded as per section 2.4.1 of 10 CFR Part 430, Subpart B, Appendix M.

(C) *Representations.* In making representations about the energy efficiency of its Multi V variable capacity air-cooled multi-split heat pump and heat recovery system products, for compliance, marketing, or other purposes, LG must fairly disclose the results of testing under the DOE test procedure, doing so in a manner consistent with the provisions outlined below:

(1) For Multi V combinations tested in accordance with this alternate test procedure, LG may make representations based on these test results.

(2) For Multi V combinations that are not tested, LG may make representations based on the testing results for the tested combination and which is consistent with either of the two following methods, except that only method (i) may be used, if available:

(i) Representation of non-tested combinations according to an Alternative Rating Method (ARM) approved by DOE; or

(ii) Representation of non-tested combinations at the same energy efficiency level as the tested combination with the same outdoor unit.

V. Summary and Request for Comments

Through today's notice, DOE announces receipt of the LG Petition for Waiver from the test procedures applicable to LG's Multi V commercial multi-split heat pump products, and for the reasons articulated above, DOE is granting LG an Interim Waiver from those procedures. As part of this notice, DOE is publishing LG's Petition for Waiver in its entirety. The Petition contains no confidential information. Furthermore, today's notice includes an alternate test procedure that LG is required to follow as a condition of its Interim Waiver and that DOE is considering including in its subsequent Decision and Order. In this alternate test procedure, DOE is defining a ''tested combination'' which LG could use in lieu of testing all retail combinations of its Multi V multi-split heat pump products.

Furthermore, should a subsequent manufacturer be unable to test all retail combinations, DOE is considering allowing such manufacturers to rate waived products according to an ARM approved by DOE, or to rate waived products in the same manner as the specified tested combination with the same outdoor unit. DOE is also considering applying a similar alternate test procedure to other comparable Petitions for Waiver for residential and commercial central air conditioners and heat pumps. Such cases include Daikin's Petition for Waiver for its Variable Refrigerant Volume (VRV) products at 72 FR 35986 (July 2, 2007), and Mitsubishi's Petition for Waiver for its water source variable refrigerant flow products at 72 FR 17533 (April 9, 2007).

DOE is interested in receiving comments on the issues addressed in this notice. Pursuant to 10 CFR 431.401(d), any person submitting written comments must also send a copy of such comments to the petitioner, whose contact information is included in the section entitled **ADDRESSES** section above.

Issued in Washington, DC, on April 21, 2009.

Steven G. Chalk,

Principal Deputy Assistant Secretary, Energy Efficiency and Renewable Energy.

April 28, 2008

The Honorable Alexander A. Karsner,
Assistant Secretary, Energy Efficiency and Renewable Energy,
United States Department of Energy,
Forrestal Building,
1000 Independence Avenue, SW.,
Washington, DC 20585.

Re: Petition for Waiver and Application for Interim Waiver, *LG Electronics Multi V Multi-Split Air Conditioning Systems*

Dear Mr. Karsner: LG Electronics, Inc. (LG) respectfully submits this Petition for Waiver and Application for Interim Waiver, pursuant to 10 CFR 431.401, for LG Multi V multi-split air conditioning systems, specifically Multi V Plus II and Multi V Sync II systems.[1]

Among other things, the applicable test procedure does not provide a method for testing and rating a system that utilizes so many indoor units; the applicable test procedure does not provide a method for rating systems where the type and capacity of the indoor unit can be mixed in the same system; and no testing laboratories can test products with so many indoor units.

Waiver relief has been granted for many other comparable commercial multi-splits, including Mitsubishi, Samsung, Fujitsu, Sanyo Fisher, and Daikin. *See* 69 FR 52660 (Aug. 27, 2004) (Mitsubishi); 71 FR 14858 (March 24, 2006) (Mitsubishi); 72 FR 17528 (April 9, 2007) (Mitsubishi); 70 FR 9629 (Feb. 28, 2005) (Samsung); 72 FR 71387 (Dec. 17, 2007) (Samsung); 72 FR 71383 (Dec. 17, 2007 (Fujitsu); 73 FR 179 (Jan. 2, 2008) (Sanyo Fisher); 73 FR 1207, 1213 (Jan. 7, 2008) (Daikin).

LG is a manufacturer of digital appliances, as well as mobile communications, digital displays, and digital media products. Its appliances include air-conditioners, washing machines, clothes dryers, refrigerators, refrigerator-freezers, air cleaners, ovens, microwave ovens, dishwashers, and vacuum cleaners and are sold worldwide, including in the United States. LG's U.S. operations are LG Electronics USA, Inc., with headquarters at 1000 Sylvan Avenue, Englewood Cliffs, NJ 07632 (tel. 201–816–2000). Its worldwide headquarters are located at LG Twin Towers 20, Yoido-dong, Youngdungpo-gu Seoul, Korea 150–721 (tel. 011–82–2–3777–1114) URL: *http.www.LGE.com.* LG's principal brands include LG® and OEM brands, including GE® and Kenmore®. LG's appliances are produced in Korea and Mexico.

LG's Multi V systems are beneficial products, each consisting of a single outdoor unit, using a scroll type inverter compressor with variable capacity, that can connect to multiple indoor units and that uses variable refrigerant flow and control systems. (In certain high capacity applications [152,900 Btu/h and above], a consumer can choose between a system using a single outdoor unit and a system using two outdoor units.) These multi-splits are intended to be used in zoning systems where an outdoor unit can be connected with up to between 13 and 52 separate indoor units in a zoned system, which need not be the same models. The operating characteristics allow each indoor unit to have a different set temperature and a different mode of operation (*i.e.,* on/off/fan). All of the indoor units are capable of operating independently, with their own temperature and fan speed setting. Based on those controls, the outdoor unit will then determine the cooling or heating capacity delivered into the zones. The system therefore offers great flexibility and

[1] This request is a revision of the request dated April 16, 2008. It adds some outdoor models and changes certain model numbers.

convenience to the consumer, permitting precise space conditioning control throughout the building, and thus saving energy. The cooling capacities of the systems are between 76,400 and 310,000 Btu/h. There are 29 outdoor units and 70 indoor units. Model numbers and related descriptions are set forth in Appendix A.

The variable speed, constant speed or dual compressors and the associated system controls can direct refrigerant flow throughout the system to precisely meet the various heating or cooling loads required in the conditioned areas. The compressor is capable of reducing its operating capacity to as little as 10 percent of its rated capacity. The outdoor fan motor also has a variable speed drive to properly match the outdoor coil to indoor loads. Zone diversity enables the system to have a total connected indoor unit capacity of up to 130 percent of the capacity of the outdoor unit.

As discussed above, up to between 13 and 52 indoor units can be matched with each related outdoor unit. Thus, for each outdoor unit there is a multitude of possible combinations of indoor units that can be matched in a system configuration. And since there are 29 outdoor units and 70 indoor units, there is an enormous total of possible combinations.

A waiver and interim waiver for LG Multi V systems are warranted because test procedures under the Energy Policy and Conservation Act (EPCA), 42 U.S.C. 6291 *et seq.,* namely 10 CFR 431.96, evaluate the basic models in a manner so unrepresentative of their true energy consumption characteristics as to provide materially inaccurate comparative data, and/or the basic models contain one or more design characteristics that prevent testing of the basic model according to the prescribed test procedures. In such circumstances DOE ''will grant'' waiver relief. 10 CFR 431.401(e)(3), (f)(4). In that regard:

—The test procedure provides for testing of a pair of indoor and outdoor assemblies making up a typical split system, but does not specify how LG Multi V systems, with so many combinations of indoor units for each outdoor unit, could be evaluated. The situation is further complicated by the fact that there are 29 outdoor units. It is not practical to test each possible combination, and the test procedure provides no alternative rating method for generating efficiency ratings for systems with more than one indoor unit. Thus, the test procedure does not contemplate, and cannot practically be applied to, LG Multi V systems.

—Testing laboratories cannot test products with so many indoor units. In that regard, the testing of multi-splits when all indoor units are connected cannot be physically located in a single room.

—The test procedure provides for testing ''matched assemblies,'' which does not apply to LG Multi V systems. Indoor and outdoor coils in split systems are typically balanced; that is, the capacity of the outdoor coil is equivalent to the capacity of the indoor coil. The test procedure's application to ''matched assemblies'' contemplates such a balance between indoor and outdoor coil capacity. With the Multi V systems, however, the sum of the capacity of the indoor units connected into the system can be as much as 130 percent of the capacity of the outdoor coil. Such unbalanced combinations of LG indoor and outdoor units are permitted by the zoning characteristics of the system, the use of electronic expansion valves to precisely control refrigerant flow to each indoor coil, and the system intelligence for overall system control. The test procedure designed for ''matched assemblies'' therefore does not contemplate or address testing for substantially unbalanced zoning systems such as the LG Multi V systems.

—The indoor units are designed to operate at many different external static pressure values, which compounds the difficulty of testing LG Multi V systems. A test facility could not maintain proper airflow at several different external static pressure values for the many indoor units that would be connected to the outdoor unit.

* * *

For all of these reasons, the existing test procedures evaluate the LG Multi V systems in a manner so unrepresentative of their true energy consumption characteristics as to provide materially inaccurate comparative data and/or the basic models contain one or more design characteristics that prevent testing of the basic model according to the prescribed test procedures. Therefore, DOE should grant a waiver for LG Multi V systems. *See* 10 CFR 431.401(a)(1). The waiver should continue until a test procedure can be developed and adopted that will provide the U.S. market with a fair and accurate assessment of the LG Multi V system energy consumption and efficiency levels. LG intends to work with DOE, stakeholders, and the Air-Conditioning and Refrigeration Institute (ARI) to develop the appropriate test procedure.

There are no alternative test procedures known to LG that could evaluate these products in a representative manner (other than perhaps the procedures provided by DOE in its waiver decisions for comparable products).

That a waiver is warranted is borne out by the fact that DOE has granted waiver relief to Mitsubishi, Samsung, Fujitsu, Sanyo Fisher, and Daikin for comparable commercial multi-splits.

Manufacturers of all other basic models marketed in the United States and known to LG to incorporate similar design characteristics as found in the LG Multi V systems include Mitsubishi Electric and Electronics USA, Mitsubishi Heavy Industries Climate Control, Inc., Samsung Air Conditioning, Fujitsu General Limited, Sanyo Fisher (USA) Corp., and Daikin AC (Americas), Inc.

LG also requests immediate relief by grant of an interim waiver. Grant of an interim waiver is fully justified:

—The petition for waiver is likely to be granted, as evidenced not only by its merits, but also because DOE has already granted waiver relief to Mitsubishi, Samsung, Fujitsu, Sanyo Fisher, and Daikin for their commercial multi-splits. In such instances, it is in the public interest to have similar products tested and rated for energy consumption on a comparable basis.

—Without waiver relief, LG will be at a competitive disadvantage in the market and suffer economic hardship. LG would be placed in an untenable situation: the Multi V systems would be subject to a set of regulations that DOE already acknowledges should not apply to such a product, while at the same time other manufacturers are allowed to operate relieved from such regulations.

—Significant investment has already been made in LG Multi V systems. Lack of relief would not allow LG to recoup this investment and would deny LG anticipated sales revenue. This does not take into account significant losses in goodwill and brand acceptance.

—The basic purpose of EPCA is to foster purchase of energy-efficient products, not hinder such purchases. LG Multi V systems produce a benefit to consumers and are in the public interest. To encourage and foster the availability of these products is in the public interest. Standards programs should not be used as a means to block innovative, improved designs.[2] DOE's rules should accommodate and encourage—not act to block—such a product.

—Granting the interim waiver and waiver would also eliminate a non-tariff trade barrier.

—Grant of relief would also help enhance economic development and employment, including not only LG Electronics USA's operations in New Jersey, Illinois and Alabama, but also at major national retailers and regional dealers that carry LG products. Furthermore, continued employment creation and ongoing investments in its marketing, sales and servicing activities will be fostered by approval of the interim waiver. Conversely, denial of the requested relief would harm the company and would be anticompetitive.

Conclusion

LG respectfully requests that DOE grant a waiver and interim waiver from existing test standards for LG Multi V multi-split systems until such time as a representative test procedure is developed and adopted for such products.

We would be pleased to discuss this request with DOE and provide further information as needed.

We hereby certify that all manufacturers of domestically marketed units of the same product type have been notified by letter of this petition and application, copies of which letters are attached (Appendix B).

Sincerely,

John I. Taylor
Vice President, Government Relations
LG Electronics USA, Inc.
1750 K Street, NW.
Washington, DC 20006
Phone: 202–719–3490
Fax: 847–941–8177
E-mail: jtaylor@lge.com

Of counsel:

John A. Hodges
Wiley Rein LLP

[2] *See* FTC Advisory Opinion No. 457, TRRP 1718.20 (1971 Transfer Binder); 49 FR 32213 (Aug. 13, 1984); 52 FR 49141, 49147–48 (Dec. 30, 1987).

1776 K Street, NW.
Washington, DC 20006
Phone: 202–719–7000
Fax: 202–719–7049
E-mail: jhodges@wileyrein.com

Appendix A

Multi V Series Outdoor Units

Plus II 3O 460V 60 Hz models: ARUN076DT2, ARUN096DT2, ARUN115DT2, ARUN134DT2, ARUN154DT2, ARUN173DT2, ARUN192DT2, ARUN211DT2, ARUN230DT2, ARUN250DT2, ARUN270DT2, ARUN290DT2, and ARUN310DT2 with nominally rated cooling capacities of 76,400, 95,900, 114,700, 133,800, 152,900, 172,000, 191,100, 211,000, 230,000, 250,000, 270,000, 290,000, and 310,000 Btu/h respectively. The maximum number of connectable indoor units is 13, 16, 20, 23, 26, 29, 32, 35, 39, 42, 49, and 52 respectively.

Plus II 3O 230/208V 60 Hz models: ARUN076BT2, ARUN096BT2, ARUN115BT2, ARUN154BT2, ARUN173BT2, ARUN192BT2, ARUN211BT2, and ARUN230BT2 with nominally rated cooling capacities of 76,400, 95,900, 114,700, 152,900, 172,000, 191,100, 211,000, and 230,000 Btu/h respectively. The maximum number of connectable indoor units is 13, 16, 20, 26, 29, 32, 35, and 39 respectively.

Sync II 3O 230/208V 60 Hz models: ARUB076BT2, ARUB096BT2, ARUB115BT2, ARUB154BT2, ARUB173BT2, ARUB192BT2, ARUB211BT2, and ARUB230BT2 with nominally rated cooling capacities of 76,400, 95,900, 114,700, 152,900, 172,000, 191,000, 211,000, and 230,000 Btu/h respectively. The maximum number of connectable indoor units is 13, 16, 20, 26, 29, 32, 35, and 39 respectively.

Compatible Indoor Units for the Above-Listed Outdoor Units

Wall Mounted: ARNU073SEL2, ARNU093SEL2, ARNU123SEL2, ARNU153SEL2, ARNU183S5L2, and ARNU243S5L2 with nominally rated cooling capacities of 7,500, 9,600, 12,300, 15,400, 19,100, and 24,200 Btu/h respectively.

Art Cool Gallery: ARNU073SF*2, ARNU093SF*2, and ARNU123SF*2 with nominally rated cooling capacities of 7,500, 9,600, and 12,300 Btu/h respectively.

Art Cool Mirror: ARNU073SE*2, ARNU093SE*2, ARNU123SE*2, ARNU153SE*2, ARNU183S3*2, and ARNU243S3*2 with nominally rated cooling capacities of 7,500, 9,600, 12,300, 15,400, 19,100, and 24,200 Btu/h respectively.

4 Way Cassette: ARNU073TEC2, ARNU093TEC2, ARNU123TEC2, ARNU153TEC2, ARNU183TEC2, ARNU243TPC2, ARNU283TPC2, ARNU363TNC2, ARNU423TMC2, and ARNU483TMC2 with nominally rated cooling capacities of 7,500, 9,600, 12,300, 15,400, 19,100, 24,200, 28,000, 36,200, 42,000, and 48,100 Btu/h respectively.

2 Way Cassette: ARNU183TLC2 and ARNU243TLC2 with nominally rated capacities of 19,100 and 24,200 Btu/h respectively.

1 Way Cassette: ARNU073TJC2, ARNU093TJC2, and ARNU123TJC2 with nominally rated capacities of 7,500, 9,600, and 12,300 Btu/h respectively.

Ceiling Concealed Duct—Low Static: ARNU073B1G2, ARNU093B1G2, ARNU123B1G2, ARNU153B1G2, ARNU183B2G2, and ARNU243B2G2 with nominally rated capacities of 7,500, 9,600, 12,300, 15,400, 19,100, and 24,200 Btu/h respectively.

Ceiling Concealed Duct—Built-in: ARNU073B3G2, ARNU093B3G2, ARNU123B3G2, ARNU153B3G2, ARNU183B4G2, and ARNU243B4G2 with nominally rated capacities of 7,500, 9,600, 12,300, 15,400, 19,100, and 24,200 Btu/h respectively.

Ceiling Concealed Duct—High Static: ARNU073BHA2, ARNU093BHA2, ARNU123BHA2, ARNU153BHA2, ARNU183BHA2, ARNU243BHA2, ARNU283BGA2, ARNU363BGA2, ARNU423BGA2, ARNU483BRA2, URNU763B8A2, and URNU963B8A2 with nominally rated capacities of 7,500, 9,600, 12,300, 15,400, 19,100, 24,200, 28,000, 36,200, 42,000, 48,100, 76,400, and 95,500 Btu/h respectively.

Ceiling & Floor: ARNU093VEA2 and ARNU123VEA2 with nominally rated capacities of 9,600 and 12,300 Btu/h respectively.

Ceiling Suspended: ARNU183VJA2 and ARNU243VJA2 with nominally rated capacities of 19,100 and 24,200 Btu/h respectively.

Floor Standing with Case: ARNU073CEA2, ARNU093CEA2, ARNU123CEA2, ARNU153CEA2, ARNU183CFA2, and ARNU243CFA2 with nominally rated capacities of 7,500, 9,600, 12,300, 15,400, 19,100, and 24,200 Btu/h respectively.

Floor Standing without Case: ARNU073CEU2, ARNU093CEU2, ARNU123CEU2, ARNU153CEU2, ARNU183CFU2, and ARNU243CFU2 with nominally rated capacities of 7,500, 9,600, 12,300, 15,400, 19,100, and 24,200 Btu/h respectively.

Appendix B

Certification

This is to certify that LG Electronics, Inc. has sent by next day delivery a copy of its petition for waiver and application for interim waiver for LG Multi V multi-split air conditioning systems, known to LG, of domestically marketed units of the same product type (as listed the Energy Policy and Conservation Act, as amended, 42 U.S.C. 6311). The cover letter to each person states that the person may submit comments to DOE.

Attached are the names and addresses of each person to whom a copy of the petition and waiver was sent by next day delivery.

Certified by:

John I. Taylor,
Vice President, Government Relations,
LG Electronics USA, Inc.,
1750 K Street, NW.,
Washington, DC 20006,
Phone: 202–719–3490,
Fax: 847–941–8177,
E-mail: jtaylor@lge.com

Date: April 28, 2008

April 28, 2008
To Whom It May Concern:
Re: *LG Electronics, Inc. Petition for Waiver and Application for Interim Waiver; Opportunity for Comment*

This is to notify you by next day delivery of LG Electronics Inc.'s enclosed Petition for Waiver and Application for Interim Waiver of the United States Department of Energy (DOE) regulations on energy conservation test procedures. In accordance with DOE rules, we are also advising you of your opportunity to comment to DOE. The Assistant Secretary for Conservation and Renewable Energy will consider timely written comments.

Comments are to be submitted to: Assistant Secretary for Energy Efficiency and Renewable Energy, U.S. Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585–0107

Pursuant to DOE's rules, please provide us with a copy of any comments.

Sincerely,

John I. Taylor,
Vice President, Government Relations,
LG Electronics USA, Inc.,
1750 K Street, NW.,
Washington, DC 20006,
Phone: 202–719–3490,
Fax: 847–941–8177,
E-mail: jtaylor@lge.com

Daikin AC (Americas), Inc., 1645 Wallace Drive, Suite 110, Carrollton, TX 75006, *Attn:* Yoshinobu Inoue, President

Fujitsu General America, Inc., 353 Route 46 West, Fairfield, NJ 07004, *Attn:* Roy Kuczera, Senior Vice President of HVAC Sales, and Arturo Thur De Koos, Engineering & Technical Support

Mitsubishi Electric & Electronics USA, Inc., 4300 Lawrenceville-Suwanee Road, Suwanee, GA 30024, *Attn:* S. William Rau, Senior Vice President and General Manager, HVAC Advanced Products Division

Mitsubishi Heavy Industries Climate Control Inc., 3030 E. Victoria Street, Rancho Dominguez, CA 90221, *Attn:* Caesar Ceballos, Technical Support Manager

Samsung Air Conditioning, Samsung Electronics Products, LTD., 2865 Pellissier Pl., Whittier, CA 90601, *Attn:* John Miles, Director, Engineering & Technical Support

Sanyo Fisher (USA) Corp., 1690 Roberts Blvd., Suite 110, Kennesaw, GA 30144, *Attn:* Gary Nettinger, Vice President, Technical and Service

Air-Conditioning and Refrigeration Institute, 4100 North Fairfax Drive, Suite 200, Arlington, VA 22203, *Attn:* Stephen R. Yurek, Esq., President

[FR Doc. E9–10320 Filed 5–4–09; 8:45 am]

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DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

[Case No. RF–008]

Energy Conservation Program for Consumer Products: Decision and Order Granting a Waiver to Whirlpool Corporation From the Department of Energy Residential Refrigerator and Refrigerator-Freezer Test Procedure (Case No. RF–008)

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Decision and Order.

SUMMARY: DOE gives notice of the Decision and Order (Case No. RF–008) that grants to the Whirlpool Corporation (Whirlpool) a Waiver from the DOE electric refrigerator and refrigerator-freezer test procedure, for its product line containing relative humidity sensors and adaptive control anti-sweat heaters. Under today's Decision and Order, Whirlpool shall be required to test and rate its refrigerator-freezers with adaptive control anti-sweat heaters according to an alternate test procedure that takes this technology into account when measuring energy consumption.

DATES: This Decision and Order is effective May 5, 2009, and will remain in effect until the effective date of a DOE final rule prescribing an amended test procedure appropriate for the model series of Whirlpool refrigerator-freezers covered by this waiver.

FOR FURTHER INFORMATION CONTACT: Dr. Michael G. Raymond, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. *Telephone:* (202) 586–9611, *E-mail: AS_Waiver_Requests@ee.doe.gov.* Francine Pinto, or Michael Kido, U.S. Department of Energy, Office of General Counsel, Mail Stop GC–72, 1000 Independence Avenue, SW., Washington, DC 20585–0103, (202) 586–9507; *E-mail: Francine.Pinto@hq.doe.gov* or *Michael.Kido@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: In accordance with 10 CFR 430.27(l), DOE gives notice of the issuance of its Decision and Order as set forth below. The Decision and Order grants Whirlpool a Waiver from the applicable residential refrigerator and refrigerator-freezer test procedures, at 10 CFR Part 430 subpart B, appendix A1, for its product line of refrigerator-freezers with relative humidity sensors and adaptive control anti-sweat heaters, provided that Whirlpool tests and rates such products using the alternate test procedure described in this notice. Today's decision prohibits Whirlpool from making representations concerning the energy efficiency of these products unless such product has been tested in accordance with the DOE test procedure, consistent with the provisions and restrictions in the alternate test procedure set forth in the Decision and Order below, and such representation fairly discloses the results of such testing.[1] (42 U.S.C. 6293(c))

Issued in Washington, DC, on April 21, 2009.

Steven G. Chalk,

Principal Deputy Assistant Secretary, Energy Efficiency and Renewable Energy.

Decision and Order

In the Matter of: Whirlpool Corporation. (Case No. RF–008).

Background

Title III of the Energy Policy and Conservation Act (EPCA) sets forth a variety of provisions concerning energy efficiency. Part A [2] of Title III provides for the ''Energy Conservation Program for Consumer Products Other Than Automobiles.'' (42 U.S.C. 6291–6309) Part A includes definitions, test procedures, labeling provisions, energy conservation standards, and the authority to require information and reports from manufacturers. Further, Part A authorizes the Secretary of Energy to prescribe test procedures that are reasonably designed to produce results which measure energy efficiency, energy use, or estimated operating costs, and that are not unduly burdensome to conduct. (42 U.S.C. 6293(b)(3))

Today's notice involves residential products under Part A. Relevant to the current Petition for Waiver, the test procedure for residential electric refrigerator-freezers is contained in 10 CFR part 430, subpart B, Appendix A1.

DOE's regulations contain provisions allowing a person to seek a waiver from the test procedure requirements for covered consumer products, when the petitioner's basic model contains one or more design characteristics that prevent testing according to the prescribed test procedure, or when they may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 430.27(a)(1). Petitioners must include in their petition any alternate test procedures known to evaluate the basic model in a manner representative of its energy consumption characteristics. 10 CFR 430.27(b)(1)(iii).

The Assistant Secretary for Energy Efficiency and Renewable Energy (the Assistant Secretary) may grant a waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 430.27(l). In general, a waiver will remain in effect until final test procedure amendments that resolve the problem that is the subject of the waiver become effective. 10 CFR 430.27(m).

The waiver process also allows any interested person who has submitted a Petition for Waiver to file an Application for Interim Waiver of the applicable test procedure requirements. 10 CFR 430.27(a)(2). The Assistant Secretary will grant an Interim Waiver request if it is determined that the applicant will experience economic hardship if the Interim Waiver is denied, if it appears likely that the Petition for Waiver will be granted, and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination on the Petition for Waiver. 10 CFR 430.27(g).

On January 8, 2008, Whirlpool filed a Petition for Waiver from the test procedures which are applicable to its product line of refrigerator-freezers with relative humidity sensors and adaptive control anti-sweat heaters. The applicable test procedures are contained in 10 CFR Part 430, subpart B, appendix A1—Uniform Test Method for Measuring the Energy Consumption of Electric Refrigerators and Electric Refrigerator-Freezers. Because the existing test procedure under 10 CFR Part 430 takes neither ambient humidity nor adaptive technology into account, it does not accurately measure the energy consumption of Whirlpool's new refrigerator-freezers that feature humidity sensors and adaptive control anti-sweat heaters. Consequently, Whirlpool has submitted an alternate test to DOE for approval to ensure that it is correctly calculating the energy consumption of this new product line.

On July 10, 2008, DOE published Whirlpool's Petition for Waiver. 73 FR 39684. DOE did not receive any comments on the Whirlpool petition.

[1] Consistent with the statute, distributors, retailers, and private labelers are held to the same standard when making representations regarding the energy efficiency of these products. (42 U.S.C. 6293(c)).

[2] This part was originally titled Part B but it was redesignated Part A in the United States Code for editorial reasons.

Assertions and Determinations

Whirlpool's Petition for Waiver

On January 8, 2008, Whirlpool filed a Petition for Waiver from the test procedure applicable to residential electric refrigerators and refrigerator-freezers set forth in 10 CFR Part 430, Subpart B, Appendix A1, and subsequently modified its petition in April 2008.[3] Whirlpool filed its petition because it is designing new refrigerators and refrigerator-freezers that contain variable anti-sweat heater controls that detect a broad range of temperature and humidity conditions, and respond by activating adaptive heaters, as needed, to evaporate excess moisture. According to the petitioner, Whirlpool's technology is similar to that used by General Electric Company (GE) for its refrigerator-freezers, which were the subject of a Decision and Order published February 27, 2008. 73 FR 10425. Whirlpool seeks a waiver from the existing DOE test procedure applicable to refrigerators and refrigerator-freezers under 10 CFR Part 430 because it takes neither ambient humidity nor adaptive technology into account. Whirlpool stated that the DOE test procedure does not accurately measure the energy consumption of Whirlpool's new refrigerators and refrigerator-freezers that feature variable anti-sweat heater controls and adaptive heaters. Consequently, Whirlpool has submitted for DOE approval an alternate test procedure that would allow it to correctly calculate the energy consumption of this new product line.

Whirlpool requested that it be permitted to use an alternate test procedure that is the same as that DOE prescribed for GE refrigerators and refrigerator-freezers that are equipped with a similar technology. The alternate test procedure applicable to the Whirlpool and GE products simulates the energy used by the adaptive heaters in a typical consumer household, as explained in the GE Decision and Order referenced above. As DOE has stated in the past, it is in the public interest to have similar products tested and rated for energy consumption on a comparable basis.

Consultations With Other Agencies

DOE consulted with the Federal Trade Commission (FTC) staff concerning the Whirlpool Petition for waiver. The FTC staff did not have any objections to granting a waiver to Whirlpool.

Conclusion

After careful consideration of all the material that was submitted by Whirlpool and consultation with the FTC staff, it is ordered that:

(1) The ''Petition for Waiver'' submitted by Whirlpool Corporation (Case No. RF–008) is hereby granted as set forth in the paragraphs below.

(2) Whirlpool shall not be required to test or rate the following Whirlpool models[4] on the basis of the current test procedures contained in 10 CFR Part 430, Subpart B, Appendix A1, but shall be required to test and rate such products according to the alternate test procedure as set forth in paragraph (3) below:

MFI2569VE*
JFI2089A**
JFI2589A**
MFI2266AE*
MFI2067AE*
MFI2568AE*
596.7753*
AFI2538AE*
JF42REF**B0*
JF42PPF**B0*
JF42SEF**B0*
JF42CXF**B0*
KBFC42FS*0*
KBFO42FS*0*
KBFC42FT*0*
KBFO42FT*0*
MBF1956KE*
KBFS20ET*
KBFA20ER*
MBF2256KE*
MBF1956KE*

(3) Whirlpool shall be required to test the products listed in paragraph (2) above according to the test procedures for electric refrigerator-freezers prescribed by DOE at 10 CFR Part 430, Appendix A1, except that, for the Whirlpool products listed in paragraph (2) only:

(A) The following definition is added at the end of Section 1:

1.13 ''Variable anti-sweat heater control'' means an anti-sweat heater where power supplied to the device is determined by an operating condition variable(s) and/or ambient condition variable(s).

(B) Section 2.2 is revised to read as follows:

2.2 Operational conditions. The electric refrigerator or electric refrigerator-freezer shall be installed and its operating conditions maintained in accordance with HRF–1–1979, section 7.2 through section 7.4.3.3. except that the vertical ambient temperature gradient at locations 10 inches (25.4 cm) out from the centers of the two sides of the unit being tested is to be maintained during the test. Unless shields or baffles obstruct the area, the gradient is to be maintained from 2 inches (5.1 cm) above the floor or supporting platform to a height one foot (30.5 cm) above the unit under test. Defrost controls are to be operative. The anti-sweat heater switch is to be ''off'' during one test and ''on'' during the second test. In the case of an electric refrigerator-freezer equipped with variable anti-sweat heater control, the ''on'' test will be the result of the calculation described in 6.2.3. Other exceptions are noted in 2.3, 2.4, and 5.1 below.

(C) New section 6.2.3 is inserted after section 6.2.2.2.

6.2.3 Variable anti-sweat heater control test. The energy consumption of an electric refrigerator-freezer with a variable anti-sweat heater control in the ''on'' position (E_{on}), expressed in kilowatt-hours per day, shall be calculated equivalent to:

E_{ON} = E + (Heater Contribution)

Where E is determined by 6.2.1.1, 6.2.1.2, 6.2.2.1, or 6.2.2.2, whichever is appropriate, with the anti-sweat heater switch in the ''off'' position.

Heater Contribution = (Anti-sweat Heater Power × System-loss Factor) × (24 hrs/1 day) ×(1 kW/1000 W)

Where:

Anti-sweat Heater Power = A1 * (Heater Watts at 5%RH)
+ A2 * (Heater Watts at 15%RH)
+ A3 * (Heater Watts at 25%RH)
+ A4 * (Heater Watts at 35%RH)
+ A5 * (Heater Watts at 45%RH)
+ A6 * (Heater Watts at 55%RH)
+ A7 * (Heater Watts at 65%RH)
+ A8 * (Heater Watts at 75%RH)
+ A9 * (Heater Watts at 85%RH)
+ A10 * (Heater Watts at 95%RH)

Where A1–A10 are from the following table:

A1 = 0.034	A6 = 0.119
A2 = 0.211	A7 = 0.069
A3 = 0.204	A8 = 0.047
A4 = 0.166	A9 = 0.008
A5 = 0.126	A10 = 0.015

Heater Watts at a specific relative humidity = the nominal watts used by all heaters at that specific relative humidity, 72 °F ambient, and DOE reference temperatures of fresh food (FF) average temperature of 45 °F and freezer (FZ) average temperature of 5 °F.

System-loss Factor = 1.3

(4) Representations. Whirlpool may make representations about the energy use of its adaptive control anti-sweat heater refrigerator-freezer products, for compliance, marketing, or other purposes, only to the extent that such products have been tested in accordance with the provisions outlined above, and

[3] Whirlpool submitted a modified petition on April 30, 2008, which was amended solely to set forth the specific models for which the company is seeking a waiver. DOE is publishing Whirlpool's Petition for Waiver, as amended, for public comment.

[4] Whirlpool stated in its petition: ''The following bottom mounted freezer models with French doors are representative of similar models that will utilize this technology. These particular models do not use this technology at this time but as they are upgraded to add new features, or reach new energy levels this technology will be included.''

such representations fairly disclose the results of such testing.

(5) This waiver shall remain in effect from the date this Decision and Order is issued until DOE prescribes final test procedures appropriate to the above model series manufactured by Whirlpool.

(6) This waiver is conditioned upon the presumed validity of statements, representations, and documentary materials provided by the petitioner. This waiver may be revoked or modified at any time upon a determination that the factual basis underlying the Petition for Waiver is incorrect, or DOE determines that the results from the alternate test procedure are unrepresentative of the basic models' true energy consumption characteristics.

Issued in Washington, DC, on April 21, 2009.

Steven G. Chalk,

Principal Deputy Assistant Secretary, Energy Efficiency and Renewable Energy.

[FR Doc. E9–10321 Filed 5–4–09; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12589–001—CO]

Public Service Company of Colorado; Notice of Availability of Draft Environmental Assessment

April 28, 2009.

In accordance with the National Environmental Policy Act of 1969, as amended, and the Federal Energy Regulatory Commission's (Commission or FERC) regulations, 18 CFR part 380 (Order No. 486, 52 FR 47897), the Office of Energy Projects has reviewed the application for a new major license for the Tacoma Hydroelectric Project (FERC No. 12589), located on Cascade, Little Cascade and Elbert Creeks in San Juan and La Plata Counties, Colorado. The project currently occupies, in part, 233.4 acres of Federal land in the San Juan National Forest administered by the U.S. Forest Service.

Staff prepared a draft environmental assessment (EA) that analyzes the probable environmental effects of relicensing the project and concludes that relicensing the project, with appropriate staff-recommended environmental measures, would not constitute a major Federal action significantly affecting the quality of the human environment.

A copy of the EA is on file with the Commission and is available for public inspection. The EA may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access documents. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659.

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.

Comments on the EA should be filed within 30 days from the issuance date of this notice, and should be addressed to the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Room 1–A, Washington, DC 20426. Please affix ''Tacoma Hydroelectric Project No. 12589–001'' to all comments. Comments may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''eFiling'' link. For further information, contact David Turner at (202) 502–6091.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–10252 Filed 5–4–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER09–1028–000]

Coventa Hempstead Company; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

April 28, 2009.

This is a supplemental notice in the above-referenced proceeding of Coventa Hempstead Company's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is May 18, 2009.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–10251 Filed 5–4–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Western Area Power Administration

Post-2010 Resource Pool, Pick-Sloan Missouri Basin Program—Eastern Division

AGENCY: Western Area Power Administration, DOE.

ACTION: Notice of Final Procedures.

SUMMARY: Western Area Power Administration (Western), Upper Great Plains Region, a Federal power marketing agency of the Department of

Energy (DOE), hereby announces its Post-2010 Resource Pool Allocation Procedures. The Energy Planning and Management Program (Program) provides for establishing project-specific resource pools and allocating power from these pools to new preference customers and other appropriate purposes as determined by Western. Western, in accordance with the Program, is finalizing procedures to administer a Federal power resource pool increment of up to 1 percent (approximately 20 megawatts) of the long-term marketable resource of the Pick-Sloan Missouri Basin Program—Eastern Division (P–SMBP—ED) that will become available January 1, 2011 (Post-2010 Resource Pool). Western proposed procedures in the **Federal Register** on October 15, 2008 (73 FR 61109), and responses to public comments received pertaining to the proposed procedures are included in this notice. Western will publish a notice of proposed allocations in the **Federal Register** after the effective date of this notice.

DATES: The Post-2010 Resource Pool Allocation Procedures will become effective June 4, 2009.

ADDRESSES: Information regarding the Post-2010 Resource Pool Allocation Procedures, including comments, letters, and other supporting documents made or kept by Western for the purpose of developing the final procedures, are available for public inspection and copying at the Upper Great Plains Region, Western Area Power Administration, 2900 4th Avenue North, Billings, MT 59101–1266. Public comments are available for viewing at: *http://www.wapa.gov/ugp/Post2010/Post2010CmtLtr.htm.*

SUPPLEMENTARY INFORMATION: Western published the Final Rule for the Program (Final Rule) on October 20, 1995 (60 FR 54151). The Final Rule became effective on November 20, 1995. Subpart C–Power Marketing Initiative of the Program, Final Rule, 10 CFR part 905, provides for project-specific resource pools and allocations of power from these pools to eligible new preference customers and/or for other appropriate purposes as determined by Western. The additional resource pool increments shall be established by pro rata withdrawals, on 2 years' notice, from existing customers. Specifically, 10 CFR 905.32(b) provides:

> At two 5-year intervals after the effective date of the extension to existing customers, Western shall create a project-specific resource pool increment of up to an additional 1 percent of the long-term marketable resource under contract at the time. The size of the additional resource pool increment shall be determined by Western based on consideration of the actual fair-share needs of eligible new customers and other appropriate purposes.

Western held a public information and comment forum on November 20, 2008, to accept oral and written comments on the proposed procedures and call for applications. The formal comment period ended January 13, 2009. The Post-2010 Resource Pool Allocation Procedures in this **Federal Register** notice explain in detail how Western intends to implement Subpart C–Power Marketing Initiative of the Energy Planning and Management Program Final Rule in the P–SMBP—ED.

Response to Comments Regarding Post-2010 Resource Pool Allocation Procedures

Comments and Responses

Comment: Western received a comment stating that it should stay consistent with prior marketing initiatives and with the rules and regulations of the Program. The comment expressed concern that Western has been inconsistent in regard to whether Western allocates power based on an entity already having a Federal power commitment versus the entity already having an allocation of firm power from Western.

Response: Western agrees with the importance of acting consistently and in accordance with the P–SMBP—ED Final Post 1985 Marketing Plan (45 FR 71860, October 30, 1980) (Post-1985 Marketing Plan), the Program, and the Post-2000 and Post-2005 Marketing Initiatives. In response to public comments and to stay consistent with the Post-1985 Marketing Plan and the intent of the Program, General Eligibility Criterion C was clarified in the Notice of Final Procedures **Federal Register** (68 FR 67414, December 2, 2003), for the Post-2005 Resource Pool by adding ''or other firm Federal power commitment.'' New Western customers from the Post-2000 and Post-2005 Resource Pools were allocated power consistent with this clarification.

Comment: Western received a comment urging Western to consider giving allocations to cooperatives a higher priority than other applicants under the Post-2010 Resource Pool.

Response: The preference clause provides for public entities to be given preference over private entities in the marketing of Federal power. There are no preference entity applicants with a higher priority than another. Western will not provide a higher priority to one preference entity applicant over another in the Final Post-2010 Resource Pool Allocation Procedures.

Comment: Western received comments in support of an entity's application for power under the Post-2010 Resource Pool.

Response: All applications received by Western for an allocation of power from the Post-2010 Resource Pool will be considered in accordance with the Final Post-2010 Resource Pool Allocation Procedures.

Comment: Western received a comment that Criterion D of the General Eligibility Criteria does not accurately describe the prohibition of resale by a non-utility or a utility to a non-member per Western's General Power Contract Provisions. Resale by a non-utility or a utility to a non-member would be a violation of Western's General Power Contract Provisions; however Western does permit the sale of firm power to a utility's member systems in recognizing the structure of joint action agencies and rural electric generation and transmission cooperatives.

Response: Criterion D is one of several criteria intended for the purpose of determining general eligibility of the applicant and is not intended to fully describe resale. Western agrees that the prohibition of resale, by a non-utility or utility, is addressed in Western's General Power Contract Provisions which are required under the General Contract Principles, Principle E.

Comment: Western received a comment that contract provisions for new Post-2010 Resource Pool firm power customers should be identical to the terms and conditions of existing firm power customers and in considering applications and making new allocations, Western must act within existing laws and regulations. Also, if withdrawals are made for future resource pools, reductions should be applied to all firm power contract holders.

Response: Western agrees that any new allocation made from the Post-2010 Resource Pool must comply with existing laws, regulations, and guidelines, as well as contract terms and conditions applied to allocations made in previous marketing initiatives under the Program. There are no future resource pools for the Program in the P–SMBP—ED. Withdrawals for future resource pools are outside the scope of this process.

Comment: Western received a comment that in no event should Western use ''appropriate purposes'' to attempt to legislate new policy regarding eligibility requirements for receiving firm power allocations.

Response: Western is not proposing to use a share of the Post-2010 Resource Pool for other appropriate purposes.

Comment: Western received several comments pertaining to Western granting exceptions or waivers to various General Eligibility Criteria for individual applicants.

Response: If Western were to consider individual exceptions or waivers to the Post-2010 Allocation Procedures, all entities would need to be afforded the opportunity to submit new applications. Western would expect to receive many new applications with significant requests for granting individual waivers or exceptions. This process would undermine Program consistency, and may not be supportable by existing laws and regulations or the power available in the Post-2010 Resource Pool. Western will not grant exceptions or waivers to the Final Post-2010 Resource Pool Allocation Procedures in determining which entities are eligible for an allocation of power.

Final Post-2010 Resource Pool Allocation Procedures

I. Amount of Pool Resources

Western will allocate up to 1 percent (approximately 20 megawatts) of the P–SMBP—ED long-term firm hydroelectric resource available as of January 1, 2011, as firm power to eligible new preference customers. Firm power means capacity and associated energy allocated by Western and subject to the terms and conditions specified in the Western electric service contract.

II. General Eligibility Criteria

Western will apply the following General Eligibility Criteria to applicants seeking an allocation of firm power under the Post-2010 Resource Pool Allocation Procedures.

A. All qualified applicants must be preference entities as defined by section 9(c) of the Reclamation Project Act of 1939 (43 U.S.C. 485h(c)), as amended and supplemented.

B. All qualified applicants must be located within the currently established P–SMBP—ED marketing area.

C. All qualified applicants must not be currently receiving benefits, directly or indirectly, from a current P–SMBP—ED firm power allocation or other firm Federal power commitment. Qualified Native American applicants, who did not receive an allocation from the Post-2000 or Post-2005 Resource Pools, are not subject to this requirement.

D. Qualified utility and non-utility applicants must be able to use the firm power directly or be able to sell it directly to retail customers.

E. Qualified utility applicants that desire to purchase power from Western for resale to consumers, including cooperatives, municipalities, public utility districts, and public power districts must have met utility status by January 1, 2008. Utility status means the entity has responsibility to meet load growth, has a distribution system, and is ready, willing, and able to purchase Federal power from Western on a wholesale basis.

F. Qualified Native American applicants must be an Indian tribe as defined in the Indian Self Determination Act of 1975, 25 U.S.C. 450b, as amended.

III. General Allocation Criteria

Western will apply the following General Allocation Criteria to applicants seeking an allocation of firm power under the Post-2010 Resource Pool Allocation Procedures.

A. Allocations of firm power will be made in amounts as determined solely by Western in exercise of its discretion under Federal Reclamation Law.

B. An allottee will have the right to purchase such firm power only upon executing an electric service contract between Western and the allottee, and satisfying all conditions in that contract.

C. Firm power allocated under these procedures will be available only to new preference customers in the existing P–SMBP—ED marketing area. The marketing area of the P–SMBP—ED is Montana (east of the Continental Divide), all of North Dakota and South Dakota, Nebraska east of the 101° meridian, Iowa west of the 94½° meridian, and Minnesota west of a line on the 94½° meridian from the southern boundary of the state to the 46° parallel and then northwesterly to the northern boundary of the state at the 96½° meridian.

D. Allocations made to Native American tribes will be based on the actual load experienced in calendar year 2007. Western has the right to use estimated load values for calendar year 2007 should actual load data not be available. Western will adjust inconsistent estimates during the allocation process.

E. Allocations made to qualified utility and non-utility applicants will be based on the actual loads experienced in calendar year 2007. Western will apply the Post-1985 Marketing Plan and the Program criteria to these loads. Western will carry forward key principles and criteria established in the Post-2000 and Post-2005 Resource Pools, except as modified herein.

F. Energy provided with firm power will be based upon the customer's monthly system load pattern.

G. Any electric service contract offered to a new customer shall be executed by the customer within 6 months of a contract offer by Western, unless otherwise agreed to in writing by Western.

H. The resource pool will be dissolved subsequent to the closing date of the last qualified applicant to execute their respective firm electric service contract. Firm power not under contract will be used in accordance with the Program.

I. The minimum allocation shall be 100 kilowatts (kW).

J. The maximum allocation for qualified utility and non-utility applicants shall be 5,000 kW.

K. Contract rates of delivery shall be subject to adjustment in the future as provided for in the Program.

L. If unanticipated obstacles to the delivery of hydropower benefits to Native American tribes arise, Western retains the right to provide the economic benefits of its resources directly to these tribes.

IV. General Contract Principles

Western will apply the following General Contract Principles to all applicants receiving an allocation of firm power under the Post-2010 Resource Pool Allocation Procedures.

A. Western shall reserve the right to reduce a customer's summer season contract rate of delivery by up to 5 percent for new project pumping requirements, by giving a minimum of 5 years' written notice in advance of such action.

B. Western, at its discretion and sole determination, reserves the right to adjust the contract rate of delivery on 5 years' written notice in response to changes in hydrology and river operations. Any such adjustments shall only take place after a public process by Western.

C. Each allottee is ultimately responsible for obtaining its own third-party delivery arrangements, if necessary. Western may assist the allottee in obtaining third-party transmission arrangements for the delivery of firm power allocated under these procedures to new customers.

D. Contracts entered into under the Post-2010 Resource Pool Allocation Procedures shall provide for Western to furnish firm electric service effective from January 1, 2011, through December 31, 2020.

E. Contracts entered into as a result of these procedures shall incorporate Western's standard provisions for power

sales contracts, integrated resource planning, and the General Power Contract Provisions.

Post-2010 Resource Pool Procedures Requirements

Environmental Compliance

Western completed an Environmental Impact Statement on the Program (DOE/EIS–0812), pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321–4347 (2007), as amended and supplemented, (NEPA). The Record of Decision was published in the **Federal Register** on October 12, 1995 (60 FR 53181). Western's NEPA review assured all environmental effects related to these actions have been analyzed.

Dated: April 28, 2009.

Timothy J. Meeks,

Administrator.

[FR Doc. E9–10319 Filed 5–4–09; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8900–6]

Cross-Media Electronic Reporting Rule State Authorized Program Revision/Modification Approvals: State of Delaware

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's approval, under regulations for Cross-Media Electronic Reporting, of the State of Delaware's request to revise/modify programs to allow electronic reporting for certain of their EPA-authorized programs.

DATES: EPA's approval is effective May 5, 2009.

FOR FURTHER INFORMATION CONTACT: Evi Huffer, U.S. Environmental Protection Agency, Office of Environmental Information, Mail Stop 2823T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, (202) 566–1697, *huffer.evi@epa.gov,* or David Schwarz, U.S. Environmental Protection Agency, Office of Environmental Information, Mail Stop 2823T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, (202) 566–1704, *schwarz.david@epa.gov.*

SUPPLEMENTARY INFORMATION:

On October 13, 2005, the final Cross-Media Electronic Reporting Rule (CROMERR) was published in the **Federal Register** (70 FR 59848) and codified as part 3 of title 40 of the CFR. CROMERR establishes electronic reporting as an acceptable regulatory alternative to paper reporting and establishes requirements to assure that electronic documents are as legally dependable as their paper counterparts. Under subpart D of CROMERR, State, tribal or local government agencies that receive, or wish to begin receiving, electronic reports under their EPA-authorized programs must apply to EPA for a revision or modification of those programs and get EPA approval. Subpart D provides standards for such approvals based on consideration of the electronic document receiving systems that the state, tribe, or local government will use to implement the electronic reporting. Additionally, in 3.1000(b) through (e) of 40 CFR part 3, subpart D provides special procedures for program revisions and modifications to allow electronic reporting, to be used at the option of the State, tribe or local government in place of procedures available under existing program-specific authorization regulations. An application submitted under the subpart D procedures must show that the State, tribe or local government has sufficient legal authority to implement the electronic reporting components of the programs covered by the application and will use electronic document receiving systems that meet the applicable subpart D requirements.

On August 21, 2008, the State of Delaware Department of Natural Resources and Environmental Control (DEDNREC) submitted an application for their Online Reporting System (ORS) electronic document receiving system for revision or modification of EPA-authorized programs under 40 CFR parts 51, 60, 122, and 271. EPA reviewed DEDNREC's request to revise/modify their EPA-authorized programs and, based on this review, EPA determined that the application met the standards for approval of authorized program revisions/modifications set out in 40 CFR part 3, subpart D. In accordance with 40 CFR 3.1000(d), this notice of EPA's decision to approve DEDNREC's request for revision/modification to certain of their authorized programs is being published in the **Federal Register**.

Specifically, EPA has approved DEDNREC's request for revisions/modifications to the following of their authorized programs to allow electronic reporting under 40 CFR parts 51, 61, 122, 261–265:

- Part 51—Requirements for Preparation, Adoption, and Submittal of Implementation Plans;
- Part 60—Standards of Performance for New Stationary Sources;
- Part 123—National Pollutant Discharge Elimination System (NPDES) State Program Requirements; and
- Part 271—Requirements for Authorization of State Hazardous Waste Programs.

DEDNREC was notified of EPA's determination to approve its application with respect to the authorized programs listed above in a letter dated April 23, 2009.

Dated: April 23, 2009.

Lisa Schlosser,

Director, Office of Information Collection.

[FR Doc. E9–10332 Filed 5–4–09; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL MEDIATION AND CONCILIATION SERVICE

Labor-Management Cooperation Program Act of 1978 (Pub. L. 95–524)

AGENCY: Federal Mediation and Conciliation Service.

ACTION: Publication of Final Fiscal Year 2009 Program Guidelines/Application Solicitation for Labor-Management Committees.

SUMMARY: The Federal Mediation and Conciliation Service (FMCS) is publishing the final Fiscal Year 2009 Program Guidelines/Application Solicitation for the Labor-Management Cooperation Program. The program is supported by Federal funds authorized by the Labor-Management Cooperation Act of 1978, subject to annual appropriations. This Solicitation contains a change in the deadline for accepting applications.

The National Council of EEOC Locals No. 216 submitted a comment in response to the draft filing which was published in the **Federal Register** on March 20, 2009, [*Volume 74, Number 3 (Pages 11948–11952)*]. The Locals No. 216 has not applied for a grant because it was ineligible to do so under FMCS regulations *[FY2009 Program Guidelines/Application Solicitation for Labor Management Committees (Section (C) Eligibility, Page 9)].* Its comments involve that regulation. Locals No. 216 has requested in effect that FMCS allow Federal agencies to apply for an FMCS grant. We have carefully considered the comment, and understand that implementation of the change requested would increase the likelihood of grant acceptance for the Equal Employment Opportunity Commission (EEOC). However, FMCS is not able to adopt the requested changes due to OMB regulations *[OMB Circular A–102, Grants and Cooperative Agreements*

with States and Local Governments; OMB Circular A–110, Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Learning, Hospital, and other Non-profit Organizations; OMB Circular 123, Management's Responsibility for Internal Control] and the Labor Management Relations Act *[Sec. 203(e); Sec. 205A(a)(1)(A)(B)].* Grants are given to support the establishment and operation of joint labor-management committees comprised of employees and employers covered by a formal collective bargaining agreement in the private or public sectors under the Labor-Management Cooperation Act of 1978. Federal agencies are not eligible.

FMCS's core mission is building sound labor-management relationships. We encourage the National Council of EEOC Locals No. 216 in coordination with the EEOC, and other Federal agencies and collective bargaining representatives of their employees, to seek our no-charge assistance in Mediation, Training, and Facilitation services for employers and their unionized employees.

DATES: FMCS will accept applications beginning May 1, 2009, and continue to do so until August 15, 2009, or until all FY2009 grant funds are obligated. Awards will be made by September 30, 2009.

ADDRESSES: Michael Bartlett, Federal Register Liaison, Federal Mediation and Conciliation Service, 2100 K Street, NW., Washington, DC 20427. Comments may be submitted by fax at (202) 606–5345 or electronic mail (e-mail) to *mbartlett@fmcs.gov.*

FOR FURTHER INFORMATION CONTACT: Linda Stubbs, Grants Management Specialist, FMCS 2100 K Street, NW., Washington, DC 20427. Telephone number 202–606–8181, e-mail to *lstubbs@fmcs.gov* or fax at (202) 606–3434.

Federal Mediation Conciliation Service Labor-Management Cooperation Program; Application Solicitation for Labor-Management Committees FY2009

A. Introduction

The following is the final Solicitation for the Fiscal Year (FY) 2009 cycle of the Labor-Management Cooperation Program as it pertains to the support of labor-management committees. These guidelines represent the continuing efforts of the Federal Mediation and Conciliation Service to implement the provisions of the Labor-Management Cooperation Act of 1978, which was initially implemented in FY1981. The Act authorizes FMCS to provide assistance in the establishment and operation of company/plant, area, public sector, and industry-wide labor-management committees which:

(A) have been organized jointly by employers and labor organizations representing employees in that company/plant, area, government agency, or industry; and

(B) are established for the purpose of improving labor-management relationships, job security, and organizational effectiveness; enhancing economic development; or involving workers in decisions affecting their working lives, including improving communication with respect to subjects of mutual interest and concern.

The Program Description and other sections that follow, as well as a separately published FMCS Financial and Administrative Grants Manual, make up the basic guidelines, criteria, and program elements a potential applicant for assistance under this program must know in order to develop an application for funding consideration for either a company/plant, area-wide, industry, or public sector labor-management committee. Directions for obtaining an application kit may be found in Section H. A copy of the Labor-Management Cooperation Act of 1978, included in the application kit, should be reviewed in conjunction with this solicitation.

B. Program Description

Objectives

The Labor-Management Cooperation Act of 1978 identifies the following seven general areas for which financial assistance would be appropriate:

(1) To improve communication between representatives of labor and management;

(2) To provide workers and employers with opportunities to study and explore new and innovative joint approaches to achieving organizational effectiveness;

(3) To assist workers and employers in solving problems of mutual concern not susceptible to resolution within the collective bargaining process;

(4) To study and explore ways of eliminating potential problems which reduce the competitiveness and inhibit the economic development of the company/plant, area, or industry;

(5) To enhance the involvement of workers in making decisions that affect their working lives;

(6) To expand and improve working relationships between workers and managers; and

(7) To encourage free collective bargaining by establishing continuing mechanisms for communication between employers and their employees through Federal assistance in the formation and operation of labor-management committees.

The primary objective of this program is to encourage and support the establishment and operation of joint labor-management committees to carry out specific objectives that meet the aforementioned general criteria. The term ''labor'' refers to employees represented by a labor organization and covered by a formal collective bargaining agreement. These committees may be found at the plant (company), area, industry, or public sector levels.

A plant or company committee is generally characterized as restricted to one or more organizational or productive units operated by a single employer. An area committee is generally composed of multiple employers of diverse industries as well as multiple labor unions operating within and focusing upon a particular city, county, contiguous multicounty, or statewide jurisdiction.

An industry committee generally consists of a collection of agencies or enterprises and related labor union(s) producing a common product or service in the private sector on a local, state, regional, or nationwide level. A public sector committee consists of government employees and managers in one or more units of a local or state government, managers and employees of public institutions of higher education, or of employees and managers of public elementary and secondary schools. Those employees must be covered by a formal collective bargaining agreement or other enforceable labor-management agreement. In deciding whether an application is for an area or industry committee, consideration should be given to the above definitions as well as to the focus of the committee.

In FY2009, competition will be open to company/plant, area, private industry, and public sector committees. Special consideration will be given to committee applications involving innovative or unique efforts. All application budget requests should focus directly on supporting the committee. Applicants should avoid seeking funds for activities that are clearly available under other Federal programs (e.g., job training, mediation of contract disputes, etc.)

Required Program Elements

1. *Problem Statement*—The application should have numbered pages and discuss in detail what specific problem(s) face the company/plant, area, government, or industry and its workforce that will be addressed by the committee. Applicants must

document the problem(s) using as much relevant data as possible and discuss the full range of impacts these problem(s) could have or are having on the company/plant, government, area, or industry. An industrial or economic profile of the area and workforce might prove useful in explaining the problem(s). This section basically discusses *WHY* the effort is needed.

2. *Results or Benefits Expected*—By using specific goals and objectives, the application must discuss in detail *WHAT* the labor-management committee will accomplish during the life of the grant. Applications that promise to provide objectives *after* a grant is awarded will receive little or no credit in this area. While a goal of ''improving communication between employers and employees'' may suffice as one over-all goal of a project, the objectives must, whenever possible, be expressed in *specific* and *measurable* terms. Applicants should focus on the outcome, impacts or changes that the committee's efforts will have. Existing committees should focus on *expansion* efforts/results expected from FMCS funding. The goals, objectives, and projected impacts will become the foundation for future monitoring and evaluation efforts of the grantee, as well as the FMCS grants program.

3. *Approach*—This section of the application specifies *HOW* the goals and objectives will be accomplished. At a minimum, the following elements must be included in all grant applications:

(a) A discussion of the strategy the committee will employ to accomplish its goals and objectives;

(b) A listing, by name and title, of all existing or proposed members of the labor-management committee. The application should also offer a rationale for the selection of the committee members (e.g., members represent 70% of the area or company/plant workforce).

(c) A discussion of the number, type, and role of all committee staff persons. Include proposed position descriptions for all staff that will have to be hired as well as resumes for staff already on board; noting, that grant funds may not be used to *pay for existing employees;* an assurance that grant funds will not be used to pay for existing employees;

(d) In addressing the proposed approach, applicants must also present their justification as to why Federal funds are needed to implement the proposed approach;

(e) A statement of how often the committee will meet (we require meetings at least every other month) as well as any plans to form subordinate committees for particular purposes; and

(f) For applications from existing committees, a discussion of past efforts and accomplishments and how they would integrate with the proposed expanded effort.

4. *Major Milestones*—This section must include an implementation plan that indicates what major steps, operating activities, and objectives will be accomplished as well as a timetable for *WHEN* they will be finished. A milestone chart must be included that indicates what specific accomplishments (process and impact) will be completed by month over the life of the grant using ''month one'' as the start date. The accomplishment of these tasks and objectives, as well as problems and delays therein, will serve as the basis for quarterly progress reports to FMCS.

Applicants must prepare their budget narrative and milestone chart using a start date of ''month one'' and an end date of ''month twelve'' or ''month eighteen'', as appropriate. Thus, if applicant is seeking a twelve month grant, use figures reflecting month one through twelve. If applicant is seeking an eighteen month grant, use figures reflecting month one through eighteen. If the grant application is funded, FMCS will identify the start and end date of the grant on the Application for Federal Assistance (SF–424) form.

5. *Evaluation*—Applicants must provide for either an external evaluation or an internal assessment of the project's success in meeting its goals and objectives. An evaluation plan must be developed which briefly discusses what basic questions or issues the assessment will examine and what baseline data the committee staff already has or will gather for the assessment. This section should be written with the application's own goals and objectives clearly in mind and the impacts or changes that the effort is expected to cause.

6. *Letters of Commitment*—Applications must include current letters of commitment from *all* proposed or existing committee participants and chairpersons. These letters should indicate that the participants *support* the application and *will* attend all scheduled committee meetings. A blanket letter signed by a committee chairperson or other official on behalf of all members is not acceptable. We encourage the use of individual letters submitted on company or union letterhead represented by the individual. The letters should match the names provided under Section 3(b).

7. *Other Requirements*—Applicants are also responsible for the following:

(a) The submission of data indicating approximately how many employees will be covered or represented through the labor-management committee;

(b) From existing committees, a copy of the existing staffing levels, a copy of the by-laws (if any), a breakout of annual operating costs and identification of all sources and levels of current financial support;

(c) A detailed budget narrative that *clearly identifies* each line item and the estimated cost (a complete breakdown of each line item) based on policies and procedures contained in the FMCS Financial and Administrative Grants Manual;

(d) An assurance that the labor-management committee will not interfere with any collective bargaining agreements;

(e) An assurance that committee meetings will be held at least every other month and that written minutes of all committee meetings will be prepared and made available to FMCS; and

(f) An assurance that the maximum rate for an individual consultant paid from grant project can be no more than *$950* for an eight-hour-day. The day includes preparation, evaluation and travel time. Also, time and effort records must be maintained.

Selection Criteria

The following criteria will be used in the scoring and selection of applications for award:

(1) The extent to which the application has clearly identified the problems and justified the needs that the proposed project will address.

(2) The degree to which appropriate and *measurable* goals and objectives have been developed to address the problems/needs of the applicant.

(3) The feasibility of the approach proposed to attain the goals and objectives of the project and the perceived likelihood of accomplishing the intended project results. This section will also address the degree of innovativeness or uniqueness of the proposed effort.

(4) The appropriateness of committee membership and the degree of commitment of these individuals to the goals of the application as indicated in the letters of support.

(5) The feasibility and thoroughness of the implementation plan in specifying major milestones and target dates.

(6) The cost effectiveness and fiscal soundness of the application's budget request, as well as the application's feasibility vis-a-vis its goals and approach.

(7) The overall feasibility of the proposed project in light of all of the

information presented for consideration; and

(8) The value to the government of the application in light of the overall objectives of the Labor-Management Cooperation Act of 1978. This includes such factors as innovativeness, site location, cost, and other qualities that impact upon an applicant's value in encouraging the labor-management committee concept.

C. Eligibility

Eligible grantees include state and local units of government, labor-management committees (or a labor union, management association, or company on behalf of a committee that will be created through the grant), and certain third-party private non-profit entities on behalf of one or more committees to be created through the grant. Federal government agencies and their employees are not eligible.

Third-party private, non-profit entities that can document that a major purpose or function of their organization is the improvement of labor relations are eligible to apply. However, all funding must be directed to the functioning of the labor-management committee, and all requirements under Part B must be followed. Applications from third-party entities must document particularly strong support and participation from all labor and management parties with whom the applicant will be working. Applications from third-parties which do not directly support the operation of a new or expanded committee will not be deemed eligible, nor will applications signed by entities such as law firms or other third-parties failing to meet the above criteria.

Successful grantees *will* be bound by OMB Circular 110 i.e., ''contractors that develop or draft specifications, requirements, statements of work, and invitations for bids and/or requests for proposals shall be *excluded* (emphasis added from competing for such procurements).

Applicants who received funding under this program in the last 6 years for committee operations are not eligible to re-apply. The only exception will be made for grantees that seek funds on behalf of an entirely different committee whose efforts are totally outside of the scope of the original grant.

D. Allocations

The FY2009 appropriation for this program is $650,000. The Grant Review Board will review submissions and make recommendations for awards based on merit without regard to category.

In addition, to the competitive process identified in the preceding paragraph, FMCS will subject to funds availability, set aside a sum not to exceed thirty percent of its non-reserved appropriation to be awarded on a non-competitive basis. These funds will be used only to support applications that have been solicited by the Director of the Service and are not subject to the dollar range noted in Section E. All funds returned to FMCS from a competitive grant award may be awarded on a non-competitive basis in accordance with budgetary requirements.

E. Dollar Range and Length of Grants

Awards to expand existing or establish new labor-management committees will be for a period of up to 18 months. If successful progress is made during this initial budget period and all grant funds are not obligated within the specified period, these grants may, at the discretion of FMCS, be extended for up to six months.

The dollar range of awards is as follows:

—Up to $65,000 over a period of up to 18 months for company/plant committees or single department public sector applicants;

—Up to $125,000 per 18-month period for area, industry, and multi-department public sector committee applicants.

Additionally, FMCS reserves the right under special conditions to award supplemental (continuation) grants subject to funds availability. If awarded the additional amount is added to the current grant amount.

Applicants are reminded that these figures *represent maximum Federal funds only.* If total costs to accomplish the objectives of the application exceed the maximum allowable Federal funding level and its required grantee match, applicants may supplement these funds through voluntary contributions from other sources. Applicants are also strongly encouraged to consult with their local or regional FMCS field office to determine what kinds of training may be available at no cost before budgeting for such training in their applications. A list of our field leadership team and their phone numbers may be obtained from the FMCS Web site (*http://www.fmcs.gov*) under ''Who We Are''.

F. Cash Match Requirements and Cost Allowability

All applicants must provide at least 10 percent of the total allowable project costs in cash. Matching funds may come from state or local government sources or private sector contributions, but may not include other Federal funds. Funds generated by grant-supported efforts are considered ''project income,'' and may not be used for matching purposes.

It is the policy of this program to reject all requests for *indirect or overhead* costs as well as *''in-kind''* match contributions. In addition, grant funds must not be used to supplant private or local/state government funds currently spent for committee purposes. Funding requests from existing committees should focus entirely on the costs associated with the expansion efforts. Also, under no circumstances may business or labor officials participating on a labor-management committee be compensated out of grant funds for *time* spent at committee meetings or *time* spent in committee training sessions. Applicants generally will not be allowed to claim all or a portion of *existing* full-time staff as an expense or match contribution. For a more complete discussion of cost allowability, applicants are encouraged to consult the FY2009 FMCS Financial and Administrative Grants Manual, which will be included in the application kit.

G. Application Submission and Review Process

The Application for Federal Assistance (SF–424) form must be signed by *both* a labor and management representative. In lieu of signing the SF–424 form, representatives may type their name, title, and organization on plain bond paper with a signature line signed and dated, in accordance with block 18 of the SF–424 form. The individual listed as contact person in block 6 on the application form will generally be the only person with whom FMCS will communicate during the application review process. Please be sure that person is available once the application has been submitted. Additionally, it is the applicant's responsibility to notify FMCS in writing of any changes (e.g. if the address or contact person has changed).

We will accept applications beginning May 1, 2009, and continue to do so until August 15, 2009, or until all FY2009 grant funds are obligated. Awards will be made by September 30, 2009. Proposals may be accepted at any time between April 1, 2009 and August 15, 2009 but proposals received late in the cycle have a greater risk of not being funded due to unavailability of funds. Once your application has been received and acknowledged by FMCS, no applications or supplementary materials will be accepted thereafter. Applicants are highly advised to contact

the FMCS Grants Program prior to committing any resources to the preparation of a proposal.

An original application containing numbered pages, plus *three* copies, should be addressed to the Federal Mediation and Conciliation Service, Labor-Management Grants Program, 2100 K Street, NW., Washington, DC 20427. FMCS will not consider videotaped submissions or video attachments to submissions. FMCS will confirm receipt of all applications within 10 days thereof.

All eligible applications will be reviewed and scored by a Grant Review Board. The Board(s) will recommend selected applications for rejection or further funding consideration. The Director or his/her designee will finalize the scoring and selection process. All FY2009 grant applicants will be notified of results and *all* grant awards will be made by September 30, 2009. Applications that fail to adhere to eligibility or other major requirements will be administratively rejected by the Director or his/her designee.

H. Contact

Individuals wishing to apply for funding under this program should contact the Federal Mediation and Conciliation Service as soon as possible to obtain an application kit. Please consult the FMCS Web site (*http://www.fmcs.gov*) to download forms and information. These kits and additional information or clarification can be obtained free of charge by contacting the Federal Mediation and Conciliation Service, Labor-Management Grants Program, 2100 K Street, NW., Washington, DC 20427, Linda Stubbs at (202) 606–8181 (*lstubbs@fmcs.gov*). Please consult the FMCS Web site (*http://www.fmcs.gov*) to download forms and information.

Fran Leonard,

Chief Financial Officer, Federal Mediation and Conciliation Service.

[FR Doc. E9–10263 Filed 5–4–09; 8:45 am]

BILLING CODE 6732–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than May 20, 2009.

A. Federal Reserve Bank of Minneapolis (Jacqueline G. King, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. Donna L. Hanson, LeRoy, Minnesota; to acquire additional voting shares of First LeRoy Bancorporation, Inc., and thereby indirectly acquire additional voting shares of First State Bank Minnesota, both of LeRoy, Minnesota.

Board of Governors of the Federal Reserve System, April 30, 2009.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E9–10296 Filed 5–4–09; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than May 29, 2009.

A. Federal Reserve Bank of Kansas City (Todd Offenbacker, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. Citizens National Corporation, Wisner, Nebraska; to acquire up to an additional 2 percent, for a total of up to 32.7 percent, of the voting shares of Republic Corporation, and thereby indirectly acquire additional voting shares of United Republic Bank, both in Omaha, Nebraska.

Board of Governors of the Federal Reserve System, April 30, 2009.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E9–10297 Filed 5–4–09; 8:45 am]

BILLING CODE 6210–01–S

GENERAL SERVICES ADMINISTRATION

[OMB Control No. 3090–00XX]

Office of Citizen Services; Submission for OMB Review; Online Citizen Survey

AGENCY: Office of Citizen Services (OCS), General Services Administration (GSA).

ACTION: Notice of request for comments regarding a new OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the General Services Administration will be submitting to the Office of Management and Budget (OMB) a request to review and approve a new information collection requirement regarding an Online Citizen Survey.

Public comments are particularly invited on: Whether this collection of information is necessary and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate and based on valid assumptions and methodology; and ways to enhance the quality, utility, and clarity of the information to be collected.

DATES: Submit comments on or before: June 4, 2009.

FOR FURTHER INFORMATION CONTACT: Ms. Karen Trebon, Program Analyst, GSA OCS, 1800 F Street, NW., G 132, Washington, DC 20405, (202) 501–1802,

or *Karen.trebon@gsa.gov.* Please cite OMB Control No. 3090–XXXX, Online Citizen Survey.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the Regulatory Secretariat (VPR), General Services Administration, Room 4041, 1800 F Street, NW., Washington, DC 20405 and a copy to Ms. Karen Trebon, Program Analyst, GSA OCS, 1800 F Street, NW., G 132, Washington, DC 20405. Please cite OMB Control No. 3090–00XX, Online Citizen Survey, in all correspondence.

SUPPLEMENTARY INFORMATION:

A. Purpose

GSA's OCS currently provides service to citizens through the Internet at USA.gov, *GobiernoUSA.gov* and a family of consumer Web sites, through the phone at the National Contact Center 1–800–FED–INFO (1–800–333–4636), and through the distribution of print publications from the distribution center in Pueblo, CO. In addition, OCS communicates with the public through e-mail, an online blog at *http://www.govgab.gov* and online personal assistance.

Additional market research is needed on a continual basis to develop customer service strategies and determine the future directions for our multi-channel efforts at OCS and for those customer service activities in other government agencies. This is especially true in the current Web 2.0 environment where citizens, particularly in Generation X and Y, have different communication and collaboration styles and needs. Since citizens expect their government experience to be on par with those they have with the private sector, it is crucial to determine how best the government can serve citizens in a world with rapidly changing technologies. Surveys will include questions regarding communication channel preferences for how citizens contact government, service level expectations and interests in social media and Web 2.0 applications. OCS will share this information and collaborate with all government agencies that are working to improve citizen engagement and customer service.

OCS will work with a market research vendor that has an established panel of Americans who have agreed to take surveys for various clients. Therefore, OCS will not be collecting or storing any personally identifiable information. The vendor will also provide support in: (a) The development of questions; (b) building, programming and disseminating the online surveys; and (c) analyzing the responses. OCS will work with the contractor to ensure that the citizens recruited and surveyed represent a statistically valid demographic cross section of the American public.

B. Annual Reporting Burden

Respondents: 3,500.
Responses per respondent: .25.
Annual Responses: 14,000.
Hours per response: .33.
Total Burden hours: 4,620.
Obtaining copies of proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 3090–00XX, Online Citizen Survey, in all correspondence.

Dated: April 24, 2009.

Casey Coleman,

Chief Information Officer.

[FR Doc. E9–10352 Filed 5–4–09; 8:45 am]

BILLING CODE 6820–34–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier OS–0990–New]

Agency Information Collection Request; 60-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed information collection request for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *Sherette.funncoleman@hhs.gov,* or call the Reports Clearance Office on (202) 690–6162. Written comments and recommendations for the proposed information collections must be directed to the OS Paperwork Clearance Officer at the above e-mail address within 60-days.

Proposed Project: ''Evaluate the Advancing Systems Improvements to Support Targets for Healthy People 2010 (ASIST2010) Program''—OMB No. 0990–NEW—Office on Women's Health.

Abstract: The Office on Women's Health is collecting data from 13 funded grantees and clients participating in ASIST2010, a three-year, cooperative agreement program. ASIST2010 uses a public health systems approach to improve performance on two or more of seven Healthy People 2010 (HP 2010) objectives that target women and/or men in six focus areas—cancer, diabetes, heart disease and stroke, access to quality health services, educational and community-based programs, nutrition and overweight, and physical activity and fitness. The goals of the ASIST2010 program are to: (1) Provide additional support to existing public health systems/collaborative partnerships to enable them to add a gender focus to HP 2010 objectives that track the health status of women and/or men, to help improve gender outcome in the targeted population and/or geographic area; (2) improve surveillance/information systems that allow tracking of program progress on HP 2010 objectives at the grantee level; and (3) develop and implement a plan to sustain the program after OWH funding ends. The sites participating in the ASIST2010 program represent four academic medical centers, three community-based organizations, two hospitals, two state health departments, one county health department, and one foundation.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Grantee Staff	Grantee Telephone Interview Protocol (Round 1). Site Visit Advance Letter. Site Visit Protocol. Grantee Telephone Interview Protocol (Round 2).	65	3	1	195
Partner Organization Staff (In-person interviews).	Site Visit Protocol	52	1	1	52
Consumers (In-person interviews).	Site Visit Protocol	18	1	1	18
Consumers (Focus groups)	Focus Group Advance Letter Focus Group Flyer. Consumer Focus Group Discussion Guide.	40	1	1.5	60
Comparison Organization Staff (Telephone Interviews).	Advance Letter for Comparison Organizations Comparison Organization Interview Protocol	10	1	1	10
Total					335

Terry Nicolosi,

Office of the Secretary, Paperwork Reduction Act Reports Clearance Officer.

[FR Doc. E9–10315 Filed 5–4–09; 8:45 am]

BILLING CODE 4150–33–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration on Aging

Agency Information Collection Activities; Submission for OMB Review; Comment Request; State Annual Long-Term Care Ombudsman Report and Instructions

AGENCY: Administration on Aging, HHS.

ACTION: Notice.

SUMMARY: The Administration on Aging (AoA) is announcing that the proposed collection of information listed below has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Submit written comments on the collection of information by June 4, 2009.

ADDRESSES: Submit written comments on the collection of information by fax 202–395–6974 to the OMB Desk Officer for AoA, Office of Information and Regulatory Affairs, OMB.

FOR FURTHER INFORMATION CONTACT: Sue Wheaton, telephone: (202) 357–3587; *e-mail: sue.wheaton@aoa.gov*.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, AoA has submitted the following proposed collection of information to OMB for review and clearance.

States provide the following data and narrative information in the report:

1. Numbers and descriptions of cases filed and complaints made on behalf of long-term care facility residents to the statewide ombudsman program;
2. Major issues identified impacting on the quality of care and life of long-term care facility residents;
3. Statewide program operations; and
4. Ombudsman activities in addition to complaint investigation.

The report form and instructions have been in continuous use, with minor modifications, since they were first approved by OMB for the FY 1995 reporting period. This request is for approval to extend use of the current form and instructions, with no modifications, for three years, covering the FY 2009–2011 reporting periods.

The data collected on complaints filed with ombudsman programs and narrative on long-term care issues provide information to Centers for Medicare and Medicaid Services and others on patterns of concerns and major long-term care issues affecting residents of long-term care facilities. Both the complaint and program data collected assist the states and local ombudsman programs in planning strategies and activities, providing training and technical assistance and developing performance measures.

A reporting form and instructions may be viewed in the ombudsman section of the AoA Web site, *http://www.aoa.gov*.

AoA estimates the burden of this collection and entering the report information as follows: Approximately 10,310 hours, with 52 State Agencies on Aging responding annually.

Dated: April 28, 2009.

Edwin L. Walker,

Acting Assistant Secretary for Aging.

[FR Doc. E9–10305 Filed 5–4–09; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Mentoring Children of Prisoners Relationship Quality Survey.

OMB No.: 0970–0308.

Description: The Promoting Safe and Stable Families Amendments of 2001 (Pub. L. 107–133) amended Title IV–B of the Social Security Act (42 U.S.C. 629–629e) to provide funding for nonprofit agencies that recruit, screen, train, and support mentors for children with an incarcerated parent or parents. The Family and Youth Services Bureau (FYSB) of the Administration for Children and Families, United States Department of Health and Human Services, administers the Monitoring Children of Prisoners (MCP) program. The MCP program creates lasting, high-quality one-to-one mentoring relationships that provide young people with caring adult role models. The quality of these relationships is an important indicator of success in mentoring programs. Previous research has shown an association between high-quality mentoring relationships and positive changes in youth behavior associated with positive youth benefits, such as improved school attendance,

reductions in risk behavior, and other benefits.

The Relationship Quality Instrument consists of 15 rigorously field-tested questions about the relationship, plus several questions that establish context (age, gender, duration of relationship and frequency of contacts, etc.). The answers to the questions help assess how satisfied the youth (mentee) is with the relationship; whether the mentee is happy in the relationship; whether the mentee trusts the mentor; and whether the mentor has helped the mentee to cope with problems. Researchers in the field of mentoring have tested and validated the questions.

FYSB requires grantees receiving funding to provide information that can be used to evaluate outcomes for participating children. FYSB will use the information provided by the instrument to assure effective service delivery and program management and to guide the development of national monitoring and technical assistance systems. Finally, FYSB will use data from this collection for reporting program outcomes to Congress in the FY 2006 Performance Report during the budget process and as the basis for outcome evaluation of the program over the long term.

Rhodes J., Reddy, R., Roffman, J., and Grossman J.B. (March, 2005). Promoting Successful Youth Mentoring Relationships: A Preliminary Screening Questionnaire. The Journal of Primary Prevention, 26:2, 147–167.

Respondents: Public, community- and faith-based organizations receiving funding to implement the MCP program.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Relationship Quality Instrument for Mentoring Children of Prisoners Program	215	1	116	24,940

Estimated Total Annual Burden Hours: 24,940.

Additional Information

Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, *Attn:* ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. *E-mail address: infocollection@acf.hhs.gov.*

OMB Comment

OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project. *Fax:* 202–395–7245. *Attn:* Desk Officer for the Administration for Children and Families.

Dated: April 29, 2009.

Janean Chambers,

Reports Clearance Officer.

[FR Doc. E9–10205 Filed 5–4–09; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Master Plan for Rocky Mountain Laboratories Record of Decision

ACTION: Notice.

SUMMARY: The National Institutes of Health (NIH), an operating division of the Department of Health and Human Services (HHS), has decided, after completion of a Final Environmental Impact Statement (FEIS) and a thorough consideration of the public comments on the Draft EIS and the Final EIS, to implement the Proposed Action, which is identified as the Preferred Alternative in the FEIS. This action involves the establishment of a long-range physical Master Plan for Rocky Mountain Laboratories (RML) in Hamilton, Montana to guide future development of the campus. This alternative accounts for potential growth in RML personnel, possible land acquisitions, and consequent construction of new administrative and research-related space over the 20-year planning period.

FOR FURTHER INFORMATION CONTACT: Valerie Nottingham, Chief of the Environmental Quality Branch, Division of Environmental Protection, Office of Research Facilities Development and Operations, NIH, Building 13, Room 2S11, 9000 Rockville Pike, Bethesda, MD 20892, Fax 301–480–8056, e-mail *nihnepa@mail.nih.gov.*

SUPPLEMENTARY INFORMATION:

Decision

After careful review of the environmental consequences in the FEIS for the Master Plan, Rocky Mountain Laboratories, and consideration of public comment throughout the NEPA process, the NIH has decided to implement the Proposed Action, described below as the Selected Alternative.

Selected Alternative

The Selected Alternative is intended to be a strategic tool for the efficient allocation of campus resources, the orderly accommodation of future growth, and the creation of an environment, which is both functionally and aesthetically conducive to accomplishing the RML mission. The Selected Alternative will provide a guide for the reasoned and orderly development of the RML campus, one that values and builds on existing resources, corrects current deficiencies and meets changing needs through new construction or renovations. The plan sets forth implementation priorities and a logical sequencing of planned development.

The Selected Alternative involves the establishment of a long-range physical Master Plan for RML. This alternative covers a 20-year planning period, with reviews every 5 years to ensure that the plan continues to address planning and development related issues affecting the campus. The alternative addresses the future development of the RML site, including placement of future construction; vehicular and pedestrian circulation on and off-campus; parking within the property boundaries; open

space in and around the campus; required setbacks; historic properties; natural and scenic resources; noise; and lighting. This alternative accounts for potential growth in RML personnel, possible land acquisitions, and consequent construction of new administrative, research, and support space over the planning period. Future construction on the site could include such facilities as new animal holding, research laboratories, and support facilities. All future construction and renovation projects are contingent on programmatic need and funding.

NIH will continue to develop RML to accommodate NIH's and NIAID's research needs and required programmatic requirements consistent with the commitment to maintain the ''campus'' character of the site. The alternative advances these objectives by programming and locating future RML growth so that local services and utilities are available to support growth and establishing development guidelines for future changes to the site that ensure that, as the campus grows, new development would be responsive to the context of adjacent neighborhoods or developments.

Under the Selected Alternative, RML population is anticipated to grow in the next 20 years to a total campus population of 427. The primary growth at the campus would be in intramural research personnel and the administrative and facility staff to support them.

Alternatives Considered

The Proposed Action Alternative, Capacity Growth Alternative and No Action Alternative were the three alternatives analyzed in the FEIS. Each addresses the future development of the RML site, including placement of future construction; vehicular and pedestrian circulation on and off-campus; parking within the property boundaries; open space in and around the campus; required setbacks; historic properties; natural and scenic resources; noise; and lighting. They account for potential growth in RML personnel, possible land acquisitions, and consequent construction of space over the planning period. Future construction on the site could include such facilities as new animal holding, research laboratories, and support facilities.

Factors Involved in the Decision

HHS requires that NIH facilities have a Master Plan; however, there currently is no official Master Plan for the RML campus. In addition, factors such as the construction of Building 28, associated established physical security requirements, concerns in the Hamilton area about growth, and increased interest within the local community regarding activities on the RML campus have made clear the need for greater coordinated development of the campus. In order to accomplish the NIH mission, NIH has decided to prepare updated long-range facilities plans for all its campuses, including RML, to address issues of facility requirements, prudent land use, and orderly future development.

The Master Plan contains information and recommendations to guide development of individual projects on the site. It also serves as a means of informing city and county officials and utilities of future RML development plans so they can anticipate and plan for the potential effects of RML proposals on their respective systems.

Resources Impacts

The FEIS describes potential environmental effects of the Selected Alternative. These potential effects are documented in Chapter 3 of the Final EIS. Any potential adverse environmental effects will be avoided or mitigated through design elements, procedures, and compliance with regulatory and NIH requirements. Potential impacts on air quality are all within government standards (federal, state, and local). NIH does not expect any long-term negative effects on the environment or on the citizens of Hamilton from planned construction and operations at RML.

Summary of Impacts

The following is a summary of potential impacts resulting from the Selected Alternative that the NIH considered when making its decision. No adverse cumulative effects were identified during the NEPA process. Likewise, no unavoidable or adverse impacts from implementation of the Selected Alternative were found. The Selected Alternative will be beneficial to the long-term productivity of the national and world health communities by providing improved biomedical research facilities in which scientists can investigate human disease and disorders. Biomedical research conducted at the RML facility will have the potential to advance techniques in disease prevention, develop disease immunizations, and prepare defenses against naturally emerging and re-emerging diseases. Additionally, the local community will benefit from increased employment opportunities and new income generating activities.

Housing

RML is located in a residential area of Hamilton. Temporary impacts during construction are expected to have a minimal effect on the existing residential neighborhoods. The Selected Alternative will not have a significant, long-term impact on the housing supply in the area.

Education

The current public school capacity in Hamilton would be adequate to accommodate the expected minimal growth caused by the Selected Alternative.

Transportation

The development of the RML campus would produce increased traffic volumes on the area's roadways. The first ten years (beginning in 2005) would show the greatest increase in demand on the neighboring streets; in 20 years, there would be a total increase of 252 weekday trips. For Hamilton, this increase in weekday trips is still relatively small in comparison with the increase in background traffic for the collector routes in Hamilton as stated in the Hamilton Transportation Plan 2002.

Security

In conjunction with the planned expansion of the campus, a new expanded perimeter fence will be built. The perimeter security fence will have staffed and monitored entrance gates and/or turnstiles to provide controlled access into the campus. Additional openings in the perimeter fence, beyond those planned, potentially tax personnel resources and physical security. All new construction must comply with the *NIH Physical Security Design Guidelines* to ensure the safety of persons and research. Visitors would continue to be screened in the Visitor Center and deliveries would be screened in the Shipping and Receiving Building.

Employment

If the Selected Alternative is fully implemented, up to 77 new employees over the current (2008) 350 employees would be hired.

Environmental Justice

The areas of potential effect for environmental justice are neighborhoods and populations adjacent to the Project area. Five steps are used to determine environmental justice issues: (1) Identify minority and low-income populations in the area affected by the Project; (2) consider relevant public health data and industry data regarding multiple and cumulative exposure of minority and low-income

populations to human health or environmental hazards; (3) recognize interrelated cultural, social, occupational, historical, and economic factors that could amplify environmental effects of the Project; (4) develop effective public participation strategies that overcome linguistic, cultural, institutional, geographic, and other barriers; and (5) assure meaningful community representation. Low-income population refers to a community in which 25 percent or more of the population is characterized as living in poverty, as determined by statistical poverty thresholds used by the federal government. The area of potential effect does not have minority or low-income populations that fulfill the first step, In the absence of potentially affected low-income or minority populations in the affected area, the Selected Alternative will not have a disparate impact on any Environmental Justice populations.

Visual Quality

All new development follows the orthogonal grid initially generated by the Historic Core and subsequent Buildings 13, 25, and 28. This pattern is continued and built on with the placement of new buildings. Advantages of developing the campus on a grid system include ease of integration with existing orthogonally oriented structures, efficiency of land use, economical integration with, and extension of, the utility distribution system, and the acknowledgment and further establishment of a clearly defined pattern to guide future growth.

Noise

RML has established self-imposed Noise Criteria to limit the amount of noise at the campus boundaries. RML also has a program specifically focused on reducing noise and ensuring that the campus is in compliance with the Noise Criteria. Each new project has a noise analysis as part of the design to show that the new project would keep the campus in compliance with noise standards. After each project is complete, the noise levels are measured to ensure that the requirements have been met. As a new project progresses, RML would identify potential noise problems in the design phase, and determine what, if any, noise control measures would be implemented to meet the RML Campus Noise Criteria.

Air Quality

Gaseous and particulate emissions are generated during normal operations at RML. The new lab and animal space and additional waste produced by campus activities under the Selected Alternative result in increased direct impacts. Research personnel also will generate medical waste. Increases in incinerator, boiler, and generator emissions would be monitored under conditions of the RML air quality permits and all air quality would be within Montana DEQ and EPA acceptable limits

Water/Wastewater Supply

Monthly average per gross square foot (gsf) water usage rates for each building type at RML were multiplied by the gross square footage in the implementation projection to estimate future water usage. Based on these projections, water use would increase 89 percent over the 20-year planning period from the 37.4 millions gallons/year measured inflow to the campus in 2007/2008. Increased water consumption by RML would contribute to increased municipal supply demands by the City of Hamilton Department of Public Works (CHDPW), although the increases are not expected to exceed the capability of the system. Federal mandates to cut water consumption would have the effect of reducing consumption in the long-term. Campus expansion would be coordinated with the implementation of the RML Environmental Management System that is in place. In an effort to minimize waste and conserve resources, RML has formed a Water Management Group that evaluates campus water consumption and develops ways to increase water use efficiency.

As Hamilton is a rapidly growing area, the city utility infrastructure is in the process of being updated and expanded and would not be negatively impacted by the future RML expansion described in the Selected Alternative. The CHDPW Wastewater Treatment Plant (WWTP) is operating at or near capacity. To meet increased solids storage and handling and to increase throughput, the CHDPW is planning a facilities expansion. Increased wastewater discharge from RML campus growth plans would compound the CHDPW shortcomings with respect to increased throughput (and possible solid storage) until the facility expansion is realized; however, the WWTP upgrades are scheduled prior to major additions. The indirect consequence of wastewater discharge from the RML facility to the CHDPW is that it will contribute to an increased total maximum daily load from the WWTP; however, campus growth at RML is not expected to result in any decrease in effluent water quality.

Historic Resources

The actions proposed by the Selected Alternative would have no adverse effect on the RML Historic District.

Practicable Means To Avoid or Minimize Potential Environmental Harm From the Selected Alternative

All practicable means to avoid or minimize adverse environmental effects from the Selected Alternative have been identified and incorporated into the action. The proposed Master Plan construction will be subject to the existing RML pollution prevention, waste management, and safety, security, and emergency response procedures as well as existing environmental permits. Best management practices, spill prevention and control, and stormwater management plans will be followed to appropriately address the construction and operation of the new Master Plan development and comply with applicable regulatory and NIH requirements. No additional mitigation measures have been identified.

Pollution Prevention

Air quality permit standards will be met, as will all federal, state, and local requirements to protect the environment and public health. RML would continue to operate under Montana Department of Environmental Quality (DEQ) permit 2991–04 and EPA Title V Operating Permit #OP2991–00, and would comply with all applicable traps, ambient standards and meet the provisions of ARM Title 17. Montana DEQ would continue to monitor activities at RML to ensure compliance with applicable air quality regulations. The NIH will develop a stormwater pollution prevention plan (SWPPP) for construction projects over one acre and acquiring the proper Montana DEQ permits. Appropriate BMPs for sediment control during construction activities would include practices such as installing silt fences, or creating sediment.

Monitoring and Enforcement Program

The NIH will develop a monitoring and enforcement program to ensure that all practicable mitigation measures developed for activities under the Selected Alternative are fully implemented. The mitigation measures covered by the monitoring and enforcement program will include the Noise Criteria and air quality permits described above.

Conclusion

Based upon review and careful consideration, the NIH has decided to implement the Selected Alternative as

the long-range physical Master Plan for Rocky Mountain Laboratories in Hamilton, Montana. The decision accounts for potential growth in RML personnel, possible land acquisitions, and consequent construction of new administrative and research space over the 20-year planning period.

The decision was based upon review and careful consideration of the impacts identified in the FEIS and public comments received throughout the NEPA process.

Dated: April 28, 2009.

Daniel G. Wheeland,

Director, Office of Research Facilities Development and Operations, National Institutes of Health.

[FR Doc. E9–10290 Filed 5–4–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, Public Health Service, HHS.

ACTION: Notice.

SUMMARY: The inventions listed below are owned by an agency of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of Federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

ADDRESSES: Licensing information and copies of the U.S. patent applications listed below may be obtained by writing to the indicated licensing contact at the Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804; telephone: 301/496–7057; fax: 301/402–0220. A signed Confidential Disclosure Agreement will be required to receive copies of the patent applications.

Ratio Based Biomarkers for the Prediction of Cancer Survival

Description of Technology: The AKT pathway plays a key role in the regulation of cellular survival, apoptosis, and protein translation and has been shown to have prognostic significance in a number of cancers. Recently, the inventors have identified several functions of the AKT pathway in certain cancers, such as extrahepatic cholangiocarcinoma (EHCC).

This technology describes compositions, methods and kits for identifying, characterizing biomolecules expressed in a sample that are associated with the presence, the development, or progression of cancer. Utilizing multiplex tissue immunoblotting, the inventors have demonstrated that PTEN expression, PTEN/p-AKT ratios, and PTEN/p-mTOR ratios can predict the survival of cancer patients. These biomarkers may provide useful diagnostic information for cancer patients as well as identify patients appropriate for mTOR analog-based chemotherapy or agents directed against AKT.

Applications

- Diagnostic and Prognostic tool to detect the presence of cancer and predict the relative cancer survival rate for a subject with cancer.
- Method of identifying patients appropriate for therapies targeted to the AKT pathway.
- A kit for detecting cancer associated proteins in a sample.

Development Status: Pre-clinical stage of development.

Market: Extrahepatic cholangiocarcinoma (EHCC) is a malignant neoplasm of biliary tract epithelia, and constitutes approximately 80–90% of all cholangiocarcinomas. Surgical resection is the mainstay of treatment, but results in only an approximately 20% 5-year survival rate. Neoadjuvant therapies, including chemotherapy, radiation therapy, and photodynamic therapy have also failed to show significant survival benefit, thus emphasizing the need for prognostic and predictive biomarkers.

Inventors: Stephen M. Hewitt and Joon-Yong Chung (NCI).

Publications

1. JY Chung *et al.* The expression of phospho-AKT, phospho-mTOR, and PTEN in extrahepatic cholangiocarcinoma. Clin Cancer Res. 2009 Jan 15;15(2):660–667.

2. JY Chung *et al.* Transfer and multiplex immunoblotting of a paraffin embedded tissue. Proteomics 2006 Feb;6(3):767–774.

3. JY Chung *et al.* A multiplex tissue immunoblotting assay for proteomic profiling: a pilot study of the normal to tumor transition of esophageal squamous cell carcinoma. Cancer Epidemiol Biomarkers Prev. 2006 Jul;15(7):1403–1408.

Patent Status: U.S. Provisional Application No. 61/114,501 filed January 14, 2009 (HHS Reference No. E–025–2009/0–US–01).

Licensing Status: Available for licensing.

Licensing Contact: Whitney A. Hastings; 301–451–7337; *hastingw@mail.nih.gov.*

Modulating Expression of the Metastasis Suppressor MxA

Description of Technology: The invention discloses compounds that could be used to inhibit metastases. The compounds of the current invention were discovered by high-throughput screening of a novel cell line engineered with a MxA reporter. The compounds could be used to treat metastatic cancers including prostate and melanomas by increasing MxA expression.

MxA expression reduces cell motility and metastases in a mouse model. Cells expressing MxA produced smaller tumors in engrafted mice compared to controls. When injected into mouse spleens, cells expressing MxA showed a significantly delayed metastasis, and the mice survived significantly longer than controls. Expression of MxA reduced cellular motility of prostate cancer cell lines in vitro and reduced cellular motility and invasiveness of the highly metastatic melanoma cell line LOX. In addition to the use of the instant MxA compounds as antimetastatic agents, MxA is a known effective anti-viral agent and the MxA-inducing compounds could be used to treat infections sensitive to the antiviral activity of MxA, which potentially include myxovirus-associated disease.

Applications

- Treatment or prevention of cancers using MxA-targeted small molecule therapeutics.
- MxA diagnostic to identify metastatic potential in tumor biopsies.
- Treatment or prevention of a myxovirus-associated infection, including seasonal and avian flu, using MxA-inducing small molecule therapeutics.

Development Status: Identifying lead compounds for clinical development using structure-activity relationship (SAR) analysis.

Inventors: Jane B. Trepel *et al.* (NCI).

Publications

1. JF Mushinski, P Nguyen, LM Stevens, C Khanna, S Lee, EJ Chung, MJ Lee, YS Kim, WM Linehan, MA Horisberger, JB Trepel. Inhibition of tumor cell motility by the interferon-inducible GTPase MxA. J Biol Chem. 2009 Mar 18; online publication ahead of print.

2. G Athauda, A Giubellino, JA Coleman, C Horak, PS Steeg, MJ Lee, J Trepel, J Wimberly, J Sun, A Coxon, TL Burgess, DP Bottaro. c-Met ectodomain shedding rate correlates with malignant potential. Clin Cancer Res. 2006 Jul 15;12(14 Pt 1):4154–4162.

Patent Status: U.S. Patent Application No. 11/663,936 filed March 27, 2007 (HHS Reference No. E–257–2004/0–US–06) and foreign counterparts.

Licensing Status: Available for licensing.

Licensing Contact: Whitney A. Hastings; 301–451–7337; *hastingw@mail.nih.gov.*

Collaborative Research Opportunity: The National Cancer Institute, Medical Oncology Branch, is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize this technology. Please contact John D. Hewes, Ph.D. at 301–435–3121 or *hewesj@mail.nih.gov* for more information.

Targeted Recombinant Adenoviral Vectors

Description of Technology: The current invention embodies recombinant adenoviral vectors for use in targeted gene transfer. The method by which these vectors are generated involves no molecular modifications to the adenovirus genome, and allows for the production of vectors targeted specifically to virtually any cell line of choice. Specifically, the vectors are generated by directly linking biotin to the capsid of adenovirus particles. The particles are then treated with streptavidin and subsequently incubated with a biotinylated targeting moiety which is capable of recognizing a specific marker which is expressed on the surface of selected cells. The resulting adenoviral vectors are useful for gene transfer, and can be targeted to virtually any cell type of interest via incubation with a specific targeting moiety.

To date, the inventors have demonstrated that these vectors can be specifically directed to target and infect hematopoietic cell lines which display the c-kit receptor, and are capable of achieving high levels of gene expression in these cell lines. Also, these vectors can be specifically directed to cell surface markers such as CD34, CD44 and others through antibodies directly attached to the biotynilated adenoviral vectors. Such gene transfer represents a gene therapy approach upon which the development of specific therapies against a broad range of diseases may be based, including immunodeficiency diseases, blood cell disorders, and various cancers.

Applications

- Adenovirus with gene plus Biotinylation kit with strepavidin with ligand or antibody for gene of interest
- Biotin linking kits with methods for use

Development Status: Delivery of the biotinylated recombinant adenoviral vector in vitro for use in targeted gene transfer.

Inventors: Jonathan Keller *et al.* (NCI).

Publications

1. JS Smith, JR Keller, NC Lohrey, CS McCauslin, M Ortiz, K Cowan, SE Spence. Redirected infection of directly biotinylated recombinant adenovirus vectors through cell surface receptors and antigens. Proc Natl Acad Sci U S A. 1999 Aug 3;96(16):8855–8860.

2. S Ponnazhagan, G Mahendra, S Kumar, JA Thompson, M Castillas Jr. Conjugate-based targeting of recombinant adeno-associated virus type 2 vectors by using avidin-linked ligands. J Virol. 2002 Dec;76(24):12900–12907.

3. M Brandon Parrott, KE Adams, GT Mercier, H Mok, SK Campos, MA Barry. Metabolically biotinylated adenovirus for cell targeting, ligand screening, and vector purification. Mol Ther. 2003 Oct;8(4):688–700.

Patent Status

- U.S. Patent 6,555,367 issued April 29, 2003 (HHS Reference No. E–193–1997/0–US–03).
- U.S. Patent Application Publication No. US2003/0175973, published September 18, 2003 (HHS Reference No. E–193–1997/0–US–04).

Licensing Status: Available for licensing.

Licensing Contact: Whitney A. Hastings; 301–451–7337; *hastingw@mail.nih.gov.*

Dated: April 27, 2009.

Richard U. Rodriguez,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. E9–10300 Filed 5–4–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

National Center for Injury Prevention and Control, Initial Review Group, (NCIPC, IRG)

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC), announces the following meeting of the aforementioned review group:

Times and Date: 12:30 p.m.–1 p.m., May 20, 2009 (Open). 1 p.m.–3 p.m., May 20, 2009 (Closed).

Place: Teleconference, Toll Free: 888–793–2154.

Participant Passcode: 4424802.

Status: Portions of the meetings will be closed to the public in accordance with provisions set forth in Section 552b(c)(4) and (6), Title 5, U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Section 10(d) of Public Law 92–463.

Purpose: This group is charged with providing advice and guidance to the Secretary, Department of Health and Human Services, and the Director, CDC, concerning the scientific and technical merit of grant and cooperative agreement applications received from academic institutions and other public and private profit and nonprofit organizations, including State and local government agencies, to conduct specific injury research that focuses on prevention and control.

Matters to be Discussed: The meeting will include the review, discussion, and evaluation of individual research cooperative agreement applications submitted in response to Fiscal Year 2009 Requests for Applications related to the following individual research announcement: RFA–EH–09–002 ''Program to Expand State Public Health Laboratory Capacity for Newborn Bloodspot Screening (U01)''.

Agenda items are subject to change as priorities dictate.

Contact Person for More Information: Jane Suen, Dr.P.H., M.S., NCIPC, CDC, 4770 Buford Highway, NE., Mailstop F–62, Atlanta, Georgia 30341, *Telephone:* (770) 488–4281.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: April 24, 2009.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. E9–10292 Filed 5–4–09; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel; Training Grants.

Date: June 5, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, Bethesda, MD 20814.

Contact Person: Brian R Pike, PhD, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN18, Bethesda, MD 20892, 301–594–3907, *pikbr@mail.nih.gov.* (Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: April 28, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–10256 Filed 5–4–09; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0664]

Oncologic Drugs Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Oncologic Drugs Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the agency on FDA's regulatory issues.

Date and Time: The meeting will be held on May 29, 2009, from 8 a.m. to 12:30 p.m.

Location: Rosen Shingle Creek, Panzacola Ballroom, 9939 Universal Boulevard, Orlando, FL 32819. The hotel telephone number is 866–996–9939.

Contact Person: Nicole Vesely, Center for Drug Evaluation and Research (HFD–21), Food and Drug Administration, 5600 Fishers Lane (for express delivery, 5630 Fishers Lane, rm. 1093), Rockville, MD 20857, 301–827–6793, FAX: 301–827–6776, e-mail: *nicole.vesely@fda.hhs.gov*, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 3014512542. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

Agenda: On May 29, 2009, the committee will discuss the biologics license application (BLA) 125326, proposed trade name ARZERRA (ofatumumab), GlaxoSmithKline, for the proposed indication of treatment of patients with chronic lymphocytic leukemia who have received prior therapy.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/ohrms/dockets/ac/acmenu.htm*, click on the year 2009 and scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before May 15, 2009. Oral presentations from the public will be scheduled between approximately 10:30 a.m. to 11:30 a.m. Those desiring to make formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before May 7, 2009. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by May 8, 2009.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Nicole Vesely at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/oc/advisory/default.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: April 28, 2009.

Randall W. Lutter,

Deputy Commissioner for Policy.

[FR Doc. E9–10349 Filed 5–4–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), 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: Musculoskeletal, Oral and Skin Sciences Integrated Review Group Skeletal Biology Development and Disease Study Section.
Date: June 1–2, 2009.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Hilton Alexandria Old Town, 1767 King Street, Alexandria, VA 22314.
Contact Person: Priscilla B. Chen, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4104, MSC 7814, Bethesda, MD 20892. (301) 435–1787. *chenp@csr.nih.gov.*

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group, Pregnancy and Neonatology Study Section.
Date: June 1–2, 2009.
Time: 8 a.m. to 6 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: Michael Knecht, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6176, MSC 7892, Bethesda, MD 20892. (301) 435–1046. *knechtm@csr.nih.gov.*

Name of Committee: Vascular and Hematology Integrated Review Group Atherosclerosis and Inflammation of the Cardiovascular System Study Section.
Date: June 2–3, 2009.
Time: 8 a.m. to 3 p.m.
Agenda: To review and evaluate grant applications.
Place: Mayflower Park Hotel, 405 Oliver Way, Seattle, WA 98101.
Contact Person: Larry Pinkus, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4132, MSC 7802, Bethesda, MD 20892. (301) 435–1214. *pinkusl@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Vision Sciences and Technology.
Date: June 2–3, 2009.
Time: 8 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: George Ann McKie, DVM, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1124, MSC 7846, Bethesda, MD 20892. 301–435–1049. *mckiegeo@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel PAR.
Date: June 2, 2009.
Time: 2 p.m. to 6 p.m.
Agenda: To review and evaluate grant applications.
Place: Hilton Washington DC/Silver Spring, 8727 Colesville Road, Silver Spring, MD 20910.
Contact Person: Eileen W. Bradley, DSC, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5100, MSC 7854, Bethesda, MD 20892. (301) 435–1179. *bradleye@csr.nih.gov.*

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group Biological Rhythms and Sleep Study Section.
Date: June 3, 2009.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Brookshire Suites, 120 E. Lombard Street, Baltimore, MD 21202.
Contact Person: Michael Selmanoff, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1208, MSC 7844, Bethesda, MD 20892. 301–435–1119. *mselmanoff@csr.nih.gov.*

Name of Committee: Cardiovascular and Respiratory Sciences Integrated Review Group Lung Cellular, Molecular, and Immunobiology Study Section.
Date: June 3–4, 2009.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Admiral Fell Inn, 888 South Broadway, Baltimore, MD 21231.
Contact Person: George M. Barnas, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2180, MSC 7818, Bethesda, MD 20892. 301–435–0696. *barnasg@csr.nih.gov.*

Name of Committee: Bioengineering Sciences & Technologies Integrated Review Group Gene and Drug Delivery Systems Study Section.
Date: June 3–4, 2009.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Hotel Lombardy, 2019 Pennsylvania Avenue, NW., Washington, DC 20006.
Contact Person: Amy L. Rubinstein, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Rm 5152 MSC 7844, Bethesda, MD 20892. 301–435–1159. *rubinsteinal@csr.nih.gov.*

Name of Committee: Infectious Diseases and Microbiology Integrated Review Group Vector Biology Study Section.
Date: June 3, 2009.
Time: 8:30 a.m. to 6 p.m.
Agenda: To review and evaluate grant applications.
Place: Hilton Washington DC/Rockville, 1750 Rockville Pike, Rockville, MD 20852.
Contact Person: Liangbiao Zheng, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3214, MSC 7808, Bethesda, MD 20892. 301–402–5671. *zhengli@csr.nih.gov.*

Name of Committee: Emerging Technologies and Training Neurosciences Integrated Review Group Neurotechnology Study Section.
Date: June 4–5, 2009.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Melrose Hotel, 2430 Pennsylvania Avenue, NW., Washington, DC 20037.
Contact Person: Robert C. Elliott, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3130, MSC 7850, Bethesda, MD 20892. 301–435–3009. *elliotro@csr.nih.gov.*

Name of Committee: Risk, Prevention and Health Behavior Integrated Review Group Psychosocial Development, Risk and Prevention Study Section.
Date: June 4–5, 2009.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Avenue Hotel Chicago, 160 E. Huron Street, Chicago, IL 60611.
Contact Person: Anna L. Riley, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3114, MSC 7759, Bethesda, MD 20892. 301–435–2889. *rileyann@csr.nih.gov.*

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group Neuroendocrinology, Neuroimmunology, and Behavior Study Section.
Date: June 4–5, 2009.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Brookshire Suites, 120 E. Lombard Street, Baltimore, MD 21202.
Contact Person: Michael Selmanoff, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3134, MSC 7844, Bethesda, MD 20892. 301–435–1119. *mselmanoff@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Pathophysiological Basis of Mental Disorders and Addictions: Quorum.
Date: June 4–5, 2009.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: The Fairmont Washington, DC, 2401 M Street, NW., Washington, DC 20037.
Contact Person: Boris P. Sokolov, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5217A, MSC 7846, Bethesda, MD 20892. 301–435–1197. *bsokolov@csr.nih.gov.*

Name of Committee: Biobehavioral and Behavioral Processes Integrated Review Group Adult Psychopathology and Disorders of Aging Study Section.
Date: June 4–5, 2009.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Allerton Hotel Chicago, 701 North Michigan Avenue, Chicago, IL 60611.
Contact Person: Estina E. Thompson, PhD., MPH, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3178,

MSC 7848, Bethesda, MD 20892. 301–496–5749. *thompsone@maii.nih.gov.*

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group Neurobiology of Motivated Behavior Study Section.

Date: June 4–5, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: One Washington Circle Hotel, One Washington Circle, NW., Washington, DC 20037.

Contact Person: Edwin C. Clayton, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5095C, MSC 7844, Bethesda, MD 20892. (301) 402–1304. *claytone@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Cardiac Hypertrophy.

Date: June 4, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Maqsood A. Wani, DVM, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2114, MSC 7814, Bethesda, MD 20892. 301–435–2270. *wanimaqs@csr.nih.gov.*

Name of Committee: Cell Biology Integrated Review Group Membrane Biology and Protein Processing Study Section.

Date: June 4–5, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Rouge Hotel, 1315 16th Street, NW., Washington, DC 20036.

Contact Person: Janet M. Larkin, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1102, MSC 7840, Bethesda, MD 20892. 310–435–1026. *larkinja@csr.nih.gov.*

Name of Committee: Cell Biology Integrated Review Group Intercellular Interactions Study Section.

Date: June 4–5, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Legacy Hotel, 1775 Rockville Pike, Rockville, MD 20852.

Contact Person: David Balasundaram, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5189, MSC 7840, Bethesda, MD 20892. 301–435–1022. *balasundaramd@csr.nih.gov.*

Name of Committee: Vascular and Hematology Integrated Review Group Hematopoiesis Study Section.

Date: June 4–5, 2009.

Time: 8 a.m. to 1 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: Manjit Hanspal, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4138, MSC 7804, Bethesda, MD 20892. 301–435–1195. *hanspalm@csr.nih.gov.*

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group Clinical Neuroplasticity and Neurotransmitters Study Section.

Date: June 4–5, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Melrose Hotel, 2430 Pennsylvania Avenue, NW., Washington, DC 20037.

Contact Person: Suzan Nadi, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5217B, MSC 7846, Bethesda, MD 20892. 301–435–1259. *nadis@csr.nih.gov.*

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group Neurotoxicology and Alcohol Study Section.

Date: June 4–5, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Four Points by Sheraton, 1201 K Street, NW., Washington, DC 20005.

Contact Person: Brian Hoshaw, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5181, MSC 7844, Bethesda, MD 20892. 301–435–1033. *hoshawb@csr.nih.gov.*

Name of Committee: Biology of Development and Aging Integrated Review Group Development—1 Study Section.

Date: June 4–5, 2009.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: The River Inn, 924 25th Street, NW., Washington, DC 20037.

Contact Person: Cathy Wedeen, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3213, MSC 7808, Bethesda, MD 20892. 301–435–1191. *wedeenc@csr.nih.gov.*

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group Clinical and Integrative Diabetes and Obesity Study Section.

Date: June 4–5, 2009.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites New Orleans—Convention Center, 315 Julia Street, New Orleans, LA 70130.

Contact Person: Nancy Sheard, SCD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6046–E, MSC 7892, Bethesda, MD 20892. (301) 435–1154. *sheardn@csr.nih.gov.*

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group Cellular Aspects of Diabetes and Obesity Study Section.

Date: June 4–5, 2009.

Time: 8 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites New Orleans—Convention Center, 315 Julia Street, New Orleans, LA 70130.

Contact Person: Ann A. Jerkins, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6154, MSC 7892, Bethesda, MD 20892. 301–435–4514. *jerkinsa@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Systemic Injury by Environmental Exposure.

Date: June 4–5, 2009.

Time: 8 a.m. to 12 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: Patricia Greenwel, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2178, MSC 7818, Bethesda, MD 20892. 301–435–1169. *greenwep@csr.nih.gov.*

Name of Committee: Risk, Prevention and Health Behavior Integrated Review Group Social Psychology, Personality and Interpersonal Processes Study Section.

Date: June 4–5, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Mayflower Park Hotel, 405 Olive Way, Seattle, WA 98101.

Contact Person: Michael Micklin, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3136, MSC 7759, Bethesda, MD 20892. (301) 435–1258. *micklinm@csr.nih.gov.*

Name of Committee: Cardiovascular and Respiratory Sciences Integrated Review Group Respiratory Integrative Biology and Translational Research Study Section.

Date: June 4–5, 2009.

Time: 8:30 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: Warwick Seattle Hotel, 401 Lenora Street, Seattle, WA 98121.

Contact Person: Everett E. Sinnett, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2178, MSC 7818, Bethesda, MD 20892. (301) 435–1016. *sinnett@nih.gov.*

Name of Committee: Healthcare Delivery and Methodologies Community Influences on Health Behavior.

Date: June 4–5, 2009.

Time: 8:30 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: Ellen K. Schwartz, EDD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3168,

MSC 7770, Bethesda, MD 20892. (301) 435–0681. *schwarte@csr.nih.gov.*

Name of Committee: Biobehavioral and Behavioral Processes Integrated Review Group Cognition and Perception Study Section.

Date: June 4–5, 2009.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Renaissance M Street Hotel, 1143 New Hampshire Avenue, NW., Washington, DC 20037.

Contact Person: Cheri Wiggs, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3180, MSC 7848, Bethesda, MD 20892. (301) 435–1261. *wiggsc@csr.nihgov.*

Name of Committee: Infectious Diseases and Microbiology Integrated Review Group Virology—A Study Section.

Date: June 4–5, 2009.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda Downtown, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Joanna M. Pyper, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3198, MSC 7808, Bethesda, MD 20892. (301) 435–1151. *pyperj@csr.nih.gov.*

Name of Committee: Bioengineering Sciences & Technologies Integrated Review Group Instrumentation and Systems Development Study Section.

Date: June 4–5, 2009.

Time: 8:30 a.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Crowne Plaza Dulles Airport Hotel, 2200 Centreville Road, Herndon, VA 20170.

Contact Person: Marc Rigas, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5158, MSC 7849, Bethesda, MD 20892. (301) 402–1074. *rigasm@mail.nih.gov.*

Name of Committee: Infectious Diseases and Microbiology Integrated Review Group Pathogenic Eukaryotes Study Section.

Date: June 4–5, 2009.

Time: 8:30 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Georgetown, 2101 Wisconsin Avenue, NW., Washington, DC 20007.

Contact Person: Tera Bounds, DVM, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3198, MSC 7808, Bethesda, MD 20892. (301) 435–2306, *boundst@csr.nih.gov.*

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group Genomics, Computational Biology and Technology Study Section.

Date: June 4–5, 2009.

Time: 8:30 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Churchill Hotel, 1914 Connecticut Avenue, NW., Washington, DC 20009.

Contact Person: Barbara J. Thomas, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2218, MSC 7890, Bethesda, MD 20892. (301) 435–0603. *bthomas@csr.nih.gov.*

Name of Committee: Healthcare Delivery and Methodologies Community-Level Health Promotion Study Section.

Date: June 4–5, 2009.

Time: 9 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Madison A. Loews Hotel, 1177 15th Street, NW., Washington, DC 20005.

Contact Person: William N. Elwood, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3162, MSC 7770, Bethesda, MD 20892. (301) 435–1503. *elwoodwi@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel Member Conflicts in Biological Chemistry and Macromolecular Biophysics.

Date: June 4–5, 2009.

Time: 11 a.m. to 10 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Donald L. Schneider, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5160, MSC 7842, Bethesda, MD 20892. (301) 435–1727. *schneidd@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: April 27, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–10255 Filed 5–4–09; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

National Vaccine Injury Compensation Program; List of Petitions Received

AGENCY: Health Resources and Services Administration, HHS.

ACTION: Notice.

SUMMARY: The Health Resources and Services Administration (HRSA) is publishing this notice of petitions received under the National Vaccine Injury Compensation Program (''the Program''), as required by Section 2112(b)(2) of the Public Health Service (PHS) Act, as amended. While the Secretary of Health and Human Services is named as the respondent in all proceedings brought by the filing of petitions for compensation under the Program, the United States Court of Federal Claims is charged by statute with responsibility for considering and acting upon the petitions.

FOR FURTHER INFORMATION CONTACT: For information about requirements for filing petitions, and the Program in general, contact the Clerk, United States Court of Federal Claims, 717 Madison Place, NW., Washington, DC 20005, (202) 357–6400. For information on HRSA's role in the Program, contact the Director, National Vaccine Injury Compensation Program, 5600 Fishers Lane, Room 11C–26, Rockville, MD 20857; (301) 443–6593.

SUPPLEMENTARY INFORMATION: The Program provides a system of no-fault compensation for certain individuals who have been injured by specified childhood vaccines. Subtitle 2 of Title XXI of the PHS Act, 42 U.S.C. 300aa–10 *et seq.*, provides that those seeking compensation are to file a petition with the U.S. Court of Federal Claims and to serve a copy of the petition on the Secretary of Health and Human Services, who is named as the respondent in each proceeding. The Secretary has delegated his responsibility under the Program to HRSA. The Court is directed by statute to appoint special masters who take evidence, conduct hearings as appropriate, and make initial decisions as to eligibility for, and amount of, compensation.

A petition may be filed with respect to injuries, disabilities, illnesses, conditions, and deaths resulting from vaccines described in the Vaccine Injury Table (the Table) set forth at Section 2114 of the PHS Act or as set forth at 42 CFR 100.3, as applicable. This Table lists for each covered childhood vaccine the conditions which may lead to compensation and, for each condition, the time period for occurrence of the first symptom or manifestation of onset or of significant aggravation after vaccine administration. Compensation may also be awarded for conditions not listed in the Table and for conditions that are manifested outside the time periods specified in the Table, but only if the petitioner shows that the condition was caused by one of the listed vaccines.

Section 2112(b)(2) of the PHS Act, 42 U.S.C. 300aa–12(b)(2), requires that the Secretary publish in the **Federal Register** a notice of each petition filed.

Set forth below is a list of petitions received by HRSA on July 2, 2008, through September 30, 2008.

Section 2112(b)(2) also provides that the special master ''shall afford all interested persons an opportunity to submit relevant, written information'' relating to the following:

1. The existence of evidence ''that there is not a preponderance of the evidence that the illness, disability, injury, condition, or death described in the petition is due to factors unrelated to the administration of the vaccine described in the petition,'' and

2. Any allegation in a petition that the petitioner either:

(a) ''Sustained, or had significantly aggravated, any illness, disability, injury, or condition not set forth in the Table but which was caused by'' one of the vaccines referred to in the Table, or

(b) ''Sustained, or had significantly aggravated, any illness, disability, injury, or condition set forth in the Vaccine Injury Table the first symptom or manifestation of the onset or significant aggravation of which did not occur within the time period set forth in the Table but which was caused by a vaccine'' referred to in the Table.

This notice will also serve as the special master's invitation to all interested persons to submit written information relevant to the issues described above in the case of the petitions listed below. Any person choosing to do so should file an original and three (3) copies of the information with the Clerk of the U.S. Court of Federal Claims at the address listed above (under the heading ''For Further Information Contact''), with a copy to HRSA addressed to Director, Division of Vaccine Injury Compensation Program, Healthcare Systems Bureau, 5600 Fishers Lane, Room 11C–26, Rockville, MD 20857. The Court's caption (*Petitioner's Name* v. *Secretary of Health and Human Services*) and the docket number assigned to the petition should be used as the caption for the written submission. Chapter 35 of title 44, United States Code, related to paperwork reduction, does not apply to information required for purposes of carrying out the Program.

List of Petitions

1. Bahji Amelia Adams on behalf of Alexander Garrett George, Smirna, Georgia, Court of Federal Claims Number 08–0127V
2. Crystal and Brock Engler on behalf of Hayden Engler, Paducah, Kentucky, Court of Federal Claims Number 08–0483V
3. Gary Ray, Neah Bay, Washington, Court of Federal Claims Number 08–0484V
4. Frances Hendrix, Helena, Montana, Court of Federal Claims Number 08–0485V
5. Danielle Walker Smith on behalf of Walker John Smith, Deceased Greer, South Carolina, Court of Federal Claims Number 08–0486V
6. Koren McKenzie on behalf of Ethan John, Garden City, New York, Court of Federal Claims Number 08–0489V
7. Michelle and Thomas Harhai on behalf of Kyan Harhai, York, Pennsylvania, Court of Federal Claims Number 08–0490V
8. Nidhi Malhotra and Sharad Chopra on behalf of Tanishq Chopra, Parsippany, New Jersey, Court of Federal Claims Number 08–0491V
9. Enid Figueroa-Viera, Auburndale, Florida, Court of Federal Claims Number 08–0493V
10. Marion and Leslie Metcalf on behalf of Mark Metcalf, Advance, North Carolina, Court of Federal Claims Number 08–0494V
11. Kay and Brad Nordgren on behalf of Riley Nordgren, Eden Prairie, California, Court of Federal Claims Number 08–0495V
12. Tammy Renee and David Lewis Conner on behalf of Savanah Nicole Conner, Davenport, Iowa, Court of Federal Claims Number 08–0496V
13. Maria and Amado Santiago on behalf of Jonah Santiago, Corpus Christie, Texas, Court of Federal Claims Number 08–0502V
14. Erica and Robert Vernacchio on behalf of Leo Vernacchio, North Wales, Pennsylvania, Court of Federal Claims Number 08–0504V
15. Ledawn and Lance Youngclaus on behalf of Measure Scott Youngclaus, Phoenix, Arizona, Court of Federal Claims Number 08–0505V
16. Angela and Raymond Parente on behalf of Frank Parente, Debary, Florida, Court of Federal Claims Number 08–0506V
17. Patricia and George Fabre on behalf of Geoffrey Luke Fabre, Reston, Virginia, Court of Federal Claims Number 08–0507V
18. Mallie Thomas on behalf of Chase Knox Thomas, Birmingham, Alabama, Court of Federal Claims Number 08–0508V
19. Stephanie and John Hemenway on behalf of Andrew Hemenway, Washington, DC, Court of Federal Claims Number 08–0509V
20. Lisa and Raymond Kiley on behalf of Brandon Kiley, Millville, New Jersey, Court of Federal Claims Number 08–0510V
21. Mason Souza, Aloonolin, Illinois, Court of Federal Claims Number 08–0517V
22. Dawn Brucher on behalf of Tyler Brucher, Mesa, Arizona, Court of Federal Claims Number 08–0518V
23. Kimi and Val Gunn on behalf of Hunter Gunn, Irving, Texas, Court of Federal Claims Number 08–0519V
24. Clayton Brown, Riverhead, New York, Court of Federal Claims Number 08–0520V
25. Jill and Craig Campbell on behalf of Craig Campbell, III, Key Largo, Florida, Court of Federal Claims Number 08–0521V
26. Karen and Robert Vitulich on behalf of Chase Vitulich, North Wales, Pennsylvania, Court of Federal Claims Number 08–0522V
27. Kathie and Barry Hagewood on behalf of Chloe Jane Hagewood, Dickson, Tennessee, Court of Federal Claims Number 08–0523V
28. Susan Whittenburg on behalf of Sason M'sus Whittenburg, Fredericksburg, Virginia, Court of Federal Claims Number 08–0524V
29. Kristina and Diego Escutia on behalf of Brooke Escutia, Aliso Viejo, California, Court of Federal Claims Number 08–0525V
30. Gretchen and Tom Jacobs on behalf of Ava Lauren Jacobs, Scottsdale, Arizona, Court of Federal Claims Number 08–0526V
31. Lisa Colin and William Martin on behalf of Andrew Martin, Scarsdale, New York, Court of Federal Claims Number 08–0527V
32. Kristina and Christopher Vasquez on behalf of Reina Vasquez, Miami, Florida, Court of Federal Claims Number 08–0528V
33. Heidi and Daniel Bonaroti on behalf of Benjamin Bonaroti, Phoenix, Arizona, Court of Federal Claims Number 08–0529V
34. Denise Santillan on behalf of Emilio Santillan, Bakersfield, California, Court of Federal Claims Number 08–0532V
35. Karen and Austin Carter on behalf of Austin Carter, Jr., Macon, Georgia, Court of Federal Claims Number 08–0535V
36. Sharron and Joshua Philip Orme on behalf of Jarryn Elizabeth Orme, Muncie, Indiana, Court of Federal Claims Number 08–0538V
37. Katherine Davis, Tuscaloosa, Alabama, Court of Federal Claims Number 08–0543V
38. Ivonne Rose, Napa, California, Court of Federal Claims Number 08–0547V
39. Mohammad Ilyas on behalf of Aaron Amar Ilyas, Wilmington, North

Carolina, Court of Federal Claims Number 08–0553V
40. Shelley and Rick Lehner on behalf of Chloe Lehner, Burnsville, Minnesota, Court of Federal Claims Number 08–0554V
41. Theresa and Kevin Trout on behalf of Katherine Trout, Wake Forest, North Carolina, Court of Federal Claims Number 08–0555V
42. AnnMarie and David Montgomery on behalf of Carter Montgomery, Branford, Connecticut, Court of Federal Claims Number 08–0556V
43. Betty Ann DiDario, Washington, New Jersey, Court of Federal Claims Number 08–0557V
44. Patricia Gibbons, Dallas, Pennsylvania, Court of Federal Claims Number 08–0560V
45. Richard Esposito, Lambertville, New Jersey, Court of Federal Claims Number 08–0561V
46. Ann Palker-Corell, Washington, DC, Court of Federal Claims Number 08–0566V
47. Janelle and John Hall on behalf of Jakob Hall, Lake Forest Park, Washington, Court of Federal Claims Number 08–0567V
48. Karen and Brian Riutta on behalf of Josh Riutta, Jupiter, Florida, Court of Federal Claims Number 08–568V
49. Dianna Mathis on behalf of Soloman D. Cotton, Little Rock, Arkansas, Court of Federal Claims Number 08–0570V
50. William Horace Parker, Sr., Baltimore, Maryland, Court of Federal Claims Number 08–0571V
51. Aysen Kahyaoglu and James Alan Taylor on behalf of Kaan Andrew Kahyaoglu Taylor, Suffolk, Virginia, Court of Federal Claims Number 08–0572V
52. Deborah and Timothy Bokmuller on behalf of Branon Thomas Bokmuller, Hinckley, Ohio, Court of Federal Claims Number 08–0573V
53. Eileen and Ivan Rous on behalf of Emily Rous, Okatie, South Carolina, Court of Federal Claims Number 08–0576V
54. Eileen and Ivan Rous on behalf of Cole Rous, Hilton Head, South Carolina, Court of Federal Claims Number 08–0577V
55. John Christian Antle, Forest Grove, Oregon, Court of Federal Claims Number 08–0578V
56. Tessie Dingle, Marble Falls, Texas, Court of Federal Claims Number 08–0579V
57. Patrica and Mark Williams on behalf of Thomas Williams, Lockport, New York, Court of Federal Claims Number 08–0581V
58. Marilyn Lanzaro, Fairfax, Virginia, Court of Federal Claims Number 08–0584V
59. Reba and Scott Smith on behalf of Cody Smith, Vilonia, Arkansas, Court of Federal Claims Number 08–0585V
60. Inna and Yosef Ashdot on behalf of Mark Ashdot, Washington, New Jersey, Court of Federal Claims Number 08–0586V
61. Jennifer and Andrew Hickey on behalf of Matthew Hickey, Glenview, Illinois, Court of Federal Claims Number 08–0590V
62. Emmel and Annvi Miel on behalf of Alyssa Miel, Parsippany, New Jersey, Court of Federal Claims Number 08–0591V
63. Andrea and George Miketa on behalf of Max Miketa, Edina, Minnesota, Court of Federal Claims Number 08–0594V
64. Wenzday and Shawn Neher on behalf of Chancelor Neher, Deceased, Green Bay, Wisconsin, Court of Federal Claims Number 08–0596V
65. Tramella Clayton on behalf of Deven Clayton, Elk Grove, California, Court of Federal Claims Number 08–0598V
66. Jeanne Eason, Metarie, Louisiana, Court of Federal Claims Number 08–0600V
67. LaKeysha Isaac, Jackson, Mississippi, Court of Federal Claims Number 08–0601V
68. Pamela and Jeff Kay on behalf of Mason Kay, Tulsa, Oklahoma, Court of Federal Claims Number 08–0607V
69. Maybelline and Roelito Castillo on behalf of Raymond Castillo, Los Angeles, California, Court of Federal Claims Number 08–0608V
70. Oleta Lance, Mena, Arkansas, Court of Federal Claims Number 08–0611V
71. Niketa Chheda and Anand Nadar on behalf of Jeeval A. Nadar, Cleveland, Ohio, Court of Federal Claims Number 08–0612V
72. Rosa and Terry Ziolkowski on behalf of Miguel Ziolkowski, Baltimore, Maryland, Court of Federal Claims Number 08–0616V
73. Lisa and David Ching on behalf of Christopher Ching, Wellesley, Massachusetts, Court of Federal Claims Number 08–0617V
74. Dorothy Kay Windham, Houston, Texas, Court of Federal Claims Number 08–0618V
75. Donavee Joyner, Pensacola, Florida, Court of Federal Claims Number 08–0619V
76. Donna Donica, New Braunsfels, Texas, Court of Federal Claims Number 08–0625V
77. Evelyn Lee, Kansas City, Missouri, Court of Federal Claims Number 08–0626V
78. Alexia Olige and Eric Tyson on behalf of Anissa Tyson, Pensacola, Florida, Court of Federal Claims Number 08–0627V
79. Stephanie Tran and Joseph Lee Fong on behalf of Carson Lee Fong, Newton, Massachusetts, Court of Federal Claims Number 08–0629V
80. Isioma Awele Unokanjo and Martin Ebegbodi on behalf of Ndidichukwu Maximillian Ebegbodi, Katy, Texas, Court of Federal Claims Number 08–0630V
81. Judy Sand on behalf of Charles Leon Howard, Deceased, Tyler, Texas, Court of Federal Claims Number 08–0632V
82. Fay and Vincent Iosso on behalf of Francesco Iosso, Alpharetta, Georgia, Court of Federal Claims Number 08–0635V
83. Lisa and James Dutcher on behalf of Demitrius Dutcher, Endicott, New York, Court of Federal Claims Number 08–0637V
84. Ruth Brown, Camden, New Jersey, Court of Federal Claims Number 08–0638V
85. Ayesha and Tariq Khan on behalf of Samir Khan, De Soto, Texas, Court of Federal Claims Number 08–0639V
86. Robert Bruce, Columbus, Ohio, Court of Federal Claims Number 08–0640V
87. Gina and Gordon Greenwood on behalf of Graham Greenwood, Memphis, Tennessee, Court of Federal Claims Number 08–0644V
88. Karen Foster on behalf of Amanda Foster, Memphis, Tennessee, Court of Federal Claims Number 08–0649V
89. Jeanna and Eric Reed on behalf of Ian Reed, Naperville, Illinois, Court of Federal Claims Number 08–0650V
90. Vicki and Claude Corkern on behalf of Morgan Diana Corkern, Huntingdon, Tennessee, Court of Federal Claims Number 08–0651V
91. Jody Lynn Bryant, Cambridge, Minnesota, Court of Federal Claims Number 08–0652V
92. Jamie and Jeff Nichols on behalf of Carson Nichols, Deceased, Montesano, Washington, Court of Federal Claims Number 08–0654V
93. Eleanor Haywood, Norfolk, Virginia, Court of Federal Claims Number 08–0655V
94. Earl Sammons, Huntington, West Virginia, Court of Federal Claims Number 08–0657V
95. Kimberly Jordan on behalf of Khamiya Johnson, Deceased, Philadelphia, Pennsylvania, Court of Federal Claims Number 08–0659V

96. Katherine Ptak, Urbana, Illinois, Court of Federal Claims Number 08–0661V
97. Drew McLaughlin, Boston, Massachusetts, Court of Federal Claims Number 08–0662V
98. Eric Greenfield, Bay Pines, Florida, Court of Federal Claims Number 08–0668V
99. Michelle Taylor Grassie on behalf of Amelia Rose Hanson, Olathe, Kansas, Court of Federal Claims Number 08–0672V
100. Jimmy Leviner, Raleigh, North Carolina, Court of Federal Claims Number 08–0673V
101. Heidi Jagoe on behalf of Michael Jagoe, Madison, Wisconsin, Court of Federal Claims Number 08–0678V
102. Nicole and Larry Bayless on behalf of Spencer Bayless, Manhattan Beach, California, Court of Federal Claims Number 08–0679V
103. Levene Bridges, Baltimore, Maryland, Court of Federal Claims Number 08–0683V
104. Bridgette and Michael Selvaggio on behalf of Michael Selvaggio, Orchard Park, New York, Court of Federal Claims Number 08–0684V
105. Dhana Lakshmi Kelam on behalf of Shoumik Suda, Dublin, Ohio, Court of Federal Claims Number 08–0685V
106. Michael Nicolino, Akron, Ohio, Court of Federal Claims Number 08–0695V
107. Eileen Callahan, Champaign, Illinois, Court of Federal Claims Number 08–0696V

Dated: April 28, 2009.

Mary K. Wakefield,

Administrator.

[FR Doc. E9–10246 Filed 5–4–09; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS–2009–0029]

DHS Data Privacy and Integrity Advisory Committee

AGENCY: Privacy Office, DHS.

ACTION: Committee Management; Request for Applicants for Appointment to the DHS Data Privacy and Integrity Advisory Committee.

SUMMARY: The Department of Homeland Security Privacy Office is seeking applicants for appointment to the DHS Data Privacy and Integrity Advisory Committee.

DATES: Applications for membership must reach the Department of Homeland Security Privacy Office at the address below on or before June 8, 2009.

ADDRESSES: If you wish to apply for membership, please submit the documents described below to Martha K. Landesberg, Executive Director, DHS Data Privacy and Integrity Advisory Committee, by *either* of the following methods:

- *E-mail: PrivacyCommittee@dhs.gov.*
- *Fax:* (703) 235–0442.

FOR FURTHER INFORMATION CONTACT: Martha K. Landesberg, Executive Director, DHS Data Privacy and Integrity Advisory Committee, Department of Homeland Security, Washington, DC 20528, by telephone (703) 235–0780, by fax (703) 235–0442, or by e-mail to *PrivacyCommittee@dhs.gov.*

SUPPLEMENTARY INFORMATION: The DHS Data Privacy and Integrity Advisory Committee is an advisory committee established in accordance with the provisions of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. (Pub. L. 92–463). The Committee provides advice at the request of the Secretary of DHS and the DHS Chief Privacy Officer on programmatic, policy, operational, administrative, and technological issues within DHS that relate to personally identifiable information (PII), as well as data integrity and other privacy-related matters. The duties of the Committee are solely advisory in nature. In developing its advice and recommendations, the Committee may, consistent with the requirements of the FACA, conduct studies, inquiries, workshops and seminars in consultation with individuals and groups in the privacy sector and/or other governmental entities. The Committee typically meets four times in a calendar year.

Committee Membership: The DHS Privacy Office is seeking applicants for terms to expire in January 2012, and January 2013, respectively. Members are appointed by and serve at the pleasure of the Secretary of the Department of Homeland Security, and must be specially qualified to serve on the Committee by virtue of their education, training, and experience in the fields of data protection, privacy, and/or emerging technologies. Pursuant to the FACA, the Committee's Charter requires that Committee membership be balanced among individuals in the following fields:

1. Individuals who are currently working in the areas of higher education or research in public (except Federal) or not-for-profit institutions;

2. Individuals currently working in non-governmental industry or commercial interests, including at least one who shall be familiar with the data concerns of small to medium enterprises; and

3. Other individuals, as determined appropriate by the Secretary.

Committee members serve as Special Government Employees (SGE) as defined in section 202(a) of title 18 United States Code and must submit Confidential Financial Disclosure Reports (OGE Form 450) annually for review and approval by Department ethics officials. DHS may not release these reports or the information in them to the public except under an order issued by a Federal court or as otherwise provided under the Privacy Act (5 U.S.C. 552a). Committee members are also required to have an appropriate security clearance as a condition of their appointment. Members are not compensated for their service on the Committee; however, while attending meetings or otherwise engaged in Committee business, members may receive travel expenses and *per diem* in accordance with Federal regulations.

Committee History and Activities: All individuals interested in applying for Committee membership should review the history of the Committee's work. The Committee's charter and current membership, transcripts of Committee meetings, and all of the Committee's reports and recommendations to the Department are posted on the Committee's Web page on the DHS Privacy Office Web site (*http://www.dhs.gov/privacy*).

Applying for Membership

If you are interested in applying for membership on the DHS Data Privacy and Integrity Advisory Committee, please submit the following documents to Martha K. Landesberg, Executive Director, at the address provided below by June 8, 2009:

1. A letter explaining your qualifications for service on the Committee; and

2. A resume that includes a detailed description of your experience that it is relevant to the Committee's work.

Please send your documents to Martha K. Landesberg, Executive Director, DHS Data Privacy and Integrity Advisory Committee, by *either* of the following methods:

- *E-mail: PrivacyCommittee@dhs.gov.*
- *Fax:* (703) 235–0442.

In support of the Department of Homeland Security's policy on gender and ethnic diversity, qualified women and minorities are encouraged to apply for membership.

Dated: April 28, 2009.

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. E9–10318 Filed 5–4–09; 8:45 am]

BILLING CODE 9110–9L–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS–2009–0031]

Privacy Act of 1974; United States Immigration and Customs Enforcement–011 Removable Alien Records System of Records

AGENCY: Privacy Office; DHS.

ACTION: Notice of amended Privacy Act system of records.

SUMMARY: In accordance with the Privacy Act of 1974, the Department of Homeland Security proposes to amend DHS/ICE–011 Removable Alien Records System to add two new routine uses. These routine uses would allow U.S. Immigration and Customs Enforcement to share information about individuals in ICE detention with entities that seek to provide legal educational and orientation programs. DHS is seeking public comment on these proposed routine uses.

DATES: Written comments must be submitted on or before June 4, 2009. This new system will be effective June 4, 2009.

ADDRESSES: You may submit comments, identified by docket number DHS–2009–0031 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 703–483–2999.
- *Mail:* Mary Ellen Callahan, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change and may be read at *http://www.regulations.gov,* including any personal information provided.
- *Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For general questions please contact: Lyn Rahilly (202–732–3300), United States Immigration and Customs Enforcement Privacy Officer, United States Immigration and Customs Enforcement. For privacy issues please contact: Mary Ellen Callahan (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with the Privacy Act of 1974, the Department of Homeland Security proposes to amend a U.S. Immigration and Customs Enforcement (ICE) system of records known as the DHS/ICE–011 Removable Alien Records System (RARS) (74 FR 5665, Jan. 30, 2009) to add two new routine uses. RARS contains information about individual aliens who have been removed or are alleged to be removable from the United States by DHS/ICE under Federal immigration laws. These new routine uses would allow ICE to share information about aliens who are in ICE detention during removal proceedings with entities that seek to provide legal educational and orientation programs to persons in ICE detention.

Specifically, proposed Routine Use Q would permit ICE to share information about aliens in removal proceedings with the U.S. Department of Justice's Executive Office of Immigration Review (EOIR) or their contractors, consultants, or others performing or working on a contract for EOIR, so that EOIR may arrange for the provision of educational services to those aliens under EOIR's Legal Orientation Program. New Routine Use R would allow the sharing of the same information with attorneys or legal representatives for the purpose of facilitating group presentations to aliens in detention that will provide the aliens with information about their rights under U.S. immigration law and procedures. Routine Use R would support know-your-rights educational programs that are sponsored by private sector law firms and public interest legal organizations, but are not associated with the EOIR Legal Orientation Program.

II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR Part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency record keeping practices transparent, to notify individuals regarding the uses of their records, and to assist individuals to more easily find such files within the agency. Below is the description of the DHS/ICE Removable Alien Records System.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this system of records to the Office of Management and Budget (OMB) and to Congress.

SYSTEM OF RECORDS

DHS/ICE–011

SYSTEM NAME:

Removable Alien Records System (RARS).

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Records are maintained at the United States Immigration and Customs Enforcement Headquarters in Washington, DC and in field offices.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Categories of individuals covered by this system include aliens removed and alleged to be removable by DHS/ICE.

CATEGORIES OF RECORDS IN THE SYSTEM:

Categories of records in this system may include:

- Alien's name;
- Alien file number;
- Date of birth;
- Country of birth;
- United States addresses;
- Foreign addresses;
- ICE case file number;
- Subject ID and Person ID;
- Fingerprint Identification (FINS) number;

- Bureau of Prisons/U.S. Marshals Service number;
- FBI number;
- Event ID;
- Immigration bond number;
- Charge;
- Amount of bond;
- Hearing date;
- Case assignment;
- Scheduling date;
- Sections of law under which excludability/removability is alleged;
- Data collected to support DHS/ICE's position on excludability/removability, including information on any violations of law and conviction information;
- Date, place, and type of last entry into the United States;
- Attorney/representative's contact information (Last Name; First Name; Middle Name; Suffix; Law Firm; Dates of representation; whether a G–28 has been filed)
- Family data;
- DHS/ICE agents assigned;
- Employer Information: (Employer Name; Employment Start Date and End Date; County; Address; Zip Code; Telephone number; Compensation Type; Salary/Wage;);
- Government decisions concerning an individual's request for immigration benefits and information about other immigration-related actions by the Government (*e.g.,* dismissals, entry of orders of removal, etc.); and
- Other case-related information.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; 44 U.S.C. 3101; 8 U.S.C. 1103, 1227, 1228, 1229, 1229a, and 1231.

PURPOSE(S):

The purpose of this system is to assist DHS/ICE in the removal and detention of aliens in accordance with immigration and nationality laws. This system also serves as a docket and control system by providing management with information concerning the status and/or disposition of removable aliens.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records of information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. any employee of DHS in his/her official capacity;

3. any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. the United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;

2. The Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual who relies upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, Tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To a court, magistrate, administrative tribunal, opposing counsel, parties, and witnesses, in the course of a civil or criminal proceeding before a court or adjudicative body when

1. DHS or any component thereof; or

2. any employee of DHS in his or her official capacity; or

3. any employee of DHS in his or her individual capacity where the agency has agreed to represent the employee; or

4. the United States, where DHS determines that litigation is likely to affect DHS or any of its components, is a party to litigation or has an interest in such litigation, and DHS determines that use of such records is relevant and necessary to the litigation, provided however that in each case, DHS determines that disclosure of the information to the recipient is a use of the information that is compatible with the purpose for which it was collected.

I. To a court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations or in connection with criminal law proceedings.

J. To other Federal, State, local, or foreign government agencies, individuals, and organizations during the course of an investigation, proceeding, or activity within the purview of immigration and nationality laws to elicit information required by DHS/ICE to carry out its functions and statutory mandates.

K. To the appropriate foreign government agency charged with enforcing or implementing laws where there is an indication of a violation or potential violation of the law of another nation (whether civil or criminal), and to international organizations engaged in the collection and dissemination of intelligence concerning criminal activity.

L. To other Federal agencies for the purpose of conducting national intelligence and security investigations.

M. To any Federal agency, where appropriate, to enable such agency to make determinations regarding the payment of Federal benefits to the record subject in accordance with that agency's statutory responsibilities.

N. To an actual or potential party or his or her attorney for the purpose of negotiation or discussion on such matters as settlement of the case or matter, or informal discovery proceedings.

O. To foreign governments for the purpose of coordinating and conducting the removal of aliens from the United States to other nations.

P. To family members and attorneys or other agents acting on behalf of an alien to assist those individuals in determining whether (1) the alien has been arrested by DHS for immigration violations, and (2) the location of the alien if in DHS custody, provided however, that the requesting individuals are able to verify the alien's date of birth or Alien Registration Number (A–Number), or can otherwise present adequate verification of a familial or agency relationship with the alien.

Q. To the U.S. Department of Justice Executive Office of Immigration Review (EOIR) or their contractors, consultants, or others performing or working on a contract for EOIR, for the purpose of providing information about aliens who are or may be placed in removal proceedings so that EOIR may arrange for the provision of educational services to those aliens under EOIR's Legal Orientation Program.

R. To attorneys or legal representatives for the purpose of facilitating group presentations to aliens in detention that will provide the aliens with information about their rights under U.S. immigration law and procedures.

S. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD–ROM.

RETRIEVABILITY:

Records are retrieved by Name, A-file number, alien's Bureau of Prisons/U.S. Marshal number, case number, subject ID, person ID, FINS number, event ID, state ID, FBI number, and/or bond number.

SAFEGUARDS:

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated system security access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

RETENTION AND DISPOSAL:

Cases that have been closed for a year are archived and stored in the database for 75 years, then deleted. Copies of forms used within this system of records are placed in the alien's file. Electronic copies of records (copies from electronic mail and word processing systems) which are produced and made part of the file are deleted within 180 days after the recordkeeping copy is produced.

SYSTEM MANAGER AND ADDRESS:

Director, Detention and Removal Operations, Immigration and Customs Enforcement Headquarters, 500 12th Street, SW., Washington, DC 20024.

NOTIFICATION PROCEDURE:

The Secretary of Homeland Security has exempted this system from the notification, access, and amendment procedures of the Privacy Act because it is a law enforcement system. However, CBP will consider requests individual requests to determine whether or not information may be released. Thus, individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to United States Immigration and Customs Enforcement, Freedom of Information Act Office, 800 North Capitol Street, NW., Room 585, Washington, DC 20536.

When seeking records about yourself from this system of records or any other ICE system of records your request must conform with the Privacy Act regulations set forth in 6 CFR Part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you,
- Specify when you believe the records would have been created,
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the ICE may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

RECORD ACCESS PROCEDURES:

See ''Notification procedure'' above.

CONTESTING RECORD PROCEDURES:

See ''Notification procedure'' above.

RECORD SOURCE CATEGORIES:

Alien; alien's attorney/representative; DHS/ICE agent; other Federal, State, local and foreign agencies; and the courts.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

The Secretary of Homeland Security has exempted this system from subsections (c)(3) and (4), (d), (e)(1), (2), and (3), (e)(4)(G) and (H), (e)(5) and (8), (f), and (g) of the Privacy Act pursuant to 5 U.S.C. 552a(j)(2). In addition, the Secretary of Homeland Security has exempted portions of this system from subsections (c)(3), (d), (e)(1), (e)(4)(G) and (H), and (f) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2). These exemptions apply only to the extent that records in the system are subject to exemption pursuant to 5 U.S.C. 552a(j)(2) and (k)(2).

Dated: April 28, 2009.

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. E9–10260 Filed 5–4–09; 8:45 am]

BILLING CODE 9111–28–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary; Published Privacy Impact Assessments on the Web

AGENCY: Privacy Office, DHS.

ACTION: Notice of Publication of Privacy Impact Assessments.

SUMMARY: The Privacy Office of the Department of Homeland Security is making available four Privacy Impact Assessments on various programs and systems in the Department. These assessments were approved and published on the Privacy Office's Web site between January 1, 2009, and March 31, 2009.

DATES: The Privacy Impact Assessments will be available on the DHS Web site until July 6, 2009, after which they may be obtained by contacting the DHS Privacy Office (contact information below).

FOR FURTHER INFORMATION CONTACT: Mary Ellen Callahan, Chief Privacy Officer, Department of Homeland Security, Washington, DC 20528, or *e-mail: pia@dhs.gov*.

SUPPLEMENTARY INFORMATION: Between January 1, 2009, and March 31, 2009, the Chief Privacy Officer of the Department of Homeland Security (DHS) approved and published four Privacy Impact Assessments (PIAs) on the DHS Privacy Office Web site, *http://www.dhs.gov/privacy*, under the link for ''Privacy Impact Assessments.'' These PIAs cover four separate DHS programs. Below is a short summary of those programs, indicating the DHS component responsible for the system, and the date on which the PIA was approved. Additional information can be found on the Web site or by contacting the Privacy Office.

System: Correspondence Handling and Management Planning System.

Component: U.S. Citizenship and Immigration Services.

Date of approval: January 13, 2009.

The U.S. Citizenship and Immigration Service (USCIS), Texas Service Center developed the Correspondence Handling and Management Planning System (CHAMPS). The CHAMPS system is designed to facilitate workflow management, production evaluation, and time and attendance functions. USCIS conducted this PIA because CHAMPS collects and uses personally identifiable information (PII).

System: Directory Services and Email System.

Component: DHS Wide.

Date of approval: January 14, 2009.

The U.S. Coast Guard manages and operates the Directory Services Electronic Mail System (DSES). DSES currently handles all e-mail traffic in, out, and between DHS, its Components, and the Internet, and provides a directory of users' official contact information. This PIA was conducted to assess the risks associated with the processing, storage, and transmission of PII within the DSES system.

System: Maryland 3.

Component: Transportation Security Administration.

Date of approval: February 20, 2009.

The Transportation Security Administration (TSA) conducts name-based Security Threat Assessments (STA) and fingerprint-based Criminal History Records Checks (CHRCs) on pilots who operate aircraft and apply for privileges to fly to or from the three General Aviation airports in the Washington, DC restricted flight zones (Potomac Airfield, Washington Executive/Hyde Field, and College Park Airport), otherwise known as the Maryland Three (MD–3) program, and for the Airport Security Coordinator (ASC) at a MD–3 airport. For the STA process, TSA compares the biographical information of these pilots and ASCs, hereafter referred to as individuals, against Federal terrorist, immigration, and law enforcement databases. For the CHRC, TSA forwards the fingerprints to the Federal Bureau of Investigation, which conducts fingerprint-based CHRCs on individuals.

System: Department of Homeland Security General Contact List.

Component: DHS Wide.

Date of approval: March 27, 2009.

Many DHS operations and projects collect a minimal amount of contact information in order to distribute information and perform various other administrative tasks. Department Headquarters conducted this PIA because contact lists contain PII. The Department added the following systems to this PIA:

- National Protection and Programs Directorate Vehicle-Borne Explosive Device (VBIED) Training.
- U.S. Coast Guard 2009 World Maritime Day Parallel Event.
- Transportation Security Administration Inquiry Management System (IMS).
- Science and Technology Project Execution System.
- Science and Technology Multi-Band Radio Project.
- United States Citizenship and Immigration Services Teachers of English to Speakers of Other Languages (TESOL) Conference Booth Follow Up List.
- DHS Sunflower Asset Management System (SAMS).
- United States Citizenship and Immigration Services Customer Service Portal Alert by Mail.
- United States Citizenship and Immigration Services Customer Service Portal Forms by Mail.
- U.S. Coast Guard Navigation Systems Information Dissemination Network (NSIDN).
- U.S. Coast Guard List Server (CGLS).

Dated: April 28, 2009.

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. E9–10261 Filed 5–4–09; 8:45 am]

BILLING CODE 9110–9L–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form I–140, Revision of a Currently Approved Information Collection; Comment Request

ACTION: 60-Day Notice of Information Collection Under Review: Form I–140, Immigrant Petition for Alien Worker; OMB Control Number 1615–0015.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS), has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until July 6, 2009.

Written comments and suggestions regarding items contained in this notice, and especially with regard to the estimated public burden and associated response time should be directed to the Department of Homeland Security (DHS), USCIS, Chief, Regulatory Products Division, 111 Massachusetts Avenue, NW., Washington, DC 20529–2210. Comments may also be submitted to DHS via facsimile to 202–272–8352, or via e-mail at *rfs.regs@dhs.gov*. When submitting comments by e-mail, please

add the OMB Control Number 1615–0015 in the subject box.

Written comments and suggestions from the public and affected agencies concerning the collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Revision of a currently approved information collection.

(2) *Title of the Form/Collection:* Immigrant Petition for Alien Workers.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–140, U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Business or other for Profit.* The information furnished on Form I–140 will be used by U.S. Citizenship and Immigration Services to classify aliens under section 203(b)(1), 203(b)(2) or 203(b)(3) of the Immigration and Nationality Act (Act).

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 96,000 responses at one hour per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 96,000 annual burden hours.

If you need a copy of the information collection instrument, please visit: *http://www.regulations.gov/search/index.jsp*.

We may also be contacted at: USCIS, Regulatory Products Division, 111 Massachusetts Avenue, NW., Washington, DC 20529–2210, telephone number 202–272–8377.

Dated: April 30, 2009.

Stephen Tarragon,

Deputy Chief, Regulatory Products Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. E9–10328 Filed 5–4–09; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

Notice of Proposed Information Collection for 1029–0025

AGENCY: Office of Surface Mining Reclamation and Enforcement.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the Office of Surface Mining Reclamation and Enforcement (OSM) is announcing that the information collection requests for 30 CFR Part 733—Maintenance of State Programs and Procedures for Substituting Federal Enforcement of State Programs and Withdrawing Approval of State Programs, has been forwarded to the Office of Management and Budget (OMB) for review and approval. This information collection request describes the nature of the information collection and its expected burden and cost.

DATES: Comments must be submitted on or before June 4, 2009, to be assured of consideration.

ADDRESSES: Comments may be submitted to the Office of Information and Regulatory Affairs, Office of Management and Budget, Department of the Interior Desk Officer, via e-mail at *OIRA_Docket@omb.eop.gov*, or by facsimile to (202) 395–5806. Also, please send a copy of your comments to John A. Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave., NW., Room 202–SIB, Washington, DC 20240, or electronically to *jtrelease@osmre.gov*. Please reference 10290025 in your correspondence.

FOR FURTHER INFORMATION CONTACT: To receive a copy of the information collection request, contact John A. Trelease at (202) 208–2783. You may also contact Mr. Trelease at *jtrelease@osmre.gov*.

SUPPLEMENTARY INFORMATION: OMB regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities [see 5 CFR 1320.8(d)]. OSM has submitted the request to OMB to renew its approval for the collection of information found at 30 CFR Part 733. OSM is requesting a 3-year term of approval for this information collection activity.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control number for this collection of information is 1029–0025, and may be found in OSM's regulations at 30 CFR Part 733.10. Individuals are required to respond to obtain a benefit.

As required under 5 CFR 1320.8(d), a **Federal Register** notice soliciting comments on this collection was published on February 25, 2009 (74 FR 8568). No comments were received. This notice provides the public with an additional 30 days in which to comment on the following information collection activity:

Title: 30 CFR Part 733—Maintenance of State Programs and Procedures for Substituting Federal Enforcement of State Programs and Withdrawing Approval of State Programs.

OMB Control Number: 1029–0025.

Summary: This part provides that any interested person may request the Director of OSM to evaluate a State program by setting forth in the request a concise statement of facts that the person believes establishes the need for the evaluation.

Bureau Form Number: None.

Frequency of Collection: Once.

Description of Respondents: Any interested person (individuals, businesses, institutions, organizations).

Total Annual Responses: 1.

Total Annual Burden Hours: 25.

Send comments on the need for the collection of information for the performance of the functions of the agency; the accuracy of the agency's burden estimates; ways to enhance the quality, utility and clarity of the information collection; and ways to minimize the information collection burden on respondents, such as use of automated means of collection of the information, to the places listed under Addresses. Please refer to control number 1029–0025 in all correspondence.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time.

While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: April 29, 2009.

John R. Craynon,

Chief, Division of Regulatory Support.

[FR Doc. E9–10257 Filed 5–4–09; 8:45 am]

BILLING CODE 4310–05–M

DEPARTMENT OF THE INTERIOR

Minerals Management Service

Environmental Documents Prepared for Proposed Oil, Gas, and Mineral Operations by the Gulf of Mexico Outer Continental Shelf (OCS) Region

AGENCY: Minerals Management Service, Interior.

ACTION: Notice of the availability of Environmental Documents Prepared for OCS Mineral Proposals by the Gulf of Mexico OCS Region.

SUMMARY: Minerals Management Service (MMS), in accordance with Federal Regulations that implement the National Environmental Policy Act (NEPA), announces the availability of NEPA-related Site-Specific Environmental Assessments (SEA) and Findings of No Significant Impact (FONSI), prepared by MMS for the following oil-, gas-, and mineral-related activities proposed on the Gulf of Mexico and Atlantic OCS.

FOR FURTHER INFORMATION CONTACT: Public Information Unit, Information Services Section at the number below. Minerals Management Service, Gulf of Mexico OCS Region, Attention: Public Information Office (MS 5034), 1201 Elmwood Park Boulevard, Room 114, New Orleans, Louisiana 70123–2394, or by calling 1–800–200–GULF.

SUPPLEMENTARY INFORMATION: MMS prepares SEAs and FONSIs for proposals that relate to exploration, development, production, and transport of oil, gas, and mineral resources on the Federal OCS. These SEAs examine the potential environmental effects of activities described in the proposals and present MMS conclusions regarding the significance of those effects. Environmental Assessments are used as a basis for determining whether or not approval of the proposals constitutes major Federal actions that significantly affect the quality of the human environment in the sense of NEPA Section 102(2)(C). A FONSI is prepared in those instances where MMS finds that approval will not result in significant effects on the quality of the human environment. The FONSI briefly presents the basis for that finding and includes a summary or copy of the SEA.

This notice constitutes the public notice of availability of environmental documents required under the NEPA Regulations.

Activity/operator	Location	Date
TGS–NOPEC Geophysical Company, Geological & Geophysical Prospecting for Mineral Resources, SEA L08–88.	Located in the central Gulf of Mexico south of Venice, Louisiana.	11/28/2008
TGS–NOPEC Geophysical Company, Geological & Geophysical Prospecting for Mineral Resources, SEA L08–91.	Located in the central Gulf of Mexico south of Venice, Louisiana.	11/28/2008
Union Oil Company of California, Permit to Modify to Remove Well 001 Using Explosive Severance Methods, SEA ES/SR APM EB205–001.	East Breaks, Block 205, Lease OCS–G 17237, located 93 miles to the nearest Texas shoreline.	1/5/2009
ExxonMobil Production Company, Structure Removal, SEA ES/SR 08–175.	High Island, Block 193, Lease OCS–G 03237, located 18 miles from the nearest Texas shoreline.	1/5/2009
Apache Corporation, Structure Removal, SEA ES/SR 08–050B	High Island, Block A6, Lease OCS–G 04734, located 34 miles from the nearest Texas shoreline.	1/9/2009
Devon Energy Corporation, Exploration Plan for Seismic Activities, SEA R–4912.	Keathley Canyon, Block 596, Lease OCS–G 19600, located 215 miles south of Morgan City, Louisiana.	1/12/2009
Mariner Energy, Inc., Structure Removal, SEA ES/SR 08–134	Brazos, Block 541, Lease OCS–G 14812, located 30 miles from the nearest Texas shoreline.	1/13/2009
Maritech Resources, Inc., Structure Removal, SEA ES/SR 07–115A.	Ship Shoal, Block 299, Lease OCS–G 07759, located 62 miles from the nearest Louisiana shoreline.	1/13/2009
Chevron U.S.A., Inc., Revised Exploration Plan, Geological & Geophysical Exploration for Mineral Resources, SEA R–4908 AA.	Walker Ridge, Block 316, Lease OCS–G 25246, located 180 miles south of Morgan City, Louisiana.	1/13/2009
Stone Energy Corporation, Structure Removal, SEA ES/SR 08–170.	West Cameron, Block 176, Lease OCS–G 00762, located 23 miles from the nearest Louisiana shoreline.	1/13/2009
Newfield Exploration Company, Revised Exploration Plan, Geological & Geophysical Exploration for Mineral Resources, SEA R–4913 AA.	Garden Banks, Block 605, Lease OCS–G 31634, located 149 miles south of Intracoastal City, Louisiana.	1/14/2009
Energy Partners, LTD, Structure Removal, SEA ES/SR 08–150	East Cameron, Block 196, Lease OCS–G 16244, located 40 miles from the nearest Louisiana shoreline.	1/22/2009
Apache Corporation, Structure Removal, SEA ES/SR 09–009	Matagorda Island, Block 623, Lease OCS–G 03088, located 17 miles from the nearest Texas shoreline.	1/22/2009
Mariner Energy, Inc., Structure Removal, SEA ES/SR 09–006	West Cameron, Block 110, Lease OCS–G 00081, located 18 miles from the nearest Louisiana shoreline.	1/22/2009
Energy Resource Technology GOM, Inc., Structure Removal, SEA ES/SR 07–002A.	Brazos, Block 436, Lease OCS–G 04258, located 14 miles from the nearest Louisiana shoreline.	1/30/2009
Bois D'Arc Offshore, LTD, Structure Removal, SEA ES/SR 09–001, 09–002, 09–003.	Ship Shoal, Block 94, Lease OCS–00042, located 10 miles from the nearest Louisiana shoreline.	1/30/2009
Chevron U.S.A., Inc., Structure Removal, SEA ES/SR 97–145A.	South Timbalier, Block 22, Lease OCS 00165, located 4 miles from the nearest Louisiana shoreline.	1/30/2009
Energy XXI GOM, LLC, Structure Removal, SEA ES/SR 09–007, 09–008.	West Cameron, Block 248, Lease OCS–G 09408, located 44 miles from the nearest Louisiana shoreline.	1/30/2009
TGS–NOPEC Geophysical Company, Geological & Geophysical Prospecting for Mineral Resources, SEA M09–01.	Located in the eastern Gulf of Mexico	2/2/2009

Activity/operator	Location	Date
Murphy Exploration & Production Company-USA, Initial Exploration Plan, SEA N–9315.	DeSoto Canyon, Blocks 90, 91 & 134, Leases OCS–G 10442, 10443 & 23488 respectively, located 80 miles from the nearest Louisiana shoreline, 91 miles from the nearest Mississippi shoreline, 85 miles from the nearest Alabama shoreline, 92 miles from the nearest Florida shoreline.	2/5/2009
EMGS Americas, Geological & Geophysical Prospecting for Mineral Resources, SEA M08–12.	Located in the central and eastern Gulf of Mexico, south of Mobile, Alabama.	2/5/2009
BP Exploration & Production, Inc., Exploration Plan for Seismic Activities, SEA R–4915 AA.	Green Canyon, Block 742, Lease OCS–G 15607, located 130 miles south of Lafourche Parish, Louisiana.	2/6/2009
Coastal Planning & Engineering, Inc., Geological & Geophysical Prospecting for Mineral Resources, SEA M08–06.	Located off the coast of Longboat Key, Florida, on the Federal Outer Continental Shelf of the Gulf of Mexico.	2/6/2009
Energy XXI GOM, LLC, Structure Removal, SEA ES/SR 09–013.	South Timbalier, Block 21, Lease OCS 00263, located 4 miles from the nearest Louisiana shoreline.	2/6/2009
Apache Corporation, Lease-Term Pipeline Bundle, SEA P–17683, P–17684, P–17685.	High Island, Block A–376, Lease OCS–G 02754, located 120 miles from the nearest Louisiana shoreline.	2/10/2009
Helis Oil & Gas Company, LLC, Structure Removal, SEA ES/SR 09–017.	Brazos, Block 417, Lease OCS–G 22190, located 32 miles from the nearest Texas shoreline.	2/13/2009
Apache Corporation, Structure Removal, SEA ES/SR 08–012	High Island, Block A572, Lease OCS–G 02392, located 118 miles from the nearest Texas shoreline.	2/13/2009
EPL Energy Partners, LTD, Structure Removal, SEA ES/SR 08–151.	West Cameron, Block 98, Lease OCS–G 12757, located 13 miles from the nearest Louisiana shoreline.	2/13/2009
Helis Oil & Gas Company, LLC, Structure Removal, SEA ES/SR 08–159A, 08–162A.	Brazos, Block 417, Lease OCS–G 22190 and Galveston, Block 418, Lease OCS–G 18921, located 32 and 21 miles respectively from the nearest Texas shoreline.	2/23/2009
Helis Oil & Gas Company, LLC, Structure Removal, SEA ES/SR 09–017A.	Brazos, Block 417, Lease OCS–G 22190, located 32 miles from the nearest Texas shoreline.	2/23/2009
Chevron U.S.A., Inc., Structure Removal, SEA ES/SR 89–068A.	Chandeleur, Block 014, Lease OCS–G 05734, located 25 miles from the nearest Louisiana shoreline.	2/23/2009
Transcontinental Gas Pipe Line Corporation, Structure Removal, SEA ES/SR 09–004.	High Island, Block 157, Lease OCS–G 12370, located 22 miles from the nearest Texas shoreline.	2/23/2009
Maritech Resources, Inc., Structure Removal, SEA ES/SR 06–108A.	High Island, Block 208, Lease OCS–G 07286, located 25 miles from the nearest Texas shoreline.	2/23/2009
Fairfield Industries, Geological & Geophysical Prospecting for Mineral Resources, SEA L09–01.	Located in the central Gulf of Mexico, south of Cameron, Louisiana.	2/23/2009
CGGVeritas, Geological & Geophysical Prospecting for Mineral Resources, SEA T09–01.	Located in the western Gulf of Mexico, 45 miles south of Matagorda County, Texas.	2/23/2009
ERT, Structure Removal, SEA ES/SR 09–010, 09–011, 09–012.	South Pelto, Block 20, Lease OCS–G 00074, located 7 miles from the nearest Louisiana shoreline.	2/23/2009
Energy Resource Technology GOM, Inc., Structure Removal, SEA ES/SR 09–014, 09–015.	Vermilion, Block 21, Lease OCS–G 03119 & 02865 respectively, located 7 miles from the nearest Louisiana shoreline.	2/23/2009
ATP Oil & Gas Corporation, Structure Removal, SEA ES/SR 07–060A.	Vermilion, Block 318, Lease OCS–G 04427, located 86 miles from the nearest Louisiana shoreline.	2/23/2009
Devon Energy Production Company, LP, Structure Removal, SEA ES/SR 09–026, 09–027.	Eugene Island, Block 125 & 119, Leases OCS–G 00051 & 00049 respectively, located 30 miles from the nearest Louisiana shoreline.	3/3/2009
Prime Offshore, LLC, Structure Removal, SEA ES/SR 06–123A, 08–145A.	North Padre Island, Blocks 996 & 998, Leases OCS–G 23123 & 23130, located 25 and 20 miles from the nearest Texas shoreline, respectively.	3/3/2009
W & T Offshore, Inc., Structure Removal, SEA ES/SR 09–021	South Marsh Island, Block 28, Lease OCS–G 09536, located 50 miles from the nearest Louisiana shoreline.	3/3/2009
Energy Resource Technology GOM, Inc., Structure Removal, SEA ES/SR 09–019.	South Pelto, Block 20, Lease OCS 00074, located 7 miles from the nearest Louisiana shoreline.	3/3/2009
ExxonMobil Production Company, Structure Removal, SEA ES/SR 09–022.	West Delta, Block 100, Lease OCS–G 03188, located 21 miles from the nearest Louisiana shoreline.	3/3/2009
Prime Offshore, LLC, Structure Removal, SEA ES/SR 08–155A.	South Padre Island, Block 1145, Lease OCS–G 24304, located 16 miles from the nearest Texas shoreline.	3/5/2009
Chevron U.S.A., Inc., Initial Exploration Plan, SEA N–9298	Viosca Knoll, Block 383, Lease OCS–G 27977, located 40 miles from the nearest Alabama shoreline.	3/5/2009
Chevron U.S.A., Inc., Structure Removal, SEA ES/SR 07–061A.	South Timbalier, Block 151, Lease OCS–G 00463, located 32 miles from the nearest Louisiana shoreline.	3/6/2009
Linder Oil Company, A Partnership, Structure Removal, SEA ES/SR 09–005.	East Cameron (South Addition), Block 245, Lease OCS–G 00970, located 80 miles from the nearest Louisiana shoreline.	3/11/2009
Linder Oil Company, A Partnership, Structure Removal, SEA ES/SR 09–016.	East Cameron, Block 149, Lease OCS–G 13865, located 42 miles from the nearest Louisiana shoreline.	3/11/2009
Maritech Resources, Inc., Structure Removal, SEA ES/SR 09–028.	Sabine Pass, Block 012, Lease OCS–G 14590, located 15 miles from the nearest Louisiana shoreline.	3/11/2009
Shell Offshore, Inc., Structure Removal, SEA ES/SR 09–018 ..	Eugene Island, Block 331, Lease OCS–G 02116, located 80 miles from the nearest Louisiana shoreline.	3/12/2009
Chevron U.S.A., Inc., Structure Removal, SEA ES/SR 08–066A.	South Timbalier, Block 135, Lease OCS–G 00642, located 29 miles from the nearest Louisiana shoreline.	3/12/2009
BP Exploration & Production, Inc., Structure Removal, SEA ES/SR 03–202A.	South Marsh Island, Block 205, Lease OCS–G 05475, located 98 miles from the nearest Louisiana shoreline.	3/13/2009

Activity/operator	Location	Date
Shell Offshore, Inc., Initial Exploration Plan, SEA N–9317	DeSoto Canyon, Block 939, Lease OCS–G 31591, located 133 miles from the nearest Louisiana shoreline, 173 miles from the nearest Mississippi shoreline, 154 miles from the nearest Alabama shoreline and 155 miles from the nearest Florida shoreline.	3/17/2009
Energy Resource Technology GOM, Inc., Structure Removal, SEA ES/SR 09–020.	Vermilion, Block 222, Lease OCS–G 02865, located 7 miles from the nearest Louisiana shoreline.	3/17/2009
Energy XXI GOM, LLC, Structure Removal, SEA ES/SR 09–023.	Eugene Island, Block 256, Lease OCS–G 02102, located 53 miles from the nearest Louisiana shoreline.	3/19/2009
W & T Offshore, Inc., Structure Removal, SEA ES/SR 09–033	South Marsh Island, Block 28, Lease OCS–G 09536, located 50 miles from the nearest Louisiana shoreline.	3/24/2009
Energy Resource Technology GOM, Inc., Permit to Modify to Remove Well 001 Using Explosive Severance Methods, SEA ES/SR APM SM123–001.	South Marsh Island, Block 123, Lease OCS–G 23845, located 31 miles from the nearest Louisiana shoreline.	3/25/2009
McMoran Oil & Gas, LLC, Structure Removal, SEA ES/SR 09–038.	Ship Shoal, Block 139, Lease OCS–G 21115, located 21 miles from the nearest Louisiana shoreline.	3/31/2009

Persons interested in reviewing environmental documents for the proposals listed above or obtaining information about SEAs and FONSIs prepared by the Gulf of Mexico OCS Region are encouraged to contact MMS at the address or telephone listed in the **FOR FURTHER INFORMATION** section.

Dated: April 13, 2009.

Lars Herbst,

Regional Director, Gulf of Mexico OCS Region.

[FR Doc. E9–10293 Filed 5–4–09; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–ES–2009–N0085; 1112–0000–80221–F2]

Tehachapi Uplands Multiple Species Habitat Conservation Plan, Kern County, CA

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of extension of the public comment period for the draft environmental impact statement and draft habitat conservation plan in support of an incidental take permit application.

SUMMARY: We the U.S. Fish and Wildlife Service (Service), advise the public that we are extending the public comment period for the Tejon Ranchcorp's incidental take application (ITP), draft Environmental Impact Statement (DEIS), and draft Tehachapi Uplands Multiple Species Habitat Conservation Plan (TUMSHCP). See **SUPPLEMENTARY INFORMATION** for details.

DATES: Submit comments on these documents on or before July 7, 2009.

FOR FURTHER INFORMATION CONTACT: Steve Kirkland, U.S. Fish and Wildlife Service, at 805–644–1766 extension 267.

SUPPLEMENTARY INFORMATION: We are extending the public comment period on the ITP application, DEIS, and TUMSHCP (74 FR 6050, February 4, 2009), in response to requests from the public for a 60-day extension, in order to allow additional time for document review. This extension also will provide the public and Federal, State, Tribal, and local agencies with an additional opportunity to submit information and comments on these draft documents. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may 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.

If you previously submitted comments, you need not resubmit them; we have already incorporated them into the public record and will fully consider them in finalizing these documents.

For background and more information on the applicant's proposed action, as well as how to review the ITP application, draft TUMSHCP, and draft EIS and submit comments or information, *see* our February 4, 2009, notice (74 FR 6050). Please refer to TE–204887–0 when requesting documents or submitting comments.

Authority

We provide this notice under section 10(c) of the Endangered Species Act (16 U.S.C. 1531 *et seq.*) and its implementing regulations (50 CFR 17.22) and the National Environmental Policy Act (42 U.S.C. 4371 *et seq.*) and its implementing regulations (40 CFR 1506.6).

Dated: April 29, 2009.

Margaret Kolar,

Acting Deputy Regional Director, Pacific Southwest Nevada Region, Sacramento, California.

[FR Doc. E9–10286 Filed 5–4–09; 8:45 am]

BILLING CODE 4510–55–P

DEPARTMENT OF THE INTERIOR

[FBMS Charge Code L07770000.XG0000]

Field Office Relocation

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Relocation and Name Change of the Bureau of Land Management's Folsom Office in Folsom, CA.

SUMMARY: Notice is hereby given that the Bureau of Land Management's (BLM) Folsom Field Office is moving from its current location at 63 Natoma St., Folsom, CA to a new building located at 5152 Hillsdale Circle, El Dorado Hills, CA 95762. The office name will be the Mother Lode Field Office effective with the move. The BLM will move the weeks of May 4 and 11 and resume full operations at the new office on Monday, May 18, 2009, at 7 a.m.

The BLM encourages the public to arrange any work with BLM before May 1. The new telephone number is: (916) 941–3101 and is scheduled to be on line by May 18.

Directions to the new BLM office: from Highway 50 eastbound, take the Latrobe Road exit. Go 2.4 miles and turn right on Investment Boulevard. Go 0.1 miles and turn right on Robert J. Matthews Parkway. Go 0.1 mile and turn left on Hillsdale Circle. The office is on the left in 0.2 mile. The new address is: Bureau of Land Management, Mother Lode Field Office, 5152

Hillsdale Circle, El Dorado Hills, CA 95762.

FOR FURTHER INFORMATION CONTACT: BLM Folsom Field Office at (916) 985–4474.

Dated: April 3, 2009.

William S. Haigh,

Field Office Manager.

[FR Doc. E9–10301 Filed 5–4–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 07–24]

Patrick W. Stodola, M.D.; Revocation of Registration

On February 7, 2007, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Patrick W. Stodola, M.D. (Respondent), of Chicago, Illinois. The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration, AS2352653, as a practitioner, and proposed the denial of his pending application to renew his registration, on the ground that his ''continued registration is inconsistent with the public interest.'' Show Cause Order at 1.

The Show Cause Order specifically alleged that while Respondent is licensed as a physician only in Illinois, he prescribed controlled substances, via the internet, to persons located in twenty-six other States. *Id.* The Order alleged that Respondent's prescribing constituted the unauthorized practice of medicine because he did not possess the licenses required to practice medicine (and prescribe) in these States, and that the prescriptions he authorized ''were not issued in the usual course of professional practice as required by 21 CFR 1306.04.'' *Id.* at 1–2.

On March 14, 2007, Respondent filed a request for a hearing and the matter was placed on the docket of the Agency's Administrative Law Judges. Following pre-hearing procedures, a hearing was held on October 16, 2007, in Chicago, Illinois. At the hearing, both parties elicited testimony and introduced documentary evidence for the record. Following the hearing, both parties submitted briefs containing their proposed findings of fact, conclusions of law and argument.

On September 16, 2008, the ALJ issued her recommended decision (ALJ). In evaluating Respondent's experience in dispensing controlled substances and record of compliance with applicable laws, the ALJ concluded that Respondent had violated the medical practice standards adopted by multiple States which specifically require that a physician physically examine a patient before prescribing a drug to him/her. ALJ at 33–34. The ALJ further concluded that Respondent had violated the laws of numerous States by prescribing to their residents without holding the requisites licenses to practice medicine and/or dispense controlled substances. *Id.* at 34. While the ALJ found that Respondent has retained his Illinois medical license and has not been convicted of a crime, she further found that Respondent has ''refus[ed] to acknowledge his wrongdoing.'' *Id.* at 32 & 34. The ALJ thus ''conclude[d] that Respondent is unwilling or unable to accept the responsibilities inherent in a DEA registration,'' and recommended that his registration be revoked and that any pending applications be denied. *Id.* at 35.

Respondent did not file exceptions to the ALJ's decision.[1] Thereafter, the record was forwarded to me for final agency action.

Having considered the entire record in this matter, I adopt the ALJ's conclusions of law with respect to the public interest inquiry. I further adopt the ALJ's recommended sanction. Accordingly, I will revoke Respondent's registration and deny his pending application to renew the registration. I make the following findings.

Findings

Respondent is the holder of DEA Certificate of Registration, AS2352653, which authorizes him to dispensing controlled substances in schedules II through V as a practitioner. According to Respondent's Certificate of Registration, the expiration date of his registration was February 28, 2006. It is undisputed, however, that Respondent filed a timely renewal application. I therefore find that Respondent's registration has remained in effect pending the issuance of this Order. *See* 5 U.S.C. 558(c).

Respondent holds a medical license in Illinois. Tr. 85, 190–91. In his testimony, Respondent acknowledged that he is not licensed to practice medicine in any other State, *id.* at 85 & 191, and that he has never obtained a license to practice in any other State. *Id.* at 85. Moreover, Respondent does not hold a DEA registration for a location in any State other than Illinois. *Id.* at 191.

In early 2006, Respondent read an advertisement which had been placed by Just USA Meds[2] in the employment section of the Chicago Tribune's Web site. *Id.* at 165. Respondent called the phone number contained in the ad, and spoke with Challen Sullivan, Just USA's owner, who told him that his business ''was to be a provider of medical services,'' but not ''a dispenser or a vending machine of any particular medications.'' *Id.* at 87. Thereafter, Respondent entered into an agreement with the entity under which Just USA Meds would arrange for customers, who were seeking controlled substances, to speak with him by telephone. *Id.* at 14. Respondent was paid $20 per consultation and would typically issue a controlled-substance prescription for the patient upon the conclusion of the consultation. *Id.* The prescriptions were then sent to pharmacies which had entered into arrangements with Just USA Meds to dispense the drugs to its customers.

According to Respondent, a customer would contact Just USA Meds, identify himself, and provide a copy of the credit card which he intended to use to pay his bill. *Id.* at 91. Respondent asserted that a customer would then be interviewed by an employee of Just USA Meds, who would ask him the name of his doctor, what other drugs he was taking, and whether he would agree not to seek drugs from another source if Respondent (or the other doctors engaged by Just USA Meds) issued a prescription for him. *Id.* at 92. Just USA would then contact the customer's credit card company to verify whether the card was valid and to request a pre-charge for the anticipated amount of the services and drugs being provided. *Id.* After Just USA obtained the pre-charge, the customer would then be scheduled for a consultation with Respondent or another physician. *Id.* at 104.

Respondent admitted that he did not physically examine any of the persons who were referred to him by Just USA Meds. Tr. 18 (testimony of DI); *id.* at 84 (testimony of Respondent).[3] Rather, Respondent asserted that the customers were required to send in medical records including the documentation of a physical exam which had to be less than one year old. *Id.* at 97–98. He also maintained that persons who claimed ''some sort of structural harm'' were

[1] While the Government filed exceptions, the exceptions do not go to the merits of the proceeding.

[2] In this decision, Just USA Meds will also be referred to as ''Just USA.''

[3] Respondent did not even physically examine those persons he prescribed to who resided in the Chicago area. *See* GX 34 at 24 (resident of Chicago); GX 39 at 63 (resident of Highland Park, Il.); *Id.* at 133 (resident of Arlington Heights, Il.); *Id.* at 171 (resident of Hoffman Estates, Il.).

required to forward imaging documentation such as a CT scan, MRI, or X-Ray, and that if the person did not have a physical that met the above requirement, the person was sent an eleven to twelve-page-long form, which was to be taken to a doctor in his/her community to ''have the history and physical completed.'' *Id.* at 98. Relatedly, Respondent claimed that for those customers who found it inconvenient to go to a doctor's office, Just USA Meds used a company which sent a nurse to the customer's home to obtain a medical history and perform a physical. *Id.* at 100.

Respondent further maintained that he kept copies of each customer's medical records. *Id.* Respondent did not, however, produce any of these records at the hearing.

Respondent also asserted that the phone consultations he conducted were probing and would take between twenty to thirty minutes to complete.[4] *Id.* at 105. Relatedly, he maintained that Just USA Meds ''scolded [him] a couple of times in the beginning'' because the consultations took too much time. *Id.* According to Respondent, the

> consultations were inquiries concerning the history and physical, which was in front of me, the nature and extent of the medications and therapies that they had already received, their response to any medications that they had already received, what medications other than what they were requesting they were already taking, how their condition affected them, and I usually used two or three different tests inquiring from them to find out the nature of their problem.

Id. at 104. Respondent also maintained that he asked the customer to rate their pain ''on a scale of 1 to 10,'' whether he/she had previously ''taken hydrocodone,'' and if so, how it affected the customer's pain level and whether the drug had caused various adverse events. *Id.* at 105. Respondent maintained that ''those were all discussed by me each and every time,'' and that ''[t]here were no exceptions.'' *Id.*

Relatedly, Respondent asserted that the consultations ''were meaningful interviews that took as long or longer than is customarily had in a physician's office with the patient physically in front of them,'' and ''that the interviews were comprehensive and medically appropriate.'' *Id.* at 106. According to Respondent, ''probably about 90 percent of the patients who were inquiring were requesting some sort of pain relief.'' *Id.* Respondent also asserted that he would ''sometimes'' negotiate with the customers to ''alter their request'' for drugs and or ''to use some other medicine.''[5] *Id.*

According to various prescription records which were entered into evidence, Respondent issued in excess of three hundred controlled-substance prescriptions for Just USA, the overwhelming majority (approximately eighty-five to ninety percent) of which were for combination drugs containing hydrocodone, a schedule III controlled substance, and acetaminophen. *See* GXs 34, 35, & 39; 21 CFR 1308.13(e). Invariably, the prescriptions were for those formulations which contained the stronger concentrations (7.5 or 10 mg.) of hydrocodone. *See* GXs 34, 35, & 39.

As I have noted in numerous other decisions, these drugs are highly popular with drug abusers. *See Southwood Pharmaceuticals, Inc.,* 72 FR 36487, 36503 (2007) (noting 2004 survey of National Institute of Drug Abuse found that ''9.3 percent of twelfth graders reported using Vicodin, a brand name Schedule III controlled substance without a prescription in the previous year''); *William R. Lockridge,* 71 FR 77791, 77796 (2006) (noting that in 2002, the abuse of hydrocodone products resulted in more than 27,000 emergency room visits).[6] Respondent also issued smaller numbers of prescriptions for Didrex (benzphetamine, a schedule III controlled substance), as well as various schedule IV drugs including alprazolam, diazepam, Ambien (zolpidem) and phentermine. *See* GXs 34, 35, & 39; *see also* 21 CFR 1308.13(b)(2); *Id.* 1308.14(c) & (e).

As the prescriptions records indicate, the customers were located throughout the United States, and the overwhelming majority of them resided in States other than Illinois. *See* GXs 34, 35, & 39. More specifically, the records in evidence show, *inter alia,* that Respondent issued hydrocodone prescriptions in the following amounts: forty-eight to residents of Texas, forty to residents of California, nineteen to residents of North Carolina, thirteen to residents of both Ohio and of Virginia, ten to residents of Indiana, nine to residents of Colorado, eight to residents of both Massachusetts and Mississippi, seven to residents of Georgia, six to residents of Missouri, and four to residents of Oklahoma.[7] *See generally* GXs 34, 35, & 39.

As early as March 2006, Respondent spoke with a DEA Diversion Investigator to inquire as to why the Agency had not approved his renewal application. Tr. 87. During the conversation, the DI asked him ''what [he] was doing to make a living as a doctor.'' *Id.* Respondent told the DI that he worked at several clinics and ''had some telemedicine internet practice going.'' *Id.* The DI then told Respondent ''that there might be a problem with that.'' *Id.* Respondent nonetheless continued his prescribing for Just USA Meds until January 2007. *Id.* at 178.[8]

Throughout the hearing, Respondent maintained that his ''prescribing was appropriate.'' *Id.* at 99. Furthermore, on cross-examination, Respondent acknowledged that he found evidence that Just USA Meds had used his name and registration to back-date several prescriptions which had been dispensed before he commenced working for the

[4] The prescription records suggest that this testimony stretches the limits of credulity. According to GX 35, on February 9, 2006, Respondent would have performed approximately thirty consultations, and the following day, he would have performed approximately thirty-three consultations. Respondent would thus have spent between ten and seventeen hours a day consulting. While this is not out of the realm of possibility, it seems most unlikely. However, because most (if not all) of Respondent's prescribings were illegal regardless of how long the consultations lasted for, it is unnecessary to determine whether this testimony is credible.

[5] The prescriptions records, however, cast doubt on the credibility of this testimony. As found above, Respondent invariably issued prescriptions for combination drugs which contained either 7.5 or 10 mg. of hydrocodone (rather than those drugs which contain only 5 mg.), and rarely issued prescriptions for such non-controlled drugs which are used to treat pain such as Tramadol and Fioricet.

The various prescription records entered into evidence show that Respondent also wrote a miniscule number of prescriptions for non-controlled drugs including Soma (carisoprodol), Tramadol, and Fioricet (a combination of butalbital, acetaminophen and caffeine).

[6] In his testimony, Respondent asserted that drugs containing hydrocodone are not addictive or ''dangerous.'' Tr. 158–59. As found above, combination hydrocodone drugs are among the most highly abused controlled substances. I therefore reject Respondent's testimony as self-serving.

[7] The Government also introduced into evidence the sworn declaration of George Van Komen, M.D. GX 41. Respondent, however, objected to the admission of the exhibit on the ground that the declaration was testimonial in nature and that he was unable to cross-examine Dr. Van Komen. Tr. 58–59. The ALJ overruled Respondent's objection and admitted the declaration. *Id.* at 59.

I do not rely on the exhibit, however, because it is unclear whether the declaration was properly admitted. While the Government provided notice of its intent to use the Declaration in its Supplemental Prehearing Statement, the Statement does not disclose the substance of the Declaration. Moreover, the record does not establish whether a copy of the Declaration was provided to Respondent in advance of the hearing. While hearsay is admissible in these proceedings, a testimonial declaration must be timely provided to the other party in order to afford it with the opportunity to determine whether to request a subpoena of the witness.

[8] The record suggests that Respondent had additional discussions with DEA Investigators in both May and September 2006 regarding his practices. The record does not, however, establish with reasonable specificity the content of these discussions.

entity. *Id.* at 170. Respondent testified that he did not authorize this use of his registration which he discovered ''within the first couple of weeks'' after he started working for Just USA. *Id.* at 169.

Respondent failed to report the incident to the Agency, asserting that Just USA had told him that ''only one or two'' prescriptions had been back dated. *Id.* at 170. Respondent admitted, however, that he ''had no way of confirming'' the validity of Just USA's representation that the backdating had occurred in ''only one or two instances.'' *Id.*

Respondent also maintained that on multiple occasions, he engaged in due diligence to determine whether his conduct was legal. Respondent contends that shortly after he entered into his arrangement with Just USA, he was sent a document entitled ''Ordering and Registration Instructions,'' which indicated the procedures which the ''patients'' were required to complete to purchase drugs which included providing a copy of an identification card, medical records, and physician reports, etc. RX 7A. Moreover, the document listed seven States that Just USA's pharmacies did not ship to including Arizona, Kentucky, Missouri, Nevada, Pennsylvania, South Carolina, and Tennessee. *Id.* In his testimony, Respondent maintained that Just USA had sent this document to him after he asked how he would know that he was permitted to prescribe to residents of States other than Illinois. Tr. 95. Respondent further claimed that Just USA told him that it had ''already done an examination of the law, and we do not service'' the above States, because they ''required a face-to-face meeting between the prescribing doctor and the patient,'' or the State prohibited an out-of-state doctor from prescribing to its residents, or the State did not permit telemedicine. *Id.* at 95–96; *see also id.* at 184. According to Respondent, ''it was good enough for me that they had ruled out certain states that it was not appropriate to go to.''[9] *Id.* at 96.

On cross-examination, however, the Government identified multiple instances in which Respondent had issued prescriptions to patients who lived in these States. *See* Tr. 186–90. More specifically, the Government identified controlled prescriptions Respondent issued to residents of Arizona (GX 39 at 6), Kentucky (*id.* at 21), Missouri (*id.* at 23), Nevada (*id.* at 75), Pennsylvania (*id.* at 67), and South Carolina (*id.* at 182). When confronted with this evidence, Respondent did not ''know how that happened'' and claimed that he ''wasn't aware that it happened.'' *Id.* at 194.

Respondent admitted, however, that the customer's names and addresses were in the medical records, which he claimed he had access to. *Id.* at 196. He also admitted that ''in most instances,'' he did not look at where the customer lived, *id.,* but instead relied on the employees of Just USA to screen out the customers. *Id.* at 200–01.

Respondent also entered into evidence an Agency document which stated that it was clarifying DEA's ''policies regarding the dispensing and prescribing of controlled substances as they pertain to the internet.'' RX 7C. This document specifically noted the prescription requirement of Federal law, *see* 21 CFR 1306.04(a), and made explicit reference to the Agency's 2001 Guidance Document, *Dispensing and Purchasing Controlled Substances over the Internet,* 66 FR 21181. The document further stated: ''As noted in the guidance document, it is unlikely that such a relationship could be established through the use of an online questionnaire completed by a consumer prior to the purchase of controlled substances.'' RX 7C, at 1.

The Agency's 2001 Guidance expressly stated that ''[u]nder Federal and state law, for a doctor to be acting in the usual course of professional practice, there must be a bona fide doctor/patient relationship.'' 66 FR at 21182. Continuing, the Guidance observed that ''[f]or purposes of state law, many state authorities, with the endorsement of medical societies, consider the existence of the following four elements as an indication that a legitimate doctor/patient relationship has been established: A patient has a medical complaint; A medical history has been taken; A physical examination has been performed; and Some logical connection exists between the medical complaint; the medical history, the physical examination, and the drug prescribed.'' *Id.* at 21182–83. The Guidance further stated that ''[c]ompleting a questionnaire that is then reviewed by a doctor hired by the internet pharmacy could not be considered the basis for a doctor/patient relationship.'' *Id.* at 21183.

Of further relevance, the Guidance explained that ''[o]nly practitioners acting in the usual course of their professional practice may prescribe controlled substances. These practitioners *must be registered with DEA and licensed to prescribe controlled substances by the State(s) in which they operate*.'' *Id.* at 21181 (emphasis added).[10]

As further support for his contention that he performed due diligence in attempting to ascertain whether his prescribing practices were legal, Respondent introduced into evidence a document which appears to be a legal opinion (dated June 21, 2006) prepared by a Tampa, Florida-based lawyer.[11] *See* RX 7D. In stating the issue, the opinion noted that ''[a]s your Pharmacy and Prescribing Doctors are located within the States of Florida, this Memorandum's analysis focuses on Florida law as well as Federal law concerning appropriate prescribing standards.'' *Id.* at 6. Continuing, the opinion observed that ''[t]he state laws and professional standards concerning telemedicine and prescribing practices vary from state to state, and because I am licensed to practice in the State of Florida, this Memorandum's analysis is limited to Florida law as well as Federal law concerning appropriate prescribing standards.'' *Id.* The opinion further noted that it ''specifically'' did not address such issues as ''physician and pharmacy licensure.'' *Id.*

As for its legal conclusions, the opinion stated that ''[p]rescribing standards vary dramatically from state to state and in some instances vary within a particular state for the prescription of specified pharmaceutical items (e.g., some states have heightened standards for prescribing controlled substances and diet drugs).'' *Id.* at 1.[12]

[9] Respondent subsequently stated that after he stopped working for Just USA he learned that there were two or three other States (in addition to the seven States listed in RX 7A) where his prescribing was illegal. Tr. 161.

[10] Respondent also cites a ''Flow Chart,'' RX 7B, which was prepared by Just USA Meds Pharmacy and which sets forth the purported process by which customers obtained drugs as evidence of his having engaged in due diligence. The document does not set forth any legal advice and is merely cumulative of Respondent's testimony as to the procedures used by Just USA to process customer orders.

Respondent also submitted a document which contains several e-mail messages from July 27 and 28, 2006, which discuss an e-prescribing initiative introduced in Illinois, one of which originated from Mudri Associates, a DEA Consultancy. RX 7E. Respondent asserts that this evidence establishes that he contacted the consultant ''following [its] inspection of all of the procedures followed by [J]ust USA * * * [and] the pharmacies with which [J]ust USA had arrangements.'' Resp. Br. (Pt. II) at 14. The e-mail does not, however, discuss any issue other than various proposals that were part of an Illinois patient safety initiative.

[11] The text of the letter appears to have been cut and inserted into various internet-based text messages which occurred between Respondent and Challen Sullivan, the owner of Just USA Meds. *See* RX 7–D; Tr. 119 & 125–26. Nor does the text of the memorandum appear in the exhibit in the order that is customarily used by lawyers in preparing legal opinions for their clients. *See id.*

[12] The opinion provides a lengthy discussion of Florida's standards, and appears to conclude that under Florida law and regulations, a physician need

Continued

Moreover, in addition to its discussion of Florida law, the opinion notes that ''[o]ther states have adopted statutes specifically relating to prescribing standards and the business of Internet pharmacy—*often requiring a face to face physical examination and making non-compliance a crime subject to heavy penalties. These statutes are usually more comprehensive in requiring compliance by all of the website operators, physicians and pharmacies involved.* Most sophisticated and established Internet pharmacy operators avoid conducting business in these more restrictive states.'' *Id.* at 4 (emphasis added).[13]

The opinion also discussed Federal prescribing standards. In discussing this Agency's 2001 Guidance, the opinion states that ''[a]lthough the DEA acknowledges that state law ultimately controls the issue of whether a prescription is written in the usual course of professional practice, the DEA feels that the weight of legal and professional authority requires the [four] elements [set forth in the Guidance] to be present in order to establish a bona fide doctor/patient relationship.'' *Id.* The letter then quoted verbatim the four elements set forth in the Guidance.

Furthermore, the opinion also noted that ''DEA has in some instances over the past year informally challenged some pharmacies and medical professionals participating in a Medical Records Based Prescribing pharmacy business. The DEA has asserted in such instances that in its opinion Medical Records Based Prescribing does not meet applicable local legal standards which require that an adequate physician-patient relationship exists for the prescription.'' RX 7D at 5.

The opinion, however, rejected the Agency's view as to the legality of Medical Records Based Prescribing, citing among other things, its author's ''understanding that the three largest drug wholesalers * * * have concluded that the DEA does not have a legal basis for making these assertions,'' the 2003 failure of Congress to enact the Ryan Haight Internet Pharmacy Consumer Protection Act (which prohibits a practitioner's prescribing to a person he/she has not physically examined),[14] and the December 2005 testimony of Agency officials to Congress to the effect that the Controlled Substances Act does not provide a statutory definition of ''what constitutes a valid 'doctor/patient' relationship.'' *Id.* at 5. The opinion thus concluded that ''the Websites' Medical Records Based Prescribing Procedures appear to comply with the DEA's published rules and Federal law.'' *Id.*[15]

Discussion

Section 304(a) of the Controlled Substances Act (CSA) provides that a registration to ''dispense a controlled substance * * * may be suspended or revoked by the Attorney General upon a finding that the registrant * * * has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined under such section.'' 21 U.S.C. 824(a)(4). Moreover, section 303(f) of the CSA provides that ''[t]he Attorney General may deny an application for [a practitioner's] registration if he determines that the issuance of such registration would be inconsistent with the public interest.'' 21 U.S.C. 823(f). In making the public interest determination, the Act requires the consideration of the following factors:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing * * * controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

Id.

''[T]hese factors are * * * considered in the disjunctive.'' *Robert A. Leslie, M.D.,* 68 FR 15227, 15230 (2003). I may rely on any one or a combination of factors, and may give each factor the weight I deem appropriate in determining whether to revoke an existing registration or to deny an application to renew a registration. *Id.* Moreover, I am ''not required to make findings as to all of the factors.'' *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *see also Morall* v. *DEA,* 412 F.3d 165, 173–74 (D.C. Cir. 2005).

Having considered all of the factors, I acknowledge that the record contains no evidence that the State of Illinois has taken action against Respondent's medical license (factor one) or that Respondent has been convicted of an offense related to controlled substances (factor two).[16] The record contains, however, an abundance of evidence that Respondent's experience in dispensing controlled substances (factor two) and record of compliance with applicable Federal and State laws (factor four) is characterized by his repeated violation of the CSA's prescription requirement, as well as numerous state laws and regulations prohibiting the unlicensed practice of medicine and setting the standards for prescribing a drug.

Moreover, I reject Respondent's contention that his conduct should be excused because he engaged in due diligence in attempting to ascertain the legal requirement for his prescribing. Even if I was to recognize such a defense in the context of a prescribing practitioner, the record establishes that Respondent's efforts were half-baked at best, and that when he did receive information that his activities were likely illegal, he ignored it. Finally, while Respondent eventually ceased his internet-related prescribing activities, his testimony manifests that he has not accepted responsibility for his misconduct, but rather blames others.

not have personally performed a physical examination in order to prescribe a drug (other than a diet drug). *Id.* at 2–3. However, as found above, Respondent prescribed to residents of numerous other States.

[13] The opinion also observed that the American Medical Association's ''standards suggest that the physician must personally conduct the physical examination,'' RX 7D at 3, and while suggesting that the AMA's positions were inconsistent, quoted another AMA guideline which states in relevant part: ''Licensure: Physicians who prescribe medications via the Internet across state lines, without physically being located in the state(s) where the patient (clinical) encounter(s) occurs, must possess appropriate licensure in all jurisdictions where patients reside.'' *Id.* at 4.

[14] On October 15, 2008, the President signed into law the Ryan Haight Online Pharmacy Consumer Protection Act of 2008, Public Law No. 110–425, 122 Stat. 4820 (2008). Section 2 of the Act prohibits the dispensing of a prescription controlled substance ''by means of the Internet without a valid prescription,'' and defines, in relevant part, the ''[t]he term 'valid prescription' [to] mean [ ] a prescription that is issued for a legitimate medical purpose in the usual course of professional practice by * * * a practitioner who has conducted at least 1 in-person medical evaluation of the patient.'' 122 Stat. 4820. Section 2 further defines ''[t]he term 'in-person medical evaluation' [to] mean [ ] a medical evaluation that is conducted with the patient in the physical presence of the practitioner, without regard to whether portions of the evaluation are conducted by other health professionals.'' *Id.* These provisions do not, however, apply to Respondent's conduct.

[15] Respondent also cites a December 1, 2006 rulemaking which amended DEA regulations to require that a practitioner obtain a separate registration for each State in which he practices, and a December 22, 2006, memo written by the same Tampa-based attorney regarding the applicability of the new rule to internet prescribers. *See* RX 7G. In light of the fact that almost (if not) all of the actual prescriptions which are in evidence in this matter were issued by Respondent prior to his having reviewed either of these documents, I find it unnecessary to make any findings based on them.

[16] This Agency has long held that a State's failure to take action against a practitioner's authority to dispense controlled substances is not dispositive in determining whether the granting of an application for registration would be consistent with the public interest. *See Mortimer B. Levin,* 55 FR 8209, 8210 (1990). I further note that the absence of a criminal conviction is not dispositive of the public interest inquiry. *See, e.g., Edmund Chein,* 72 FR 6580, 6593 n.22 (2007).

I therefore conclude that Respondent's continued registration would be ''inconsistent with the public interest.'' 21 U.S.C. 823(f). Accordingly, Respondent's registration will be revoked and his application to renew his registration will be denied.

Factor Two and Four—Respondent's Experience in Dispensing Controlled Substances and Record of Compliance With Applicable Controlled Substance Laws

The primary issue in this case is whether the prescriptions Respondent issued pursuant to his agreement with Just USA Meds were lawful prescriptions under the CSA. Under a longstanding DEA regulation, a prescription for a controlled substance is not ''effective'' unless it is ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' 21 CFR 1306.04(a). This regulation further provides that ''an order purporting to be a prescription issued not in the usual course of professional treatment * * * is not a prescription within the meaning and intent of [21 U.S.C. 829] and * * * the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.'' *Id.* As the Supreme Court recently explained, ''the prescription requirement * * * ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse. As a corollary, [it] also bars doctors from peddling to patients who crave the drugs for those prohibited uses.'' *Gonzales* v. *Oregon,* 546 U.S. 243, 274 (2006) (citing *United States* v. *Moore,* 423 U.S. 122, 135, 143 (1975)).

Under the CSA, it is fundamental that a practitioner must establish a bona fide doctor-patient relationship in order to act ''in the usual course of * * * professional practice'' and to issue a prescription for a ''legitimate medical purpose.'' *Moore,* 423 U.S. at 141–43. At the time of the events at issue here, the CSA generally looked to state law to determine whether a doctor and patient have established a bona fide doctor-patient relationship. *See Kamir Garces-Mejias,* 72 FR 54931, 54935 (2007); *United Prescription Services, Inc.,* 72 FR 50397, 50407 (2007); *Dispensing and Purchasing Controlled Substances Over the Internet,* 66 FR at 21182–83; *but see* n.14, *supra* (discussing the Ryan Haight Act).

Moreover, shortly after the CSA's enactment, the Supreme Court explained that ''[i]n the case of a physician [the Act] contemplates that *he is authorized by the State to practice medicine* and to dispense drugs in connection with his professional practice.'' *Moore,* 423 U.S. at 140–41 (emphasis added). Accordingly, ''[a] physician who engages in the unauthorized practice of medicine'' under state laws ''is not a 'practitioner acting in the usual course of * * * professional practice' '' under the CSA. *United Prescription Services,* 72 FR at 50407 (quoting 21 CFR 1306.04(a)). This rule is supported by the plain meaning of the Act, which defines the ''[t]he term 'practitioner' [to] mean [ ] a physician * * * licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices * * * to * * * dispense * * * a controlled substance,'' 21 U.S.C. 802(21), and ''[t]he term 'dispense' [to] mean [ ] to deliver a controlled substance to an ultimate user * * * by, or pursuant to the lawful order of, a practitioner.'' *Id.* § 802(10). *See also id.* § 823(f) (''The Attorney General shall register practitioners * * * to dispense * * * if the applicant is authorized to dispense * * * controlled substances under the laws of the State in which he practices.'').

A controlled-substance prescription issued by a physician who lacks the license or other authority required to practice medicine within a State is therefore unlawful under the CSA. *See* 21 CFR 1306.04(a) (''An order purporting to be a prescription issued not in the usual course of professional treatment * * * is not a prescription within the meaning an intent of'' the CSA); *cf.* 21 CFR 1306.03(a)(1) (''A prescription for a controlled substance may be issued only by an individual practitioner who is * * * [a]uthorized to prescribe controlled substances by the jurisdiction in which he is licensed to practice his profession[.]'').

The record establishes that in issuing the prescriptions for Just USA's customers, Respondent repeatedly violated the CSA's prescription requirement. 21 CFR 1306.04(a). This is so for two reasons: (1) Respondent prescribed without establishing a valid doctor-patient relationship in violation of the medical practice standards of numerous States because he failed to physically examine the patients, and (2) Respondent's prescribing typically constituted the unauthorized practice of medicine in the States where the patients were located because he was licensed to practice medicine (and authorized to prescribe) only in Illinois. Furthermore, Respondent issued unlawful prescriptions even where various States had either enacted laws and regulations, rendered decisions in adjudications, or issued policy statements making clear that his prescribing practices were illegal.

For example, as found above, Respondent issued forty hydrocodone prescriptions to residents of California. In 2000, California enacted Cal. Bus. & Prof. Code § 2242.1,[17] which specifically prohibits the prescribing or dispensing of a dangerous drug ''on the Internet for delivery to any person in this state, without an appropriate prior examination and medical indication therefore, except as authorized by Section 2242.'' Moreover, the statute, which provides for a fine or civil penalty of twenty-five thousand dollars for a violation, further directs that ''[i]f the person or entity that is the subject of an action brought pursuant to this section is not a resident of this state, a violation of this section shall, if applicable, be reported to the person's or entity's appropriate professional licensing authority.'' *Id.* at (e).

Relatedly, in 2003, the Medical Board of California revoked a physician's medical license for engaging in the same type of prescribing practices as Respondent did here. *See In re John Steven Opsahl, M.D.,* Decision and Order, at 3 (Med. Bd. Cal. 2003) (available by query at *http://publicdocs.medbd.ca.gov/pdl/mbc.aspx*). In *Opsahl,* the Medical Board expressly found that ''[b]efore prescribing a dangerous drug, a physical examination must be performed.'' *Id.* Continuing, the Board found that ''[a] physician cannot do a good faith prior examination based on a history, a review of medical records, responses to a questionnaire and a telephone consultation with the patient, without a physical examination of the patient.'' *Id.* Finally, the Board found that:

> Medical indication means having a condition that warrants specific treatment. It is determined after the physician takes a history, performs a physical examination and makes an assessment about the patient's condition. * * * A physician cannot determine whether there is a medical indication for prescription of a dangerous drug without performing a physical examination.

Id.[18]

[17] This statute was effective January 1, 2001.

[18] Dr. Opsahl's prescribing practices involved ''verifying patient identity,'' ''obtaining and reviewing medical records,'' ''having direct contact with the patient, though personal contact was not required,'' and ''having an opportunity for follow-up.'' Decision at 4. Opsahl prescribed both non-controlled and controlled drugs including combination drugs containing hydrocodone, benzodiazepines, schedule three drugs containing codeine, as well as Ambien, phentermine, and phendimetrazine. *Id.* at 6.

Moreover, prior to Respondent's engaging in internet-based prescribing, the Medical Board of California had issued numerous Citation Orders to out-of-state physicians for internet prescribing to California residents. These Orders invariably cited not only the physicians' failure to perform ''a good faith prior examination,'' but also their lack of ''a valid California Physician and Surgeon's License to practice medicine in California.'' Citation Order, Martin P. Feldman (Aug. 15, 2003); *see also* Citation Order, Harry Hoff (Jun. 17, 2003); Citation Order, Carlos Gustavo Levy (Jan. 28, 2003); Citation Order, Carlos Gustavo Levy (Nov. 30, 2001). Moreover, the Board had issued several press releases setting forth its position that internet prescribing is unlawful. *See* GX 11 at 9 (Feb. 2004 Action Report) (''The Board has taken action against California physicians and licensees from other states for prescribing over the Internet without a good faith prior exam, and continues to investigate cases as it becomes aware of the practice.''); *Record Fines Issued by Medical Board to Physicians in Internet Prescribing Cases* (News Release Feb. 10, 2003) (available at *http://www.mbc.ca.gov/board/media/releases_2003_02-10_internet_drugs.html*). Respondent thus clearly violated both California law and the CSA in issuing these prescriptions.

Respondent issued forty-eight prescriptions for hydrocodone drugs to residents of Texas. Respondent did not, however, hold a Texas medical license. *See* Tex. Occ. Code § 155.001; *see also id.* § 151.056(a) (''A person who is physically located in another jurisdiction but who, through the use of any medium, including an electronic medium, performs an act that is part of a patient care service initiated in this state, * * * and that would affect the diagnosis or treatment of the patient, is considered to be engaged in the practice of medicine in this state and is subject to appropriate regulation by the board.''); 22 Tex. Admin. Code § 174.4(c) (''Physicians who treat and prescribe through the Internet are practicing medicine and must possess appropriate licensure in all jurisdictions where patients reside.'').

Respondent also lacked the state registration required to prescribe a controlled substance. *See* Tex. Health & Safety Code § 481.061(a) (requiring state registration to dispense); *id.* § 481.063(d) (requiring as a condition for registration that ''a practitioner [be] licensed under the laws of this state''). Respondent thus also violated Texas law, and the CSA, in prescribing controlled substances to that State's residents. *See Moore*, 423 U.S. at 140–41 (''In the case of a physician [the CSA] contemplates that *he is authorized by the State to practice medicine* and to dispense drugs in connection with his professional practice.'') (emphasis added); *United Prescription Services*, 72 FR at 50407 (''A controlled-substance prescription issued by a physician who lacks the license [or other authority required] to practice medicine within a State is * * * unlawful under the CSA.''); 21 U.S.C. 802(10) (defining '' 'dispense' [to] mean[ ] to deliver a controlled substance to an ultimate user * * * by, or pursuant to the lawful order of, a practitioner'').

Respondent issued nineteen prescriptions for drugs containing hydrocodone to North Carolina residents. Respondent did so notwithstanding that under North Carolina law, ''prescribing medication by use of the Internet or a toll-free telephone number, shall be regarded as practicing medicine'' in the State and subjects the practitioner to North Carolina law ''and appropriate regulation by the North Carolina Medical Board.'' N.C. Gen. Stat. Ann. § 90–18(b). North Carolina law further provides that ''[n]o person shall practice medicine * * * nor in any case prescribe for the cure of diseases unless the person shall have been first licensed and registered to do so.'' *Id.* § 90–18(a). Moreover, if ''the person so practicing without a license is an out-of-state practitioner who has not been licensed and registered to practice medicine and surgery in this State, the person shall be guilty of a Class I felony.'' *Id.*[19]

In addition, in February 2001, the North Carolina Medical Board issued a Position Statement entitled: *Contact With Patients Before Prescribing*. GX 25 at 11. Therein, the Board stated ''that prescribing drugs to an individual the prescriber has not personally examined is inappropriate except as noted * * * below.'' *Id.* The Board further explained that ''[b]efore prescribing a drug, a physician should make an informed medical judgment based on the circumstances of the situation and on his or her training and experience. Ordinarily, this will require that the physician personally perform an appropriate history and physical examination, make a diagnosis, and formulate a therapeutic plan, a part of which might be a prescription.'' *Id.* While the North Carolina Board recognized that it may be appropriate to prescribe to a patient without having performed a physical exam ''under certain circumstances,'' none of these apply to Respondent.[20] I thus conclude that Respondent violated both North Carolina law and the CSA in prescribing to the State's residents.

Respondent issued thirteen prescriptions for hydrocodone to Ohio residents. Ohio law defines '' 'the practice of telemedicine' [to] mean[ ] the practice of medicine in this state through the use of any communication, including oral, written, or electronic communication, by a physician outside th[e] state,'' and authorizes ''[t]he holder of a telemedicine certificate [to] engage in the practice of telemedicine in this state.'' Ohio Rev. Code Ann. § 4731.296(A) & (C). *See also id.* § 4731.41 (''No person shall practice medicine and surgery, or any of its branches, without the appropriate certificate from the state medical board to engage in the practice.''). Moreover, under the regulations of the State Medical Board of Ohio, ''a physician shall not prescribe, dispense, or otherwise provide, or cause to be provided, any controlled substances to a person who the physician has never personally examined and diagnosed'' except for in limited situations not applicable here.[21] Ohio Admin. Code § 4731–11–09(A). I thus conclude that Respondent violated both Ohio law and the CSA in issuing prescriptions to Ohio residents.

Respondent issued thirteen prescriptions for hydrocodone to Virginia residents. Under Virginia law, it is ''unlawful for any person to practice medicine * * * in the Commonwealth without a valid unrevoked licensed issued by the Board of Medicine,'' Va. Code Ann. § 54.1–2902; and ''[a]ny person shall be

[19] While North Carolina exempts from these requirements an out-of-state practitioner who ''on an irregular basis, consults with a resident registered physician,'' Respondent does not maintain that he was consulting with a North Carolina physician. N.C. Gen. Stat. Ann. § 90–18(c)(11).

[20] These circumstances ''may include admission orders for a newly hospitalized patient, prescribing for a patient of another physician for whom the prescriber is taking call, or continuing medication on a short-term basis for a new patient prior to the patient's first appointment.'' GX 25 at 11. The Board also noted that ''[e]stablished patients may not require a new history and physical examination for each new prescription, depending on good medical practice.'' *Id.*

[21] The exceptions are for ''institutional settings, on call situations, cross coverage situations, situations involving new patients,'' (but limited to where ''the physician has scheduled or is in the process of scheduling an appointment to examine the patient and the drugs are intended to be used pending that appointment''), ''protocol situations,'' ''nurses practicing in accordance with standard care arrangements, and hospice settings.'' Ohio Admin. Code § 4731–11–09.

regarded as practicing the healing arts who actually engages in such practice as defined in this chapter.'' *Id.* § 54.1–2903; *see also id.* § 54.1–2900 (the ''[p]ractice of medicine'' * * * means the prevention, diagnosis and treatment of human physical or mental ailments, conditions, diseases, pain or infirmities by any means or method''); *id.* § 54.1–2929 (''No person shall practice * * * medicine * * * without obtaining a license from the Board of Medicine'').[22] Furthermore, ''[a] prescription for a controlled substance may be issued only by a practitioner of medicine * * * who is authorized to prescribe controlled substances.'' Va. Code § 54.1–3303(A). Moreover, ''[t]he prescription shall be issued for a medicinal or therapeutic purpose and may be issued only to persons * * * with whom the practitioner has a bona fide practitioner-patient relationship.'' *Id.*

The Virginia statute also provides that ''a bona fide practitioner-patient relationship means that the practitioner shall * * * perform or have performed an appropriate examination of the patient, either physically or by the use of instrumentation and diagnostic equipment through which images and medical records may be transmitted electronically; *except for medical emergencies, the examination of the patient shall have been performed by the practitioner himself*, within the group in which he practices, or by a consulting practitioner prior to issuing a prescription.'' *Id.* (emphasis added). I thus conclude that Respondent violated Virginia law and the CSA in prescribing to Virginia's residents.

Respondent issued ten prescriptions for hydrocodone to Indiana residents. Under Indiana law, ''[i]t is unlawful for any person to practice medicine * * * in this state without holding a license or permit to do so.'' Ind. Code § 25–22.5–8–1. Moreover, the practice of medicine includes the ''prescription * * * of any form of treatment, without limitation.'' *Id.* § 25–22.5–1–1.1(a)(1)((B); *see also id.*§ (a)(4).

The Medical Licensing Board of Indiana has also adopted a regulation (similar to Ohio's), which provides that except for in limited situations, ''a physician shall not prescribe, dispense, or otherwise provide, or cause to be provided, any controlled substance to a person who the physician has never personally physically examined and diagnosed.'' 844 Ind. Admin. Code 5–4–1(a).[23] This rule has been effect since October 2003. I thus conclude that Respondent violated Indiana law and the CSA in prescribing to Indiana residents.

Respondent issued nine prescriptions for hydrocodone to Colorado residents. In November 2000, the Colorado State Board of Medical Examiners issued a policy statement entitled ''Guidelines Regarding Prescribing for Unknown Patients.'' In this statement, the Colorado Board declared that:

> It is unprofessional conduct for a physician to provide treatment and consultation recommendations, including issuing a prescription via electronic or other means, unless the physician has obtained a history and physical evaluation of the patient adequate to establish diagnoses and identify underlying conditions and/or contra-indications to the treatment recommended/provided. Issuing a prescription on the basis of a questionnaire, Internet-based consultation, or a telephonic consultation, all without a valid pre-existing patient/practitioner relationship does not constitute an acceptable standard of care.
>
> Before prescribing a drug, a physician should make an informed medical judgment based on the circumstances of the situation and on his/her training and experience. Ordinarily, this will require that the physician perform an appropriate history and physical examination, make a diagnosis, and formulate a therapeutic plan, a part of which might be a prescription.[24]

GX 12 at 14. I thus conclude that Respondent acted outside of the course of professional practice in issuing the prescriptions to Colorado residents and violated the CSA.

Respondent issued eight prescriptions for hydrocodone to Mississippi residents. In May 2000, the Mississippi State Board of Medical Licensure issued a policy statement on Internet Prescribing. *See* GX 21 at 6. The Mississippi Board advised that the ''[e]ssential components of proper prescribing and legitimate medical practice requires [sic] that the physician obtains a thorough medical history and conducts an appropriate physical examination before prescribing any medication for the first time.'' *Id.*

Moreover, since 1997, Mississippi law has provided that ''no person shall engage in the practice of medicine across state lines (telemedicine) in this state, hold himself out as qualified to do the same, or use any title, word or abbreviation to indicate to or induce others to believe that he is duly licensed to practice medicine across state lines in this state unless he has first obtained a license to do so from the State Board of Medical Licensure and has met all education and licensure requirements as determined by the State Board * * *.'' Miss. Code Ann. § 73–25–34(2). The statute specifically defines the terms ''telemedicine, or the practice of medicine across state lines,'' as including ''[t]he rendering of treatment to a patient within this state by a physician located outside this state as a result of transmission of individual patient data by electronic or other means from within this state to such physician or his agent.'' *Id.* § 73–25–34(1)(b).[25] I thus conclude that Respondent violated Mississippi law and the CSA when he prescribed to the State's residents.

Respondent also issued eight prescriptions for hydrocodone to residents of Massachusetts, whose law follows nearly verbatim the CSA's prescription requirement. *Compare* Mass. Gen. Laws ch. 94C, § 19(a), *with* 21 CFR 1306.04(a). In December 2003, the Massachusetts Board of Registration in Medicine issued the following interpretation of the State's prescription law:

> [t]o satisfy the requirement that a prescription be issued by a practitioner in the usual course of his professional practice, there must be a physician-patient relationship that is for the purpose of maintaining the patient's well-being and the physician must conform to certain minimum norms and standards for the care of patients, such as taking an adequate medical history and conducting an appropriate physical and/or mental status examination and recording the results. Issuance of a prescription, by any means, including the Internet or other electronic process, that does not meet these requirements is therefore unlawful.

Commonwealth of Massachusetts, Board of Registration in Medicine, *Policy 03–06 INTERNET PRESCRIBING* (Adopted Dec. 17, 2003).[26] As the

[22] Respondent does not claim that his prescribing came within one of the limited exceptions for out-of-state practitioners recognized by Virginia law. *See* Va. Code Ann. § 54.1–2901(A)(7) (authorizing ''[t]he rendering of medical advice * * * through telecommunications from a physician licensed to practice medicine in * * * an adjoining state to emergency medical personnel acting in an emergency situation'').

[23] The exceptions are for ''institutional settings, on-call situations, cross-coverage situations, and situations involving advanced practice nurses with prescriptive authority.'' 844 Ind. Admin. Code 5–4–1(a). Respondent does not claim that his prescribing falls within any of these exceptions.

[24] The Colorado Board has also recognized limited exceptions similar to those adopted by Ohio and Indiana.

[25] Mississippi exempts an out-of-state physician from the licensure requirement when the physician provides an evaluation, treatment recommendation, or medical opinion at the request of ''a physician duly licensed to practice medicine in th[e] state,'' and the requesting physician ''has already established a doctor/patient relationship with the patient to be evaluated and/or treated.'' Miss. Code Ann. § 73–25–34(3). Respondent, however, produced no evidence that any physician had ever requested that he evaluate a Just USA patient.

[26] The ALJ also concluded that Respondent was required to be licensed to practice medicine in Massachusetts and violated its law by prescribing

Continued

Board's interpretation makes plain, Respondent acted outside of the usual course of professional practice when he prescribed controlled substances to residents of Massachusetts, and therefore violated both Massachusetts law and the CSA.

Respondent issued seven prescriptions for hydrocodone for residents of Georgia. Under the rules of the Georgia Composite State Board of Medical Examiners, it is ''unprofessional conduct'' to ''[p]rovid[e] treatment and/or consultation recommendations via electronic or other means unless the licensee has performed a history and physical examination of the patient adequate to establish differential diagnoses and identify underlying conditions and/or contra-indications to the treatment recommended.'' Ga. Comp. R. & Regs. 360–3-.02(6).[27] Moreover, Respondent violated Georgia law because he engaged in the unlicensed practice of medicine. *See* Ga. Code Ann. § 43–34–31.1.[28] I thus conclude that Respondent violated the CSA in prescribing to Georgia residents.

Respondent issued six prescriptions for hydrocodone to Missouri residents. Under Missouri law—which was last amended in 1998—it is ''unlawful for any person not now a registered physician within the meaning of the law to practice medicine [or] * * * to engage in the practice of medicine across state lines * * * except as herein provided.'' Mo. Ann. Stat. § 334.010(1). The statute defines ''the practice of medicine across state lines'' to mean in relevant part, ''[t]he rendering of treatment to a patient within this state by a physician located outside this state as a result of transmission of individual patient data by electronic or other means from within this state to such physician or physician's agent.'' *Id.* § 334.010(2)(2). While the statute exempts from the licensure requirement an out-of-state physician who consults with a Missouri-licensed physician when the latter ''retains ultimate authority and responsibility for the * * * diagnoses and treatment * * * of the patient located within th[e] state,'' *id.* § 334.010(3), Respondent makes no claim that his prescribing falls within this exemption.[29] Respondent thus violated both Missouri law and the CSA when he prescribed to the State's residents.

Finally, Respondent issued four prescriptions for hydrocodone to Oklahoma residents. In January 2001, the Oklahoma State Board of Medical Licensure and Supervision issued its *Policy on Internet Prescribing*. GX 27, at 19. Therein, the Oklahoma Board explained that ''[u]nprofessional conduct includes 'prescribing * * * a drug * * * without sufficient examination and the establishment of a valid physician/patient relationship'* * * . The members of the Oklahoma Medical Board have interpreted that a 'sufficient examination' and 'establishment of a valid physician/patient relationship' can NOT take place without an *initial face to face encounter* with the patient.'' *Id.* (emphasis in original and quoting Okla. Stat. tit. 59, § 509–13). I thus conclude that Respondent acted outside of the usual course of professional practice when he prescribed to Oklahoma residents and thus violated the CSA.

As the forgoing demonstrates, Respondent, in issuing the prescriptions for Just USA, repeatedly violated both state laws prohibiting the unlicensed practice of medicine and those establishing standards of medical practice. As the California Court of Appeal has noted, ''the proscription of the unlicensed practice of medicine is neither an obscure nor an unusual state prohibition of which ignorance can reasonably be claimed, and certainly not by persons * * * who are licensed health care providers. Nor can such persons reasonably claim ignorance of the fact that authorization of a prescription pharmaceutical constitutes the practice of medicine.'' *Hageseth* v. *Superior Court*, 59 Cal. Rptr. 3d 385, 403 (Ct. App. 2007). The same is true of the standards for establishing a valid doctor-patient relationship.

I thus hold that Respondent acted outside of ''the usual course of * * * professional practice,'' and lacked ''a legitimate medical purpose,'' 21 CFR 1306.04(a), in issuing numerous prescriptions for the customers of Just USA. I further conclude that Respondent has committed acts which render his continued registration ''inconsistent with the public interest.'' 21 U.S.C. 824(a)(4).

Sanction

Under Agency precedent, where, as here, ''the Government has proved that a registrant has committed acts inconsistent with the public interest, a registrant must 'present sufficient mitigating evidence to assure the Administrator that [he] can be entrusted with the responsibility carried by such a registration.' '' *Medicine Shoppe-Jonesborough*, 73 FR 364, 387 (2008) (quoting *Samuel S. Jackson*, 72 FR 23848, 23853 (2007) (quoting *Leo R. Miller*, 53 FR 21931, 21932 (1988))). ''Moreover, because 'past performance is the best predictor of future performance,' *ALRA Labs, Inc.* v. *DEA*, 54 F.3d 450, 452 (7th Cir.1995), [DEA] has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for [his] actions and demonstrate that [he] will not engage in future misconduct.'' *Medicine Shoppe*, 73 FR at 387; *see also Jackson*, 72 FR at 23853; *John H. Kennedy*, 71 FR 35705, 35709 (2006); *Prince George Daniels*, 60 FR 62884, 62887 (1995). *See also Hoxie* v. *DEA*, 419 F.3d at 483 (''admitting fault'' is ''properly consider[ed]'' by DEA to be an ''important factor'' in the public interest determination).

Respondent contends that his conduct should be excused because he ''exercised due diligence to ensure that his medical behavior was within the law.'' Resp. Br. (Pt. II) at 11. In Respondent's words, ''[d]ue diligence, of course, does not mean that all mistakes were avoided. What it means, is that every effort is being made to search out whether or not any mistakes were being made.'' *Id.* Respondent further contends that ''his due diligence was not a one time, flash-in-the pan'' effort, and that he ''pursu[ed] and

to residents of that State. ALJ at 34. In light of the Massachusetts' Board clear interpretation as set forth in its policy on Internet Prescribing, I conclude that it is unnecessary to address whether Respondent also violated the State's provisions requiring a license and controlled substance registration which appear to allow an out-of-state practitioner to issue a prescription to a state resident in some instances. *Id.* Mass. Gen. Laws ch. 94C, 18(c).

[27] It is noted that the rule does ''not prohibit a licensee who is on call or covering for another licensee from treating and/or consulting a patient of such other licensee.'' Ga. Comp. R. & Regs. 360–3–.02(6). Respondent did not maintain that he was covering for, or consulting with, other physicians who were treating the Georgia residents he prescribed to.

[28] This statute provides:

(a) A person who is physically located in another state * * * and who, through the use of any means, including electronic * * * or other means of telecommunication, through which medical information or data is transmitted, performs an act that is part of a patient care service located in this state * * * that would affect the diagnosis or treatment of the patient is engaged in the practice of medicine in this state. Any person who performs such acts through such means shall be required to have a license to practice medicine in this state and shall be subject to regulation by the board.

Ga. Code Ann. § 43–34–31.1(a). While the statute includes exceptions when, *inter alia*, the physician ''[p]rovides consultation services at the request of a physician licensed in this state,'' or ''[p]rovides consultation services in the case of an emergency,'' *id.* § 43–34–31.1(b)(1) & (2), neither exception applies to Respondent.

[29] The Missouri statute contains two other exemptions which are not remotely applicable to Respondent's conduct. *See* Mo. Ann. Stat. § 334.010(3) (providing medical opinion or testimony in judicial or administrative proceeding) & (4) (performing ''utilization review'').

persist[ed] in his efforts to assure compliance with the law.'' *Id.*

Even were I to recognize a due diligence defense in the context of a practitioner's obligation to know the law, Respondent's contention is wholly unpersuasive. First, while Respondent testified that he relied on Just USA's representation that it did not ship to seven States because it had examined their laws and determined that these States either required a face-to-face meeting between the patient and doctor, or prohibited an out-of-state doctor from prescribing to State residents, Tr. 95, Respondent nonetheless issued multiple prescriptions to persons who resided in those States.

Respondent attempted to justify his issuance of these prescriptions, explaining that he relied on the employees of Just USA to screen out such customers. Respondent's explanation ignores that he is the physician and is thus ultimately responsible for his prescribing. In short, his explanation is nothing more than excuse-making.

More broadly, Respondent is a licensed physician, and is thus properly charged with the obligation to determine what the law required with respect to his prescribing activities. *See, e.g., Hageseth,* 59 Cal. Rptr. 3d at 403 (licensed health care provider cannot ''reasonably claim ignorance'' of state provisions regulating medical practice). Moreover, those who voluntarily engage in commerce by dispensing controlled substances to persons located in other States are properly charged with knowledge of the legal requirements applicable to the practice of medicine in those States. *United,* 72 FR at 50407.

In this regard, Respondent offered no evidence that he contacted any of the Medical Boards of the various States where the recipients of his prescriptions resided, to determine what their laws required with respect to both obtaining a license and establishing a legitimate doctor-patient relationship. Indeed, for all of his professed interest in the internet, Respondent does not maintain that he ever visited the Web site of any state board to research what the legal requirements were to prescribe.

In his brief, Respondent also claims that the legal opinion prepared by a Florida-based lawyer (RX 7D) ''expresses * * * the idea that Respondent * * * behave[d] within the law.'' Resp. Br. (Pt. II) at 14. According to Respondent, this document was offered ''purely and exclusively to show that [he] had exercised due diligence, regardless of what the letter said in its content.'' *Id.* Moreover, it shows that ''in the middle of the year 2006, [he] was continuing to persist in the due diligence investigation of his * * * practice.'' *Id.*

It is clear why Respondent does not rely on the content of the opinion. The opinion expressly stated that it was limited to Florida law, that it was not addressing issues such as physician licensure, warned that ''[p]rescribing standards vary dramatically from state to state,'' noted that other States had adopted prescribing standards which ''often require[] a face to face physical examination and mak[e] non-compliance a crime subject to heavy penalties.'' RX 7D at 4 & 6. Respondent nonetheless prescribed to persons in States whose prescribing standards did require face-to-face examinations, and did so even after he received the opinion—in June 2006 according to his brief and testimony. *See generally* GX 39. It is thus clear that even when Respondent was provided information as to the potential illegality of his activities, he ignored it.[30]

In his brief, Respondent also maintains that as part of his efforts he reviewed various DEA pronouncements, and that in them, ''there is not one word regarding face-to-face physical examinations being required by federal rules or instructions.'' Resp. Br. (Pt. II) at 12–13. Respondent further contends that ''[a]ny requirements for face-to-face physical examinations are to be found exclusively in State laws.'' *Id.* at 13.

That much is true—at least for the prescriptions at issue here which were written before the enactment of the Ryan Haight Act—but it provides no comfort to Respondent. As I have previously explained, ''in enacting the CSA, Congress did not adopt a federal standard for determining whether a valid doctor-patient relationship exists,'' and that ''on this issue, the CSA recognizes the traditional role of the States in regulating the practice of medicine.'' *Paul H. Volkman,* 73 FR 30630, 30643 (2008) (citing *Gonzales,* 546 U.S. at 270). Taking the steps necessary to establish a valid doctor-patient relationship under state laws and medical practice standards is thus fundamental to a practitioner's establishing that he acted in ''the usual course of professional practice'' and issued a prescription for ''a legitimate medical purpose'' as required by Federal law. Most significantly, nothing in the 2001 Guidance Document or any other Agency pronouncement can reasonably be construed as stating that Respondent's prescribing practices were legal under Federal law.[31]

As the forgoing demonstrates, when Respondent did obtain legal advice that his practices were likely unlawful, he ignored it and continued to prescribe in violation of the laws of numerous States and the CSA. Moreover, when Respondent was confronted at the hearing with the evidence that he had prescribed to residents of States where—according to his testimony—it was illegal to do so, he denied that he was responsible and instead blamed others.

The record thus amply demonstrates the absurdity of Respondent's contentions that he made ''heroic'' and ''serious efforts to assure himself that he was behaving correctly * * * relative to the law,'' that any ''mistakes and errors * * * would have been readily corrected had they been brought to his attention,'' and that ''[i]t would be rare to find someone who is attempting so studiously to abide by the law.'' Resp. Br. (Pt. II) at 15. In short, Respondent's contentions are disingenuous.

Moreover, the record establishes that Respondent was aware of the fact that Just USA had used his registration to issue several backdated prescriptions. These too were violations of the CSA, because a prescription ''may be issued only by an individual practitioner who is: (1) [a]uthorized to prescribe * * * by the jurisdiction in which he is licensed to practice * * * and (2) [e]ither registered or exempted from registration,'' *see* 21 CFR 1306.03(a) &

[30] While the opinion letter concluded that ''the Websites' Medical Records Based Prescribing Procedures appear to comply with the DEA's published rules and Federal law,'' the opinion was based on its analysis of Florida's telemedicine rule and did not purport to analyze whether these practices were legal in any other State. Nor did it address whether under Florida law, a physician who is not licensed in the State, can prescribe a controlled substance to a Florida resident. Rather, in its conclusion the opinion states only that ''Florida's laws and professional standards * * * indicate * * * that a prescribing physician *located in Florida* can prescribe using Medical Records Based Prescribing procedures.'' RX 7D at 1 (emphasis added).

[31] Respondent also contends that ''there was zero testimony regarding any complaints or inquiries directed toward [him] by any State.'' Resp. Br. (Pt. II) at 13. The contention is beside the point as there is no evidence in the record that any of the States whose laws Respondent violated were aware of his misconduct. Moreover, even if a State was aware of Respondent's misconduct and declined to take action, DEA would not be precluded from acting because Congress vested authority to enforce the CSA in the Attorney General and not state officials. *See Edmund Chein,* 72 FR 6580, 6590 (2007).

Respondent also contends that the DI ''never suggested what it is that [he] might have been doing wrong.'' Resp. Br. (Pt. II) at 15. The testimony establishes, however, that when Respondent told the DI that he ''had some telemedicine internet practice going,'' the DI responded ''that there might be a problem with that.'' Tr. 87. Even if it is the case that the DI did not specifically identify why Respondent's telemedicine prescribing was unlawful, it is not as if the DI told him it was lawful.

1306.04, and obviously lacked a legitimate medical purpose. *See also* 21 U.S.C. 822(a)(2) (''Every person who dispenses * * * shall obtain from the Attorney General a registration. * * *''); *id.* § 841(a)(1) (''Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally * * * to * * * distribute, or dispense * * * a controlled substance''); *id.* § 843(a)(2) (''It shall be unlawful for any person knowingly or intentionally * * * to use in the course of the * * * distribution[] or dispensing of a controlled substance * * * a registration number which is * * * issued to another person'').

Respondent did not report the violations, Tr. 170, and in his brief he trivialized the violations as just ''mistakes'' of the sort that ''[c]lerks, and other people who work for doctors, make.'' Resp. Br. (Pt. II) at 22. Notwithstanding the illegal nature of these acts (which had happened shortly after Respondent began his arrangement with Just USA), and that Respondent had no way of confirming the validity of Just USA's representation that its employees had used his name and registration to backdate prescriptions only once or twice, Respondent continued to work for them.

As the record demonstrates, Respondent issued hundreds of illegal prescriptions for highly abused and dangerous controlled substances.[32] While Respondent ceased his illegal activity—after engaging in it for approximately one year—he maintained throughout the hearing that his ''prescribing was appropriate,'' Tr. 99, and that it was illegal in only about two or three other States in addition to the seven States identified by Just USA and where he prescribed to anyway. *Id.* at 161. Moreover, when confronted with the evidence showing that that he had prescribed to persons in those seven States, Respondent's did not accept responsibility for having done so, but rather blamed others.

I thus conclude that Respondent has not accepted responsibility for his misconduct and that he has failed to rebut the Government's *prima facie* showing that his continued registration ''would be inconsistent with the public interest.'' 21 U.S.C. 823(f). Accordingly, Respondent's registration will be revoked and his pending application will be denied.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) & 824(a), as well as 28 CFR 0.100(b) & 0.104, I hereby order that DEA Certificate of Registration, AS2352653,[33] issued to Patrick W. Stodola, M.D., be, and it hereby is, revoked. I further order that any pending application to renew or modify the registration be, and it hereby is, denied. This Order is effective June 4, 2009.

Dated: April 24, 2009.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. E9–10245 Filed 5–4–09; 8:45 am]

BILLING CODE 4410–09–P

[32] As found above, Respondent maintained at the hearing that hydrocodone is not addictive or dangerous. Yet in 2002, the abuse of hydrocodone drugs resulted in more than 27,000 emergency room visits. Moreover, the drug is also highly abused by teenagers, among others. Respondent's testimony buttresses my conclusion that Respondent cannot be trusted to acted responsibly.

[33] While the Show Cause Order did not expressly reference Respondent's registration number XS2352653, which authorizes him to dispense narcotic drugs for the purposes of maintenance or detoxification treatment, the holding of a practitioner's registration under 21 U.S.C. 823(f) is a prerequisite for obtaining the separate registration required to conduct narcotic treatment under 21 U.S.C. 823(g). *See id.* § 823(g)(2)(D)(i). Accordingly, the revocation of Respondent practitioner's registration requires the revocation of his registration under 21 U.S.C. 823(g).

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,680]

SMTC Enclosure Systems Division Franklin, MA; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 26, 2009 in response to a petition filed by a company official on behalf of workers of SMTC, Enclosure Systems Division, Franklin, Massachusetts.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 31st day of March 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10210 Filed 5–4–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,162]

Dana Holding Corporation, Humboldt, TN; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on February 6, 2009 in response to a worker petition filed by the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) on behalf of workers of Dana Holding Corporation, Humboldt, Tennessee.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 31st day of March 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10212 Filed 5–4–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,231]

Rawlings Sporting Goods, Washington, MO; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on February 12, 2009 in response to a petition filed by a company official on behalf of workers of Rawlings Sporting Goods, Washington, Missouri.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 26th day of March 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10215 Filed 5–4–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,203]

Qimonda North America Corporation, Qimonda Richmond, a Subsidiary of Qimonda AG, Sandston, VA; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on February 10, 2009 in response to a worker petition filed on behalf of workers of Qimonda North America Corporation, Qimonda Richmond, a subsidiary of Qimonda AG, Sandston, Virginia.

The petitioning group of workers is covered by an active certification, (TA–W–64,401) which expires on December 11, 2010. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC this 31st day of March 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10214 Filed 5–4–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,190]

Hill's Family Corporation, Anaheim, CA; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on February 10, 2009 in response to a petition filed by a State Workforce Official on behalf of workers of Hill's Family Corporation, Anaheim, California.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 26th day of March 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10213 Filed 5–4–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,719]

Shorewood Packaging, Home Entertainment Division, Springfield, OR; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on December 17, 2008, in response to a petition filed on behalf of workers at Shorewood Packaging, Home Entertainment Division, Springfield, Oregon.

The petitioners have requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 31st day of March 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10211 Filed 5–4–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,263]

Kimball Office, Borden, IN; Notice of Termination of Investigation

In accordance with Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on February 17, 2009 in response to a worker petition filed on behalf of workers of Kimball Office, Borden, Indiana. The investigation revealed that this petition was mistakenly instituted twice. The petitioners withdrew their first petition on March 14, 2009 (TA–W–65,492). Therefore, this petition has been deemed invalid and the investigation has been terminated.

Signed in Washington, DC, this 30th day of March 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10216 Filed 5–4–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,623]

Leviton Manufacturing Company, Inc., Warwick, RI; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 18, 2009 in response to a petition filed by a company official on behalf of the workers of Leviton Manufacturing Company, Inc., Warwick, Rhode Island.

The petitioner requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 27th day of March 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10234 Filed 5–4–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,618]

First American Data Trace San Diego Branch San Diego, CA; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 17, 2009 in response to a worker petition filed on behalf of the workers of First American, Data Trace San Diego Branch, San Diego, California.

The petitioners requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 27th day of March 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10233 Filed 5–4–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,612]

Signature Aluminum, Greenville, PA; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an

investigation was initiated on March 17, 2009 in response to a petition filed on behalf of workers of Signature Aluminum, Greenville, Pennsylvania.

The petitioners have requested that the petition be withdrawn. Therefore, the investigation under this petition has been terminated.

Signed at Washington, DC, this 31st day of March, 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10232 Filed 5–4–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,609]

Columbia Forest Products, Trumann, AR; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 17, 2009, in response to a petition filed on behalf of workers at Columbia Forest Products, Trumann, Arkansas.

The petition in this case has been deemed invalid. In order to establish a valid petition, the petition must be signed by a union official, by a company official, by at least three workers, or by an official of the state in which the subject firm is located. This petition was signed first by only one worker, rather than the three workers required. Later it was also signed by an official of the State of Oregon who has no authority to file TAA petitions for any state other than Oregon. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 27th day of March 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10231 Filed 5–4–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,603]

CMI Equipment and Engineering Au Gres, MI; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 16, 2009 in response to a worker petition filed on behalf of workers of CMI Equipment and Engineering, Au Gres, Michigan.

The petitioners have requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 27th day of March 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10230 Filed 5–4–09; 8:45 am]

BILLING CODE; P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,601]

GMVM Orion Assembly, Orion, MI; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 16, 2009 in response to a worker petition filed by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local 5960, on behalf of workers of GMVM Orion Assembly, Orion, Michigan.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 31st day of March 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10229 Filed 5–4–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,541]

Icon Health and Fitness, Logan, UT; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 10, 2009 in response to a petition filed by a state agency representative on behalf of workers of Icon Health and Fitness, Logan, Utah.

The petitioner has requested that the petition be withdrawn. Therefore, the investigation under this petition has been terminated.

Signed at Washington, DC, this 31st day of March, 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10228 Filed 5–4–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,502]

Gerber Coburn & Gerber Service Fort Gibson, OK; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 6, 2009 in response to a worker petition filed by a company official on behalf of workers of Gerber Coburn & Gerber Service, Fort Gibson, Oklahoma.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 26th day of March 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10227 Filed 5–4–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,468]

Utah Stamping Company, Clearfield, UT; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 4, 2009, in response to a worker petition filed on behalf of workers at Utah Stamping Company, Clearfield, Utah.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 26th day of March 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10226 Filed 5–4–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,636]

A.R.E. Manufacturing Inc. Newberg, OR; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 19, 2009, in response to a petition filed by a company official on behalf of the workers of A.R.E. Manufacturing Inc., Newberg, Oregon.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

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

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10239 Filed 5–4–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,635]

Astellas Pharma Manufacturing, Inc.; Grand Island, NY; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 19, 2009 in response to a petition filed on behalf of workers of Astellas Pharma Manufacturing, Inc., Grand Island, New York.

The petitioners have requested that the petition be withdrawn. Consequently, the investigation has been terminated.

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

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10238 Filed 5–4–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,633]

Plexus Corporation; Nampa, ID; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 19, 2009 in response to a petition filed on behalf of workers of Plexus Corporation, Nampa, Idaho.

The petitioners have requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 26th day of March 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10237 Filed 5–4–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,631]

Metokote Corporation; La Peer, MT; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 18, 2009 in response to a worker petition filed by a company official on behalf of workers of Metokote Corporation, La Peer, Montana.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 27th day of March 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10236 Filed 5–4–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,627]

Steelscape, Rancho Cucamonga, CA; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 18, 2009, in response to a worker petition filed by a company official on behalf of workers at Steelscape, Rancho Cucamonga, California.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 26th day of March 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10235 Filed 5–4–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,457]

American Standard Brands, Crane Plastic, Mansfield, OH; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 3, 2009 in response to a petition filed on behalf of workers of American Standard Brands, Crane Plastic, Mansfield, Ohio.

The petitioners have requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 31st day of March 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10225 Filed 5–4–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,361]

Schaeffler Group USA, Inc., Ina Division, Cheraw, SC; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on February 24, 2009 in response to a petition filed on behalf of workers of Schaeffler Group USA, Ina Division, Cheraw, South Carolina.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

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

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10223 Filed 5–4–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,346]

Leggett and Platt, Inc. Hanover Township, PA; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on February 23, 2009 in response to a worker petition filed on behalf of the workers of Leggett and Platt, Inc., Hanover Township, Pennsylvania.

The petitioners requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 27th day of March 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10222 Filed 5–4–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,322; TA–W–65,322A; TA–W–65,322B; TA–W–65,322C]

Notice of Termination of Investigation

TA–W–65,322, Dodger Industries, Inc., Eldora, Iowa
TA–W–65,322A, Dodger Industries, Inc., Raleigh, North Carolina
TA–W–65,322B, Dodger Industries, Inc., Clinton, North Carolina
TA–W–65,322C, Dodger Industries, Inc., Fayetteville, North Carolina

In accordance with Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on February 20, 2009 in response to a petition filed by a company official on behalf of workers of Dodger Industries, Inc., Eldora, Iowa, Raleigh, North Carolina, Clinton, North Carolina, and Fayetteville, North Carolina.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed in Washington, DC, this 27th day of March 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10221 Filed 5–4–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,318]

Americas Styrenics, LLC, Marietta, OH; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on February 20, 2009 in response to a petition filed by the United Steelworkers of America, Local 14200 on behalf of workers of Americas Styrenics, LLC, Marietta, Ohio.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 31st day of March 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10220 Filed 5–4–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,285]

May and Scofield, LLC, Fowlerville, MI; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on February 18, 2009 in response to a petition filed by a company official on behalf of workers of May and Scofield, LLC, Fowlerville, Michigan.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

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

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10218 Filed 5–4–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,277]

Carrollton Specialty Products Company, Moberly, MO; Notice of Termination of Investigation

In accordance with Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on February 17, 2009 in response to a worker petition filed on behalf of workers of Carrollton Specialty Products Company, Moberly, Missouri.

The petitioners have requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed in Washington, DC, this 30th day of March 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10217 Filed 5–4–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,295]

Jeld-Wen, Hawkins Windows Division, Hawkins, Wisconsin; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on February 18, 2009 in response to a petition filed on behalf of workers of Jeld-Wen, Hawkins Windows Division, Hawkins, Wisconsin.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 26th day of March 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10219 Filed 5–4–09; 8:45 am]

BILLING CODE 4510–FN–P

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: National Science Foundation.

ACTION: Notice.

SUMMARY: The National Science Foundation is announcing plans to request renewal of an annual Web-based collection for the Informal Science Education (ISE) Program. In accordance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, we are providing opportunity for public comment on this action. After obtaining and considering public comment, NSF will prepare the submission requesting OMB Clearance of this collection for no longer than 3 years.

Comments: Comments are invited on (a) Whether the proposed collection on 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 on respondents, including through the use of automated collection techniques or other forms of information technology; and (d) ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Written comments should be received by July 6, 2009, to be assured of consideration. Comments received after that date would be considered to the extent practicable.

ADDRESSES: Written comments regarding the information collection and requests for copies of the proposed information collection request should be addressed to Suzanne Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Blvd., Rm. 295, Arlington, VA 22230, or by e-mail to *splimpto@nsf.gov*.

FOR FURTHER INFORMATION CONTACT: Suzanne Plimpton on (703) 292–7556 or send e-mail to *splimpto@nsf.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Title of Collection: Informal Science Education (ISE). Project Monitoring System.

OMB Control No.: 3145–0158.

Expiration Date of Approval: July 31, 2009.

1. Abstract

This document has been prepared to support the clearance of a Management Information System for the Informal Science Education (ISE) program. The goals for the program are to encourage and support projects that (1) Engage the interest of children and adults in science, technology, engineering, and mathematics (STEM) in daily life so that they develop capabilities; scientific and technological literacy, mathematical competence, problem-solving skills, and the desire to learn; (2) bring together individuals and organizations from the informal and formal education communities, as well as from the private and public sectors, to strengthen STEM education in all settings; and (3) develop and implement innovative strategies that support the development of a socially responsible and informed public, and demonstrate promise of increasing participation of all citizens in STEM.

The ISE Management Information System will be comprised of three Web-based surveys, an initial survey that obtains background information about the ISE project, an annual survey, and a final survey. The survey that obtains background information would be completed soon after project grants are awarded (i.e., within 45 days), the annual would be completed at the end of each program year, and the final would be completed soon after the ISE grant period has ended (i.e., within 45 days). Through the use of these three surveys, the system will collect data from each ISE-funded project about the project, its grant recipient and partner organizations, participants, activities, deliverables, and impacts. Information from the system will be used by ISE program officers to evaluate the collective impact of the ISE portfolio of funded projects, to monitor project-related activities and projects' progress over time, and to obtain information that can inform the design of future ISE projects.

2. Expected Respondents

The expected respondents are principal investigators of any ISE projects that have been funded since 2004.

3. Burden on the Public

The average annual reporting burden for the baseline and final reports is approximately 40 hours, and the reporting burden for the annual report is approximately 24 hours. The total elements will be 4,560 burden hours for an average number of 150 respondents per year. The burden on the public is negligible because the collection is limited to project participants that have received funding from the ISE program.

Dated: April 29, 2009.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. E9–10248 Filed 5–4–09; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Cyberinfrastructure; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Advisory Committee for Cyberinfrastructure (25150).

Date and Time: June 2, 2009, 10 a.m.—5 p.m.; June 3, 2009, 8:30 a.m.—1 p.m.

Place: National Science Foundation, 4201 Wilson Blvd., Room 1235, Arlington, VA 22230.

Type of Meeting: Open.

Contact Person: Kristen Oberright, Office of the Director, Office of Cyberinfrastructure (OD/OCI) National Science Foundation, 4201 Wilson Blvd., Suite 1145, Arlington, VA 22230, *Telephone:* 703–292–8970.

Minutes: May be obtained from the contact person listed above.

Purpose of Meeting: To advise NSF on the impact of its policies, programs and activities on the CI community. To provide advice to the Director/NSF on issues related to long-range planning, and to form ad hoc subcommittees to carry out needed studies and tasks.

Agenda: Report from the Director. Discussion of CI research initiatives, education, diversity, workforce issues in CI and long-range funding outlook.

Dated: April 29, 2009.

Susanne Bolton,

Committee Management Officer.

[FR Doc. E9–10199 Filed 5–4–09; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0185]

Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations

I. Background

Pursuant to section 189a.(2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (the Commission or NRC staff) is publishing this regular biweekly notice. The Act requires the Commission publish notice of any amendments issued, or proposed to be issued and grants the Commission the

authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from April 9, 2009 to April 22, 2009. The last biweekly notice was published on April 21, 2009 (74 FR 18251).

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rulemaking and Directives Branch, TWB–05–B01M, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Copies of written comments received may be examined at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland.

Within 60 days after the date of publication of this notice, any person(s) whose interest may be affected by this action may file a request for a hearing and a petition to intervene with respect to issuance of the amendment to the subject facility operating license. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/*. If a request for a hearing or petition for leave to intervene is filed within 60 days, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also set forth the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner/requestor intends to rely in proving the contention at the hearing. The petitioner/requestor must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner/requestor intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner/requestor to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would

take place before the issuance of any amendment.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E–Filing rule, which the NRC promulgated in August 28, 2007 (72 FR 49139). The E–Filing process requires participants to submit and serve all adjudicatory documents over the internet or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least five (5) days prior to the filing deadline, the petitioner/requestor must contact the Office of the Secretary by e-mail at *hearingdocket@nrc.gov*, or by calling (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances in which the petitioner/requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each petitioner/requestor will need to download the Workplace Forms Viewer™ to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The Workplace Forms Viewer™ is free and is available at *http://www.nrc.gov/site-help/e-submittals/install-viewer.html*. Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html*.

Once a petitioner/requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html*. A filing is considered complete at the time the filer submits its documents through EIE. To be timely, an electronic filing must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically may seek assistance through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html* or by calling the NRC electronic filing Help Desk, which is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays. The help electronic filing Help Desk can be contacted by telephone at 1–866–672–7640 or by e-mail at *MSHD.Resource@nrc.gov*.

Participants who believe that they have a good cause for not submitting documents electronically must file a motion, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, *Attention:* Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, *Attention:* Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Non-timely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer, or the Atomic Safety and Licensing Board that the petition and/or request should be granted and/or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp*, unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

For further details with respect to this amendment action, see the application for amendment which is available for public inspection at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the ADAMS Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. 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*.

Energy Northwest, Docket No. 50–397, Columbia Generating Station, Benton County, Washington

Date of amendment request: March 30, 2009.

Description of amendment request: The proposed changes would delete those portions of Technical Specifications (TSs) superseded by Title 10 of the *Code of Federal Regulations* (10 CFR) Part 26, Subpart I, consistent with U.S. Nuclear Regulatory Commission (NRC)-approved TS Task Force (TSTF) traveler TSTF–511, ''Eliminate Working Hour Restrictions from TS 5.2.2 to Support Compliance with 10 CFR Part 26.''

The NRC issued a ''Notice of Availability of Model Safety Evaluation, Model No Significant Hazards Determination, and Model Application for Licensees That Wish To Adopt TSTF–511, Revision 0, ''Eliminate Working Hour Restrictions From TS 5.2.2 To Support Compliance With 10

CFR Part 26'' in the **Federal Register** on December 30, 2008 (73 FR 79923). In its application dated March 30, 2009, the licensee affirmed the applicability of the model no significant hazards consideration.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

Criterion 1: The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Response: No.

The proposed change removes TS restrictions on working hours for personnel who perform safety related functions. The TS restrictions are superseded by the worker fatigue requirements in 10 CFR Part 26. Removal of the TS requirements will be performed concurrently with the implementation of the 10 CFR Part 26, Subpart I, requirements. The proposed change does not impact the physical configuration or function of plant structures, systems, or components (SSCs) or the manner in which SSCs are operated, maintained, modified, tested, or inspected. Worker fatigue is not an initiator of any accident previously evaluated. Worker fatigue is not an assumption in the consequence mitigation of any accident previously evaluated.

Therefore, it is concluded that this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Criterion 2: The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

Response: No.

The proposed change removes TS restrictions on working hours for personnel who perform safety related functions. The TS restrictions are superseded by the worker fatigue requirements in 10 CFR Part 26. Working hours will continue to be controlled in accordance with NRC requirements. The new rule allows for deviations from controls to mitigate or prevent a condition adverse to safety or as necessary to maintain the security of the facility. This ensures that the new rule will not unnecessarily restrict working hours and thereby create the possibility of a new or different kind of accident from any accident previously evaluated. The proposed change does not alter the plant configuration, require new plant equipment to be installed, alter accident analysis assumptions, add any initiators, or affect the function of plant systems or the manner in which systems are operated, maintained, modified, tested, or inspected.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

Criterion 3: The proposed change does not involve a significant reduction in a margin of safety.

Response: No.

The proposed change removes TS restrictions on working hours for personnel who perform safety related functions. The TS restrictions are superseded by the worker fatigue requirements in 10 CFR Part 26. The proposed change does not involve any physical changes to the plant or alter the manner in which plant systems are operated, maintained, modified, tested, or inspected. The proposed change does not alter the manner in which safety limits, limiting safety system settings or limiting conditions for operation are determined. The safety analysis acceptance criteria are not affected by this change. The proposed change will not result in plant operation in a configuration outside the design basis. The proposed change does not adversely affect systems that respond to safely shutdown the plant and to maintain the plant in a safe shutdown condition. Removal of plant-specific TS administrative requirements will not reduce a margin of safety because the requirements in 10 CFR Part 26 are adequate to ensure that worker fatigue is managed.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the analysis adopted by the licensee and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: William A. Horin, Esq., Winston & Strawn, 1700 K Street, NW., Washington, DC 20006–3817.

NRC Branch Chief: Michael T. Markley.

Exelon Generation Company, LLC, and PSEG Nuclear, LLC, Docket Nos. 50–277 and 50–278, Peach Bottom Atomic Power Station (PBAPS), Units 2 and 3, York and Lancaster Counties, Pennsylvania

Date of amendment request: August 7, 2008.

Description of amendment request: The submittal contains six proposed amendments that would modify the PBAPS Units 2 and 3 Operating Licenses DPR–44 and DPR–56, respectively. Four of the six amendments would incorporate Technical Specification Task Force (TSTF) travelers that have been previously approved by the Nuclear Regulatory Commission (NRC). The remaining proposed amendments would modify the PBAPS Units 2 and 3 Technical Specifications (TSs) to incorporate administrative changes and clarifications. Each of the six proposed TS amendments and the associated proposed no significant hazards consideration determinations are discussed below.

A proposed amendment to incorporate TSTF–363–A, ''Revise Topical Report References in ITS [improved technical specifications] 5.6.5, COLR [Core Operating Limits Report],'' Revision 0, would modify the PBAPS Units 2 and 3 TS 5.6.5, ''Core Operating Limits Report (COLR),'' to remove the requirement to maintain COLR Topical Report references by number, title, date, and NRC staff approved document, if included. Incorporation of the TSTF will permit referencing of the topical report by number and title only in the TSs. The additional details would be controlled within the COLR document instead of the TSs. Revision of these details would be subject to the requirements of Title 10 of the *Code of Federal Regulations* Part 50, Section 50.59 for any changes as opposed to TS amendment.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

This action does not affect the plant or operation of the plant. The change simply removes technical details from the Technical Specifications already included in the COLR. These technical details will still be subject to the regulations in 10 CFR 50.59. Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

No new accident scenarios, failure mechanisms, or limiting single failures are introduced as a result of the proposed changes. All systems, structures, and components previously required for the mitigation of a transient remain capable of fulfilling their intended design functions. The proposed change has no adverse effects on any safety-related system or component and does not challenge the performance or integrity of any safety related system. This change is considered as an administrative action. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

This administrative action does not involve any reduction in a margin of safety. The change simply removes technical details from the Technical Specifications already included in the COLR. These technical

details will still be subject to the regulations in 10 CFR 50.59. Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

A proposed amendment to incorporate TSTF–400–A, ''Clarification of Surveillance Requirement on Bypass of Noncritical DG [diesel generator] Automatic Trips,'' Revision 1, would modify the PBAPS Units 2 and 3 TS Surveillance Requirement (SR) 3.8.1.13 to clarify the intent of the SR. Specifically, the wording of the SR would be revised to clarify that the intent of the SR is to test non-critical Emergency DG automatic trips.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

This change clarifies the purpose of SR 3.8.1.13, which is to verify that noncritical automatic Diesel Generator (DG) trips are bypassed in an accident. The DG automatic trips and their bypasses are not initiators of any accident previously evaluated. Therefore, the probability of any accident is not significantly increased. The function of the DG in mitigating accidents is not changed. The revised SR continues to ensure the DG will operate as assumed in the accident analysis. Therefore, the consequences of any accident previously evaluated are not affected.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

This change clarifies the purpose of SR 3.8.1.13, which is to verify that noncritical automatic DG trips are bypassed in an accident. The proposed change does not involve a physical alteration of the plant (no new or different type of equipment will be installed) or a change in the methods governing normal plant operation. Thus, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

This change clarifies the purpose of SR 3.8.1.13, which is to verify that noncritical automatic DG trips are bypassed in an accident. This change clarifies the purpose of the SR, which is to verify that the DG is capable of performing the assumed safety function. The safety function of the DG is unaffected, so the change does not affect the margin of safety. Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

A proposed amendment to incorporate TSTF–439–A, ''Elimination of Second Completion Times Limiting Time From Discovery of Failure To Meet an LCO,'' Revision 2, would modify the PBAPS Units 2 and 3 TS Section 1.3, ''Completion Times,'' regarding second completion times for TS Action (TSA) statements. The plant TSs include Limiting Conditions of Operation (LCOs). LCOs are the minimum functional capabilities or performance levels of systems, structures and components (SSCs) that must be met in order for the plant to operate within its safety limits. A TSA is the required action that must be performed for an associated LCO. The PBAPS TSAs are composed of individual ''conditions,'' the associated action required for the condition, and the completion time for the associated action. The completion time is the time period specified in the TSA in which an action must be completed for a given condition. In some instances, alternate conditions could be entered and exited indefinitely such that operation of the plant could continue without ever restoring SSCs to meet the LCO. Additional secondary completion times (such as limits on the period of time from discovery of the failure to meet the LCO) were specified for these instances to preclude this practice. However, two programs have been instituted that provide a strong disincentive to licensees continuing operation with alternating TSAs for an LCO as described above. These programs are the Maintenance Rule and the Reactor Oversight Process. 10 CFR 50.65(a)(1), the Maintenance Rule, requires each licensee to monitor the performance or condition of SSCs against licensee-established goals to ensure that the SSCs are capable of fulfilling their intended functions. If the performance or condition of an SSC does not meet established goals, appropriate corrective action is required. The NRC Resident Inspectors monitor the licensee's Corrective Action process and could take action if the licensee's maintenance program allowed the systems required by a single LCO to become concurrently inoperable multiple times. The performance and condition monitoring activities required by 10 CFR 50.65(a)(1) and (a)(2) would identify if poor maintenance practices resulted in multiple entries into the ACTIONS of the TSs and unacceptable unavailability of these SSCs. The effectiveness of these performance monitoring activities, and associated corrective actions, is evaluated at least every refueling cycle, not to exceed 24 months per 10 CFR 50.65(a)(3).

NEI 99–02, ''Regulatory Assessment Performance Indicator Guideline,'' describes the tracking and reporting of performance indicators to support the NRC's Reactor Oversight Process (ROP). The NEI document is endorsed by Regulatory Issue Summary 2001–11, ''Voluntary Submission Of Performance Indicator Data.'' Extended unavailability due to multiple entries into the ACTIONS would affect the NRC's evaluation of the licensee's performance under the ROP.

In addition to these programs, a requirement is added to Section 1.3, ''Completion Times,'' of the TSs to require licensees to have administrative controls to limit the maximum time allowed for any combination of Conditions that result in a single contiguous occurrence of failing to meet the LCO. These administrative controls should consider plant risk and shall limit the maximum contiguous time of failing to meet the LCO.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change eliminates certain Completion Times from the Technical Specifications. Completion Times are not an initiator to any accident previously evaluated. As a result, the probability of an accident previously evaluated is not affected. The consequences of an accident during the revised Completion Time are no different than the consequences of the same accident during the existing Completion Times. As a result, the consequences of an accident previously evaluated are not affected by this change. The proposed change does not alter

or prevent the ability of structures, systems, and components (SSCs) from performing their intended function to mitigate the consequences of an initiating event within the assumed acceptance limits. The proposed change does not affect the source term, containment isolation, or radiological release assumptions used in evaluating the radiological consequences of an accident previously evaluated. Further, the proposed change does not increase the types or amounts of radioactive effluent that may be released offsite, nor significantly increase individual or cumulative occupational/public radiation exposures. The proposed change is consistent with the safety analysis assumptions and resultant consequences. Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change does not involve a physical alteration of the plant (*i.e.*, no new or different type of equipment will be installed) or a change in the methods governing normal plant operation. The proposed change does not alter any assumptions made in the safety analysis. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed change to delete the second Completion Time does not alter the manner in which safety limits, limiting safety system settings or limiting conditions for operation are determined. The safety analysis acceptance criteria are not affected by this change. The proposed change will not result in plant operation in a configuration outside of the design basis. Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

A proposed amendment to incorporate TSTF–485–A, ''Correct Example 1.4–1,'' Revision 0, would modify the PBAPS Units 2 and 3 TS Section 1.4, ''Frequency.'' Specifically, Example 1.4–1 would be revised to be consistent with the requirements of SR 3.0.4 which was revised by TSTF–359, ''Increase Flexibility in Mode Restraints,'' Revision 9. The current version of Example 1.4–1 is not consistent with the current requirements of SR 3.0.4. Example 1.4–1 would be modified to reflect that it is possible to enter the MODE or other specified condition in the applicability of an LCO with a surveillance not performed within the frequency requirements of SR 3.0.2 without resulting in a violation of SR 3.0.4.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change revises Section 1.4, ''Frequency,'' Example 1.4–1, to be consistent with Surveillance Requirement (SR) 3.0.4 and Limiting Condition for Operation (LCO) 3.0.4. This change is considered administrative in that it modifies the example to demonstrate the proper application of SR 3.0.4 and LCO 3.0.4. The requirements of SR 3.0.4 and LCO 3.0.4 are clear and are clearly explained in the associated Bases. As a result, modifying the example will not result in a change in usage of the Technical Specifications (TS). The proposed change does not adversely affect accident initiators or precursors, the ability of structures, systems, and components (SSCs) to perform their intended function to mitigate the consequences of an initiating event within the assumed acceptance limits, or radiological release assumptions used in evaluating the radiological consequences of an accident previously evaluated. Therefore, this change is considered administrative and will have no effect on the probability or consequences of any accident previously evaluated.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

No new or different accidents result from utilizing the proposed change. The change does not involve a physical alteration of the plant (*i.e.,* no new or different type of equipment will be installed) or a change in the methods governing normal plant operation. In addition, the change does not impose any new or different requirements or eliminate any existing requirements. The change does not alter assumptions made in the safety analysis. The proposed change is consistent with the safety analysis assumptions and current plant operating practice.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed change is administrative and will have no effect on the application of the Technical Specification requirements. Therefore, the margin of safety provided by the Technical Specification requirements is unchanged. There are no changes to the plant safety analyses involved with this change. Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

A proposed amendment would modify the PBAPS Units 2 and 3 TS to incorporate two administrative changes. The first change would modify TS Table 3.3.8.1–1, ''Loss of Power Instrumentation.'' TS Table 3.3.8.1–1 lists the TS functions associated with the Loss of Power Instrumentation. The allowable values associated with the TS functions were revised as a result of a modification, but as described in the note, were to expire no later than March 1, 2000. The values in effect previous to the modification were retained in note (a) at the bottom of the Table. The previous values were retained as a note to allow for appropriate transition during the period of time that the modifications were being installed on Units 2 and 3.

The modifications are complete and the note is no longer necessary. Therefore, it is proposed to eliminate note (a) at the bottom of Table 3.3.8.1–1, as an administrative change to the TS.

The second change would modify TS Table 3.3.3.1–1, ''Post Accident Monitoring Instrumentation,'' to correct a typographical error. A previous license amendment incorporated TSTF–295, Revision 0, ''Post Accident Monitoring Clarifications,'' which included changing the title for Function 8 in TS Table 3.3.3.1–1 from, ''PCIV Position,'' to ''Penetration Flow Path PCIV Position.'' However, Function 8 was inadvertently revised on the PBAPS, Unit 2 page to state ''Penetration Flaw Path PCIV Position.'' The proposed amendment would correct this typographical error for Function 8 in Table 3.3.3.1–1 of the Unit 2 PBAPS TS.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed changes are administrative in nature and do not impact the operation, physical configuration, or function of plant structures, systems, or components (SSCs). Also, the proposed changes do not impact the initiators or assumptions of analyzed events, nor do the proposed changes impact the mitigation of accidents or transient events. Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed changes are administrative in nature and do not alter plant configuration, require that new equipment be installed, alter assumptions made about accidents previously evaluated, or impact the operation or function of plant equipment.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed changes are administrative in nature and do not involve any physical changes to plant SSCs, or the manner in which SSCs are operated, maintained, modified, tested, or inspected. The proposed changes do not involve a change to any safety limits, limiting safety system settings, limiting conditions of operation, or design parameters for any SSC. The proposed changes do not impact any safety analysis assumptions and do not involve a change in initial conditions, system response times, or other parameters affecting any accident analysis. Therefore, the proposed changes do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

A proposed amendment would modify the PBAPS Units 2 and 3 TS to incorporate an administrative change to Table 3.3.1.1–1, ''Reactor Protection System Instrumentation.'' Specifically, the proposed change would modify TS Table 3.3.1.1–1 to delete the ''NA'' from the Allowable Value column for Function 2.1, ''OPRM Upscale.'' The reference to footnote ''(d),'' which states: ''*See* COLR for OPRM period based detection algorithm (PBDA) setpoint limits,'' will remain in the Allowable Value column for Function 2.f in TS Table 3.3.1.1–1.

Footnote ''d'' in TS Table 3.3.1.1–1 references the PBAPS Core Operating Limits Report (COLR) for setpoint limits associated with Function 2.f. There are trip setpoints maintained in the COLR which are considered applicable to the TSs since they satisfy the requirements of 10 CFR 50.36 for limiting safety system settings. Therefore, the ''NA'' designation associated with note ''d'' will be eliminated to preclude possible confusion.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change is administrative in nature and does not impact the operation, physical configuration, or function of plant structures, systems, or components (SSCs). Also, the proposed change does not impact the initiators or assumptions of analyzed events, nor does the proposed change impact the mitigation of accidents or transient events. Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change is administrative in nature and does not alter plant configuration, require that new equipment be installed, alter assumptions made about accidents previously evaluated, or impact the operation or function of plant equipment. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed change is administrative in nature and does not involve any physical changes to plant SSCs, or the manner in which SSCs are operated, maintained, modified, tested, or inspected. The proposed change does not involve a change to any safety limits, limiting safety system settings, limiting conditions of operation, or design parameters for any SSC. The proposed change does not impact any safety analysis assumptions and does not involve a change in initial conditions, system response times, or other parameters affecting any accident analysis. Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. J. Bradley Fewell, Associate General Counsel, Exelon Generation Company LLC, 4300 Winfield Road, Warrenville, IL 60555.

NRC Branch Chief: Harold K. Chernoff.

FirstEnergy Nuclear Operating Company, Docket Nos. 50–334 and 50–412, Beaver Valley Power Station, Unit Nos. 1 and 2, Beaver County, Pennsylvania

Docket No. 50–346, Davis-Besse Nuclear Power Station, Unit No. 1, Ottawa County, Ohio

Docket No. 50–440, Perry Nuclear Power Plant, Unit No. 1, Lake County, Ohio

Date of amendment request: March 25, 2009.

Description of amendment request: The proposed amendment would delete those portions of the subject plants' Technical Specifications superseded by 10 CFR Part 26, Subpart I.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

Criterion 1: The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated

The proposed change removes Technical Specification restrictions on working hours for personnel who perform safety related functions. The Technical Specification restrictions are superseded by the worker fatigue requirements in 10 CFR Part 26. Removal of the Technical Specification requirements will be performed concurrently with the implementation of the 10 CFR Part 26, Subpart I, requirements. The proposed change does not impact the physical configuration or function of plant structures, systems, or components (SSCs) or the manner in which SSCs are operated, maintained, modified, tested, or inspected. Worker fatigue is not an initiator of any accident previously evaluated. Worker fatigue is not an assumption in the consequence mitigation of any accident previously evaluated.

Therefore, it is concluded that this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Criterion 2: The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident From Any Accident Previously Evaluated

The proposed change removes Technical Specification restrictions on working hours for personnel who perform safety related functions. The Technical Specification restrictions are superseded by the worker fatigue requirements in 10 CFR Part 26. Working hours will continue to be controlled in accordance with NRC requirements. The new rule allows for deviations from controls to mitigate or prevent a condition adverse to safety or as necessary to maintain the security of the facility. This ensures that the new rule will not unnecessarily restrict working hours and thereby create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change does not alter the plant configuration, require new plant equipment to be installed, alter accident analysis assumptions, add any initiators, or effect the function of plant systems or the manner in which systems are operated, maintained, modified, tested, or inspected.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

Criterion 3: The Proposed Change Does Not Involve a Significant Reduction in a Margin of Safety

The proposed change removes Technical Specification restrictions on working hours for personnel who perform safety related functions. The Technical Specification restrictions are superseded by the worker fatigue requirements in 10 CFR Part 26. The proposed change does not involve any physical changes to the plant or alter the manner in which plant systems are operated, maintained, modified, tested, or inspected. The proposed change does not alter the manner in which safety limits, limiting safety system settings or limiting conditions for operation are determined. The safety analysis acceptance criteria are not affected by this change. The proposed change will not result in plant operation in a configuration outside the design basis. The proposed change does not adversely affect systems that respond to safely shutdown the plant and to maintain the plant in a safe shutdown condition.

Removal of plant-specific Technical Specification administrative requirements will not reduce a margin of safety because the requirements in 10 CFR Part 26 are adequate to ensure that worker fatigue is managed.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the requested amendments involve no significant hazards consideration.

Attorney for licensee: David W. Jenkins, Attorney, FirstEnergy Corporation, 76 South Main Street, Akron, Ohio 44308.

NRC Branch Chief: Russell Gibbs.

FirstEnergy Nuclear Operating Company, et al., Docket No. 50–440, Perry Nuclear Power Plant, Unit No. 1, Lake County, Ohio

Date of amendment request: March 11, 2009.

Description of amendment request: The proposed amendment would adopt the Technical Specification Task Force (TSTF) Standard Technical Specification (STS) change TSTF–475, Revision 1. The amendment would: (1) Revise the TS surveillance requirement (SR) frequency in TS 3.1.3, ''Control Rod OPERABILITY'' and (2) Revise Example 1.4–3 in Section 1.4 ''Frequency'' to clarify the applicability of the 1.25 surveillance test interval extension.

The Nuclear Regulatory Commission (NRC) staff issued a notice of opportunity for comment in the **Federal Register** on November 13, 2007 (72 FR 63935), on possible license amendments adopting TSTF–475 using the NRC's consolidated line item improvement process (CLIIP) for amending licensees' TSs, which included a model safety evaluation (SE) and model no significant hazards consideration (NSHC) determination. The NRC staff subsequently issued a notice of availability of the models for referencing in license amendment applications in the **Federal Register** on August 16, 2007 (72 FR 46103), which included the resolution of public comments on the model SE. The August 16, 2007, notice of availability referenced the November 13, 2007, notice. The licensee has affirmed the applicability of the November 13, 2007, NSHC determination in its application.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), an analysis of the issue of no significant hazards consideration is presented below:

Criterion 1—The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated.

The proposed change generically implements TSTF–475, Revision 1, ''Control Rod Notch Testing Frequency and SRM Insert Control Rod Action.'' TSTF–475, Revision 1 modifies NUREG–1433 (BWR/4) and NUREG–1434 (BWR/6) STS. The changes: (1) revise TS testing frequency for surveillance requirement (SR) 3.1.3.2 in TS 3.1.3, ''Control Rod OPERABILITY'', (2) clarify the requirement to fully insert all insertable control rods for the limiting condition for operation (LCO) in TS 3.3.1.2, Required Action E.2, ''Source Range Monitoring Instrumentation'' (NUREG–1434 only), and (3) revise Example 1.4–3 in Section 1.4 ''Frequency'' to clarify the applicability of the 1.25 surveillance test interval extension. This change does not affect either the design or operation of the Control Rod Drive Mechanism (CRDM). The affected surveillance and Required Action is not considered to be an initiator of any analyzed event. Revising the frequency for notch testing fully withdrawn control rods will not affect the ability of the control rods to shutdown the reactor if required. Given the extremely reliable nature of the CRDM, as demonstrated through industry operating experience, the proposed monthly notch testing of all withdrawn control rods continues to provide a high level of confidence in control rod operability. Hence, the overall intent of the notch testing surveillances, which is to detect either random stuck control rods or identify generic concerns affecting control rod operability, is not significantly affected by the proposed change. Requiring control rods to be fully inserted when the associated SRM is inoperable is consistent with other similar requirements and will increase the shutdown margin. The clarification of Example 1.4–3 in Section 1.4 ''Frequency'' is an editorial change made to provide consistency with other discussions in Section 1.4. Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated. The consequences of an accident after adopting TSTF–475, Revision 1 are no different than the consequences of an accident prior to adoption. Therefore, this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Criterion 2—The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident from any Accident Previously Evaluated.

The proposed change does not involve a physical alteration of the plant (no new or different type of equipment will be installed) or a change in the methods governing normal plant operation. The proposed change will not introduce new failure modes or effects and will not, in the absence of other unrelated failures, lead to an accident whose consequences exceed the consequences of accidents previously analyzed. Thus, this change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

Criterion 3—The Proposed Change Does Not Involve a Significant Reduction in the Margin of Safety.

TSTF–475, Revision 1 will: (1) Revise the TS SR 3.1.3.2 frequency in TS 3.1.3, ''Control Rod OPERABILITY'', (2) clarify the requirement to fully insert all insertable control rods for the limiting condition for operation (LCO) in TS 3.3.1.2, ''Source Range Monitoring Instrumentation,'' and (3) revise Example 1.4–3 in Section 1.4 ''Frequency'' to clarify the applicability of the 1.25 surveillance test interval extension. The GE Nuclear Energy Report, ''CRD Notching Surveillance Testing for Limerick Generating Station,'' dated November 2006, concludes that extending the control rod notch test interval from weekly to monthly is not expected to impact the reliability of the scram system and that the analysis supports the decision to change the surveillance frequency. Therefore, the proposed changes in TSTF–475, Revision 1 do not involve a significant reduction in a margin of safety.

The NRC staff proposes to determine that the amendment requests involve no significant hazards consideration.

Attorney for licensee: David W. Jenkins, Attorney, FirstEnergy Corporation, Mail Stop A–GO–15, 76 South Main Street, Akron, OH 44308.

NRC Branch Chief: Russell Gibbs.

FPL Energy Seabrook, LLC Docket No. 50–443, Seabrook Station, Unit No. 1, Rockingham County, New Hampshire

Date of amendment request: February 18, 2009.

Description of amendment request: The proposed changes would eliminate Working Hour Restrictions from Technical Specification (TS) 6.2.2 to support compliance with Title 10 of the *Code of Federal Regulations* (10 CFR) Part 26, Subpart I, consistent with the U.S. Nuclear Regulatory Commission (NRC) approved TS Task Force (TSTF) traveler TSTF–511, ''Eliminate Working Hour Restrictions from TS 5.2.2 to Support Compliance with 10 CFR Part 26.''

The NRC issued a ''Notice of Availability of Model Safety Evaluation, Model No Significant Hazards Determination, and Model Application for Licensees That Wish To Adopt TSTF–511, Revision 0, 'Eliminate Working Hour Restrictions From TS 5.2.2 To Support Compliance With 10 CFR Part 26'" in the **Federal Register** on December 30, 2008 (73 FR 79923). In its application dated February 18, 2009, the licensee concluded that the no significant hazards consideration (NSHC) determination presented in the notice is applicable to Seabrook Station.

Basis for proposed NSHC determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of NSHC, which is presented below:

Criterion 1: The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed change removes Technical Specification restrictions on working hours for personnel who perform safety-related functions. The Technical Specification restrictions are superseded by the worker fatigue requirements in 10 CFR Part 26. Removal of the Technical Specification requirements will be performed concurrently with the implementation of the 10 CFR Part 26, Subpart I, requirements. The proposed change does not impact the physical configuration or function of plant structures, systems, or components (SSCs) or the manner in which SSCs are operated, maintained, modified, tested, or inspected. Worker fatigue is not an initiator of any accident previously evaluated. Worker fatigue is not an assumption in the consequence mitigation of any accident previously evaluated.

Therefore, it is concluded that this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Criterion 2: The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change removes Technical Specification restrictions on working hours for personnel who perform safety-related functions. The Technical Specification restrictions are superseded by the worker fatigue requirements in 10 CFR Part 26. Working hours will continue to be controlled in accordance with NRC requirements. The new rule allows for deviations from controls to mitigate or prevent a condition adverse to safety or as necessary to maintain the security of the facility. This ensures that the new rule will not unnecessarily restrict working hours and thereby create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change does not alter the plant configuration, require new plant equipment to be installed, alter accident analysis assumptions, add any accident initiators, or affect the function of plant systems or the manner in which systems are operated, maintained, modified, tested, or inspected.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

Criterion 3: The proposed change does not involve a significant reduction in a margin of safety.

The proposed change removes Technical Specification restrictions on working hours for personnel who perform safety-related functions. The Technical Specification restrictions are superseded by the worker fatigue requirements in 10 CFR Part 26. The proposed change does not involve any physical changes to the plant or alter the manner in which plant systems are operated, maintained, modified, tested, or inspected. The proposed change does not alter the manner in which safety limits, limiting safety system settings or limiting conditions for operation are determined. The safety analysis acceptance criteria are not affected by this change. The proposed change will not result in plant operation in a configuration outside the design basis. The proposed change does not adversely affect systems that respond to safely shutdown the plant and to maintain the plant in a safe shutdown condition.

Removal of plant-specific Technical Specification administrative requirements will not reduce a margin of safety because the requirements in 10 CFR Part 26 are adequate to ensure that worker fatigue is managed.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis, and based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves NSHC.

Attorney for licensee: M.S. Ross, Florida Power & Light Company, P.O. Box 14000, Juno Beach, FL 33408–0420.

NRC Acting Branch Chief: Richard Ennis.

Indiana Michigan Power Company (the licensee), Docket No. 50–315 and 50–316, Donald C. Cook Nuclear Plant (CNP), Units 1 and 2, Berrien County, Michigan

Date of amendment request: January 14, 2009.

Description of amendment request: The proposed amendment would modify the Operating License (OL), Condition 2.C.(2) and Appendix B, Environmental Technical Specifications, Part II, ''Non-Radiological Environmental Protection Plan [EPP].'' The licensee states that the proposed amendment is administrative in nature and intended to delete obsolete program information to relieve CNP of the burden of preparing and submitting unnecessary environmental reports.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The Environmental Protection Plant (EPP) is concerned with monitoring the effect that plant operations have on the environment for the purpose of protecting the environment and has no effect on any accident postulated

in the Updated Final Safety Analysis Report. Accident probabilities or consequences are not affected in any way by the environmental monitoring and reporting required by the EPP. The revision or deletion of portions of Appendix B of the OL will not impact the design or operation of any plant system or component. No environmental protection requirements established by other federal, state, or local agencies are being reduced by this license amendment request.

Therefore, the proposed changes do not involve a significant increase in the probability of occurrence or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed changes are administrative in nature. Environmental monitoring and reporting have no effect on accident initiation. The deletion of portions of Appendix B of the OL will not impact the design or operation of any plant system or component. There will be no affect on the types or amount of any effluents released from CNP.

Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

These proposed changes are administrative in nature. Changes in the reporting requirements and other administrative revisions in accordance with this submittal have no impact on margin of safety. Environmental evaluations will still be performed, when necessary, on changes to plant design or operation to assess the affect on environmental protection. Review, analysis, and investigation of unusual and important environmental events will still be performed in accordance with CNP's Corrective Action Program.

Therefore, the proposed amendment would not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment requests involve no significant hazards consideration.

Attorney for licensee: James M. Petro, Jr., Senior Nuclear Counsel, Indiana Michigan Power Company, One Cook Place, Bridgman, MI 49106.

NRC Branch Chief: Lois M. James.

Indiana Michigan Power Company (the licensee), Docket Nos. 50–315 and 50–316, Donald C. Cook Nuclear Plant, Units 1 and 2 (CNP–1 and CNP–2), Berrien County, Michigan

Date of amendment request: March 19, 2009.

Description of amendment request: The proposed amendment would delete those portions of the Technical Specifications (TSs) superseded by 10 CFR Part 26, Subpart I. The proposed change is consistent with Nuclear Regulatory Commission (NRC)-approved Technical Specification Task Force (TSTF) Improved Standard TS Change Traveler, TSTF–511, ''Eliminate Working Hour Restrictions from TS 5.2.2 to Support Compliance with 10 CFR Part 26,'' Revision 0. The availability of this TS improvement was announced in the **Federal Register** (FR) on December 30, 2008 (73 FR 79923) as part of the consolidated line item improvement process. The licensee concluded that the no significant hazards consideration determination as presented in the FR notice is applicable to CNP–1 and CNP–2.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

Criterion 1: The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed change removes TS restrictions on working hours for personnel who perform safety-related functions. The TS restrictions are superseded by the worker fatigue requirements in 10 CFR Part 26. Removal of the TS requirements will be performed concurrently with the implementation of the 10 CFR Part 26, Subpart I, requirements. The proposed change does not impact the physical configuration or function of plant structures, systems, or components (SSCs) or the manner in which the SSCs are operated, maintained, modified, tested, and inspected. Worker fatigue is not an initiator of any accident previously evaluated. Worker fatigue is not an assumption in the consequence mitigation of any accident previously evaluated.

Therefore, it is concluded that this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Criterion 2: The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change removes TS restrictions on working hours for personnel who perform safety-related functions. The TS restrictions are superseded by the worker fatigue requirements in 10 CFR Part 26. Working hours will continue to be controlled in accordance with NRC requirements. The new rule allows for deviations from controls to mitigate or prevent a condition adverse to safety or as necessary to maintain the security of the facility. This ensures that the new rule will not unnecessarily restrict working hours and thereby create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change does not alter the plant configuration, require new plant equipment to be installed, alter accident analysis assumptions, add any initiators, or affect the function of plant systems or the manner in which systems are operated, maintained, modified, tested, or inspected.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any [accident] previously evaluated.

Criterion 3: The proposed change does not involve a significant reduction in a margin of safety.

The proposed change removes TS restrictions on working hours for personnel who perform safety-related functions. The TS restrictions are superseded by the worker fatigue requirements in 10 CFR Part 26. The proposed change does not involve any physical changes to the plants or alter the manner in which plant systems are operated, maintained, modified, tested, and inspected. The proposed change does not alter the manner in which safety limits, limiting safety system settings or limiting conditions for operation are determined. The safety analysis acceptance criteria are not affected by this change. The proposed change will not result in plant operation in a configuration outside the design basis. The proposed change does not adversely affect systems that respond to safely shutdown the plants and to maintain the plants in a safe shutdown condition.

Removal of plant-specific TS administrative requirements will not reduce a margin of safety because the requirements in 10 CFR Part 26 are adequate to ensure that worker fatigue is managed.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: James M. Petro, Jr., Senior Nuclear Counsel, Indiana Michigan Power Company, One Cook Place, Bridgman, MI 49106.

NRC Branch Chief: Lois M. James.

Luminant Generation Company LLC, Docket Nos. 50–445 and 50–446, Comanche Peak Steam Electric Station, Units 1 and 2, Somervell County, Texas

Date of amendment request: March 4, 2009.

Brief description of amendments: The amendment adds a license condition for submittal of inservice inspection (ISI) information and analyses requested in Section (e) of the final rule in Title 10 of the *Code of Federal Regulations* (10 CFR), Part 50.61a, or the proposed rule (October 3, 2007; 72 FR 56275), prior to issuance of the 10 CFR 50.61a, within 1

year of completing each American Society of Mechanical Engineers Boiler and Pressure and Vessel Code (ASME Code), Section XI, Category B–A and B–D reactor vessel (RV) weld inspections. This amendment request is associated with the request for relief to extend the ISI interval for ASME Code, Section XI, Category B–A and B–D RV welds from 10 years to 20 years (TAC Nos. ME0777 and ME0778) and the license condition will be added in accordance with the conditions and limitations of U.S. Nuclear Regulatory Commission (NRC) approved WCAP–16168–NP, Revision 2, ''Risk-Informed Extension of the Reactor Vessel In-service Inspection Interval.''

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change will revise the license to require the submission of information and analyses to the NRC following completion of each ASME Code, Section Xl, Category B–A and B–D Reactor Vessel weld inspection. The extension of the ISI from 10 to 20 years is being evaluated as part of the relief request independent from the proposed operating license change. Submission of the information and analyses can have no effect on the consequences of an accident or the probability of an accident because the submission of information is not related to the operation of the plant or any equipment, the programs and procedures used to operate the plant, or the evaluation of accidents. The submittal of information and analyses provides the opportunity for the NRC to independently assess the information and analyses.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change will only affect the requirement to submit information and analyses when specified inspections are performed. There are no changes to plant equipment, operating characteristics or conditions, programs and procedures or training. Therefore, there are no potential new system interactions or failures that could create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed change will revise the license to require the submission of information and analyses to the NRC following completion of each ASME Code, Section Xl, Category B–A and B–D Reactor Vessel weld inspection. The requirement to submit information and analyses is an administrative tool to assure the NRC has the ability to independently review information developed by the Licensee. The proposed change does not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Timothy P. Matthews, Esq., Morgan, Lewis and Bockius, 1800 M Street, NW., Washington, DC 20036.

NRC Branch Chief: Michael T. Markley.

National Aeronautics and Space Administration, Docket Nos. 50–30 and 50–185, Plum Brook Reactor Facility, Sandusky, Ohio

Date of application for amendment: January 9, 2009.

Brief description of amendment: The proposed amendment would add a new paragraph to Licenses TR–3 and R–93 requiring that the National Aeronautics and Space Administration assess the residual radioactivity and demonstrate that the stream bed and banks of Plum Brook between Plum Brook Station boundary and Sandusky Bay meet the radiological criteria for unrestricted use specified in 10 CFR 20.1402 prior to terminating Licenses TR–3 and R–93.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

A. The proposed amendment to Licenses TR–3 and R–93 does not involve a significant increase in the probability or consequences of an accident previously analyzed.

The accident scenarios applicable to the decommissioning of the Plum Brook Reactor Facility are described in section 3.3 of the Decommissioning Plan for the Plum Brook Reactor. The Decommissioning Plan describes postulated events that could result in a release of radioactive materials from the site and analyzes the radiation dose consequences of these events and demonstrates that no adverse public health and safety impacts are expected from these events. Radiological assessment of the residual radioactivity in environmental areas involves sampling and performance of surveys. Spot remediation of some areas will be performed to assure that the as low as reasonably achievable criteria are met. These activities will involve handling and movements of minimal quantities of radioactive material and will involve methods and processes similar to those used for onsite radiological decontamination and remediation. Further, since any planned spot remediation will involve the handling of extremely small quantities of radioactive material, the consequences of any postulated accidents will be a small fraction of the consequences of the accidents previously analyzed in the Decommissioning Plan. Therefore, the proposed amendment will not increase the probability or consequences of accidents previously analyzed.

B. The proposed amendment to Licenses TR–3 and R–93 will not create the possibility of a new or different kind of accident from any accident previously evaluated.

Accidents previously analyzed in the Decommissioning Plan assess different scenarios that could cause the dispersion of radioactive material to the environment. These scenarios arise from dismantlement activities associated with the decommissioning. Assessment of residual radioactivity in Plum Brook involve samples and survey activities that use techniques and processes that are comparable to those used in on-site assessments. In addition, radioactivity that will remain in the environmental areas after License Termination will meet the regulatory criteria for unrestricted use specified in 10 CFR 20.1402. Therefore, no new or different types of accidents are created by this proposed amendment.

C. The proposed amendment to Licenses TR–3 and R–93 will not involve a significant reduction in a margin of safety.

As discussed previously, the activities that will be performed at the facility are as previously described and evaluated in the accident analyses presented in the Decommissioning Plan. The radiological criteria to be used in applying for termination of the NRC Licenses will remain the same as originally proposed and are consistent with the criteria of 10 CFR 20 Subpart E for unrestricted use. The results of assessments performed by the Licensee will remain subject to review by the NRC for adequate implementation of the license termination criteria. Therefore, the margins of safety applicable to assessing the long term dose to members of the public from exposure to the facility after termination of the license remain unchanged. In addition, since this amendment does not impact any previously reviewed accident analyses as previously discussed, no margins of safety are affected by this proposed amendment.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for the Licensee: J. William Sikora, Esquire, 21000 Bookpark Road, Mail Stop 500–118, Cleveland, Ohio 44135.

NRC Branch Chief: Rebecca Tadesse.

Nebraska Public Power District, Docket No. 50–298, Cooper Nuclear Station, Nemaha County, Nebraska

Date of amendment request: March 11, 2009.

Description of amendment request: The proposed amendment would revise Surveillance Requirements 3.8.4.2 and 3.8.4.5 in Technical Specification (TS) Section 3.8.4, ''DC [Direct Current] Sources—Operating,'' by adding a parameter of total battery resistance to the values of battery connection resistance. The proposed changes correct nonconservative TSs.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Do the proposed changes involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

Performing surveillances that test the resistance and capacity of batteries is not a precursor of any accident previously evaluated. Adding a new parameter as an acceptance criterion for successful test of the batteries does not significantly affect the method of performing the surveillances, such that the probability of an accident would be affected. Therefore, the proposed changes do not result in a significant increase in the probability of an accident previously evaluated.

Revision of the surveillances by adding total battery resistance as a parameter to be monitored will help to ensure that the voltage and capacity of the batteries is such that they will provide the power assumed in calculations of design basis accident mitigation. Therefore, the change does not involve a significant increase in the consequences of an accident previously evaluated.

NPPD [Nebraska Public Power District] concludes that the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Do the proposed changes create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change does not involve any modification of the plant or how the plant is operated. Therefore, NPPD concludes that these proposed changes do not create the possibility of a new or different kind of accident from any previously evaluated.

3. Do the proposed changes involve a significant reduction in a margin of safety?

Response: No.

The proposed change will continue to ensure that the station batteries are able to perform their design function as assumed in calculations that evaluate their function during design basis accidents. The proposed change will not affect the design or functioning of the Reactor Protection System, the Emergency Core Cooling Systems, or containment. Based on this, the ability of CNS [Cooper Nuclear Station] to mitigate the design basis accidents that rely on operation of the station batteries is not adversely impacted. Therefore, NPPD concludes that these proposed changes do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. John C. McClure, Nebraska Public Power District, Post Office Box 499, Columbus, NE 68602–0499.

NRC Branch Chief: Michael T. Markley.

PPL Susquehanna, LLC, Docket Nos. 50–387 and 50–388, Susquehanna Steam Electric Station, Units 1 and 2, Luzerne County, Pennsylvania

Date of amendment request: March 24, 2009.

Description of amendment request: The proposed amendment would delete Technical Specification (TS) Section 5.2.2.e, which is superseded by Title 10 of the *Code of Federal Regulations* (10 CFR) Part 26, ''Fitness For Duty Programs,'' Subpart I, ''Managing Fatigue.'' This change is consistent with U.S. Nuclear Regulatory Commission (NRC) approved Revision 0 to Technical Specification Task Force (TSTF) Improved Standard Technical Specification Change Traveler, TSTF–511, ''Eliminate Working Hour Restrictions from TS 5.2.2 to Support Compliance with 10 CFR Part 26.''

The NRC issued a notice of the issuance of a final rule in the **Federal Register** (73 FR 16966, March 31, 2008) that amended 10 CFR Part 26. The revised regulations in 10 CFR Part 26, Subpart I supersede working hour restrictions contained in TSs. Public comment periods for the proposed changes to 10 CFR Part 26 were provided prior to the amendment of Part 26. The NRC staff subsequently issued a notice of availability of the model License Amendment Request (LAR), model Safety Evaluation (SE), and model proposed No Significant Hazards Consideration (NSHC) determination for referencing in license amendment applications using Consolidated Line Item Improvement Process (CLIIP), in the **Federal Register** on December 30, 2008 (73 FR 79923). No public comment period was provided for the model LAR, model SE, and model NSHC determination provided in the notice of availability since the notice of availability was used to implement the changes to 10 CFR Part 26, for which previous comment periods were provided. The licensee affirmed the applicability of the model NSHC determination in its application dated March 24, 2009.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), an analysis of the issue of no significant hazards consideration is presented below:

Criterion 1: The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed change removes Technical Specification restrictions on working hours for personnel who perform safety related functions. The Technical Specification restrictions are superseded by the worker fatigue requirements in 10 CFR Part 26. Removal of the Technical Specification requirements will be performed concurrently with the implementation of the 10 CFR Part 26, Subpart I, requirements. The proposed change does not impact the physical configuration or function of plant structures, systems, or components (SSCs) or the manner in which SSCs are operated, maintained, modified, tested, or inspected. Worker fatigue is not an initiator of any accident previously evaluated. Worker fatigue is not an assumption in the consequence mitigation of any accident previously evaluated.

Therefore, it is concluded that this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Criterion 2: The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change removes Technical Specification restrictions on working hours for personnel who perform safety related functions. The Technical Specification restrictions are superseded by the worker fatigue requirements in 10 CFR Part 26. Working hours will continue to be controlled in accordance with NRC requirements. The new rule allows for deviations from controls to mitigate or prevent a condition adverse to safety or as necessary to maintain the security of the facility. This ensures that the new rule will not unnecessarily restrict working hours and thereby create the possibility of a new or different kind of

accident from any accident previously evaluated.

The proposed change does not alter the plant configuration, require new plant equipment to be installed, alter accident analysis assumptions, add any initiators, or effect the function of plant systems or the manner in which systems are operated, maintained, modified, tested, or inspected.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

Criterion 3: The proposed change does not involve a significant reduction in a margin of safety.

The proposed change removes Technical Specification restrictions on working hours for personnel who perform safety related functions. The Technical Specification restrictions are superseded by the worker fatigue requirements in 10 CFR Part 26. The proposed change does not involve any physical changes to plant or alter the manner in which plant systems are operated, maintained, modified, tested, or inspected. The proposed change does not alter the manner in which safety limits, limiting safety system settings or limiting conditions for operation are determined. The safety analysis acceptance criteria are not affected by this change. The proposed change will not result in plant operation in a configuration outside the design basis. The proposed change does not adversely affect systems that respond to safely shutdown the plant and to maintain the plant in a safe shutdown condition. Removal of plant-specific Technical Specification administrative requirements will not reduce a margin of safety because the requirements in 10 CFR Part 26 are adequate to ensure that worker fatigue is managed.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

Based on the above, the NRC staff concludes that the proposed change presents no significant hazards consideration under the standards set forth in 10 CFR 50.92(c), and, accordingly, a finding of ''no significant hazards consideration'' is justified.

Attorney for licensee: Bryan A. Snapp, Esquire, Assoc. General Counsel, PPL Services Corporation, 2 North Ninth St., GENTW3, Allentown, PA 18101–1179.

NRC Branch Chief: John Boska (Acting).

Notice of Issuance of Amendments to Facility Operating Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing in connection with these actions was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.22(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items are available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management Systems (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* 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.*

Arizona Public Service Company, et al., Docket Nos. STN 50–528, STN 50–529, and STN 50–530, Palo Verde Nuclear Generating Station, Unit Nos. 1, 2, and 3, Maricopa County, Arizona

Date of application for amendment: July 2, 2008.

Brief description of amendment: The amendments revised Technical Specification (TS) 4.2.2, ''Control Element Assemblies,'' to allow replacement of the full-strength control element assemblies (CEAs) with CEAs of a new design beginning with the Palo Verde Nuclear Generating Station (PVNGS), Unit 3 fourteenth refueling outage (U3R14) in the spring of 2009. Additionally, the TS is revised to remove the registered trademark ''Inconel'' while retaining the generic terminology ''Alloy 625'' and deleting the references to part-length CEAs in TS 4.2.2.

Date of issuance: April 17, 2009.

Effective date: As of the date of issuance and shall be implemented within 60 days from the date of issuance.

Amendment No.: Unit 1—172; Unit 2—172; Unit 3—172.

Facility Operating License Nos. NPF–41, NPF–51, and NPF–74: The amendment revised the Operating Licenses and Technical Specifications.

*Date of initial notice in **Federal Register:*** January 27, 2009 (74 FR 4766).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated April 17, 2009.

No significant hazards consideration comments received: No.

Carolina Power & Light Company, Docket Nos. 50–325 and 50–324, Brunswick Steam Electric Plant, Units 1 and 2, Brunswick County, North Carolina

Date of application for amendments: November 24, 2008, as supplemented by letter dated April 2, 2009.

Brief Description of amendments: The amendments delete Technical Specification (TS) 3.6.3.2, ''Containment Atmosphere Dilution (CAD) System,'' and the associated TS Bases that will result in modifications to containment combustible gas control TS requirements as permitted by 10 CFR 50.44. This change is consistent with NRC-approved Revision 2 of Technical Specifications Task Force (TSTF) Improved Standard Technical Specifications Change Traveler 478 (TSTF– 478), ''BWR [Boiling Water Reactor] Technical Specification Changes that Implement the Revised Rule for Combustible Gas Control.'' TSTF–478, Revision 2 also makes TS and associated TS Bases changes for the TS section on Drywell Cooling System Fans. Since Brunswick Steam Electric Plant, Units 1 and 2 TSs do not have this TS section, these changes are not needed. The availability of TSTF–478 was announced in the **Federal Register** on November 21, 2007 (72 FR 65610), as part of the consolidated line item improvement process.

Date of issuance: April 13, 2009.

Effective date: As of the date of issuance and shall be implemented within 120 days.

Amendment Nos: 252 and 280.

Facility Operating License Nos. DPR–71 and DPR–62: Amendments change the Technical Specifications.

Date of initial notice in ***Federal Register:*** February 10, 2009 (74 FR 6664). The supplemental letter provided clarifying information that was within the scope of the initial notice and did not change the initial proposed no significant hazards consideration.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated April 13, 2009.

No significant hazards consideration comments received: No.

Duke Energy Carolinas, LLC, et al., Docket Nos. 50–414, Catawba Nuclear Station, Unit 2, York County, South Carolina

Date of application for amendments: November 13, 2008, as supplemented by letters dated February 5, 2009, and February 19, 2009.

Brief description of amendments: The amendment revised the Technical Specifications and revised a license condition to incorporate an interim alternate repair criterion for steam generator tube repair criteria during the End of Cycle 16 refueling outage and subsequent cycle 17 operation.

Date of issuance: April 13, 2009.

Effective date: As of the date of issuance and shall be implemented within 30 days from the date of issuance. However, the license condition on page 2 of Appendix B of the license shall be implemented prior to any entry into Mode 4 during cycle 17 operation.

Amendment Nos.: 244.

Facility Operating License No. NPF–52: Amendment revised the license and the technical specifications.

Date of initial notice in ***Federal Register***: February 24, 2009 (74 FR 8278). Supplements sent by letters dated February 5, 2009, and February 19, 2009, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination.

The Commission's related evaluation, state consultation, and final no significant hazards consideration determination of the amendment are contained in a Safety Evaluation dated April 13, 2009.

No significant hazards consideration comments received: No.

Entergy Nuclear Operations, Inc., Docket No. 50–247, Indian Point Nuclear Generating Unit No. 2, Westchester County, New York

Date of application for amendment: July 9, 2008, as supplemented by letters dated September 29, October 3, and October 8, 2008, and February 6, 2009.

Brief description of amendment: The amendment revises the Technical Specifications (TSs) by revising the test acceptance criteria specified in the TS surveillance requirement for the emergency diesel generator endurance test.

Date of issuance: April 22, 2009.

Effective date: As of the date of issuance, and shall be implemented within 30 days.

Amendment No.: 259.

Facility Operating License No. DPR–26: The amendment revised the License and the Technical Specifications.

Date of initial notice in ***Federal Register:*** September 9, 2008 (73 FR 52416). The September 29, October 3, and October 8, 2008, and February 6, 2009, supplements provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the NRC staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated April 22, 2009.

No significant hazards consideration comments received: No.

FirstEnergy Nuclear Operating Company, et al., Docket Nos. 50–334 and 50–412, Beaver Valley Power Station, Unit Nos. 1 and 2 (BVPS–1 and –2), Beaver County, Pennsylvania

Date of application for amendment: September 24, 2008, as supplemented on November 10, 2008.

Brief description of amendment: The amendments revise Technical Specifications (TSs) associated with replacing sodium hydroxide with sodium tetraborate as a chemical additive for containment sump pH control following a loss-of-coolant accident at BVPS–2. Due to common TSs for BVPS–1 and –2, administrative changes were made to BVPS–1 license to reflect the BVPS–2 changes.

Date of issuance: April 16, 2009.

Effective date: As of the date of issuance and shall be implemented prior to achieving Mode 4 during startup from the BVPS–2 refueling outage in the fall of 2009.

Amendment Nos.: 283 and 168.

Facility Operating License Nos. DPR–66 and NPF–73: Amendments revise the License and TSs.

Date of initial notice in ***Federal Register:*** January 27, 2009 (74 FR 4772). The November 10, 2008, supplemental letter provided clarifying information that was within the scope of the initial notice and did not change the initial proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated April 16, 2009.

No significant hazards consideration comments received: No.

Florida Power Corporation, et al., Docket No. 50–302, Crystal River Unit No. 3 Nuclear Generating Plant, Citrus County, Florida

Date of application for amendment: December 17, 2008, supplemented by letter dated January 29, 2009.

Brief description of amendment: The amendment revises the Crystal River Unit 3 Improved Technical Specifications Administrative Controls, Section 5.6.2.9, ''Inservice Testing Program,'' to incorporate the Technical Specification Task Force (TSTF) Standard TS Change Traveler, TSTF–479, Revision 0, ''Changes to Reflect Revision of 10 CFR 50.55a,'' and TSTF–497, Revision 0, ''Limit Inservice Testing Program SR 3.0.2 Application to Frequencies of 2 Years or Less.''

Date of issuance: April 13, 2009.

Effective date: Date of issuance, to be implemented within 30 days.

Amendment No.: 232.

Facility Operating License No. DPR–72: Amendment revises the technical specifications.

Date of initial notice in ***Federal Register:*** January 27, 2009 (74 FR 4773). The supplemental letter provided clarifying information that was within the scope of the initial notice and did not change the initial proposed no significant hazards consideration.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated April 13, 2009.

No significant hazards consideration comments received: No.

Florida Power and Light Company, et al., Docket Nos. 50–335 and 50–389, St. Lucie Plant, Unit Nos. 1 and 2, St. Lucie County, Florida

Date of application for amendments: July 10, 2008.

Brief description of amendments: The amendments modified Technical Specification (TS) requirements related to diesel fuel oil testing consistent with Nuclear Regulatory Commission approved Industry/Technical

Specification Task Force (TSTF) TSTF–374, ''Revision to TS 5.5.13 and Associated TS Bases for Diesel Fuel Oil,'' Revision 0.

Date of issuance: April 14, 2009.

Effective date: As of the date of issuance and shall be implemented within 60 days of issuance.

Amendment Nos.: 207 and 155.

Renewed Facility Operating License Nos. DPR–67 and NPF–16: Amendments revised the TSs by relocating references to specific American Society for Testing and Materials standards for fuel oil testing to licensee-controlled documents and adding alternate criteria to the ''clear and bright'' acceptance test for new fuel oil.

Date of initial notice in ***Federal Register:*** February 10, 2009 (74 FR 6666).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated April 14, 2009.

No significant hazards consideration comments received: No.

Northern States Power Company, LLC, Docket No. 50–263, Monticello Nuclear Generating Plant, Wright County, Minnesota

Date of application for amendment: September 25, 2007, as supplemented by letters dated September 8, 2008, November 6, 2008, January 20, 2009 and April 2, 2009.

Brief description of amendment: The amendment revised the allowable value and channel calibration frequency for Function 2.j, Recirculation Riser Differential Pressure—High Function (Break Detection), in Table 3.3.5.1–1, ''Emergency Core Cooling system Instrumentation.''

Date of issuance: April 7, 2009.

Effective date: As of the date of issuance and shall be implemented within 90 days.

Amendment No.: 161.

Facility Operating License No. DPR–22: Amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** November 20, 2007 (72 FR 65368).

The supplemental letters contained clarifying information, did not change the initial no significant hazards consideration determination, and did not expand the scope of the original **Federal Register** notice.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated April 7, 2009.

No significant hazards consideration comments received: No.

Southern Nuclear Operating Company, Inc., Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, City of Dalton, Georgia, Docket Nos. 50–321 and 50–366, Edwin I. Hatch Nuclear Plant, Units 1 and 2, Appling County, Georgia

Date of application for amendments: July 15, 2008.

Brief description of amendments: The amendments revise the TS 5.5.7 Ventilation Filter Testing Program to eliminate the requirement to test the power output of the Standby Gas Treatment System's electric heater and to increase the relative humidity for the testing of the charcoal filter adsorber. Also, a surveillance requirement is being revised to eliminate reference to the heater and to shorten the required SGTS run time.

Date of issuance: April 15, 2009.

Effective date: As of the date of issuance and shall be implemented within 60 days from the date of issuance.

Amendment Nos.: 261 and 205.

Renewed Facility Operating License Nos. DPR–57 and NPF–5: Amendments revised the licenses and the technical specifications.

Date of initial notice in ***Federal Register:*** February 10, 2009 (74 FR 6668). The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated April 15, 2009.

No significant hazards consideration comments received: No.

Tennessee Valley Authority, Docket Nos. 50–327 and 50–328, Sequoyah Nuclear Plant, Units 1 and 2, Hamilton County, Tennessee

Date of application for amendments: April 15, 2008, as supplemented on December 10, 2008.

Brief description of amendments: The amendments revise the Sequoyah Unit 1 and Unit 2 technical specifications to be more consistent with those of NUREG–1431, Revision 3.0, ''Standard Technical Specifications Westinghouse Plants.''

Date of issuance: April 13, 2009.

Effective date: As of the date of issuance and shall be implemented within 45 days.

Amendment Nos.: 323 and 315.

Facility Operating License Nos. DPR–77 and DPR–79: Amendments revised the technical specifications.

Date of initial notice in ***Federal Register:*** May 20, 2008 (73 FR 29164). The December 10, 2008, supplemental letter provided clarifying information that was within the scope of the initial notice and did not change the initial proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated April 13, 2009.

No significant hazards consideration comments received: No.

Virginia Electric and Power Company, et al., Docket No. 50–280, Surry Power Station, Unit 1, Surry County, Virginia

Date of application for amendment: October 14, 2008, as supplemented February 20, 2009.

Brief description of amendments: These amendments revise Technical Specification (TS) 6.4.Q, ''Steam Generator (SG) Program,'' and TS 6.6.A.3, ''Steam Generator Tube Inspection Report,'' to incorporate an interim alternate repair criterion into the provisions for SG tube repair for use during the Surry 1 2009 spring refueling outage (R–22) and the subsequent operating cycle.

Date of issuance: April 8, 2009.

Effective date: As of the date of issuance and shall be implemented prior to increasing reactor coolant system temperature above 200 °F during startup of Surry Unit 1 from refueling outage 22.

Amendment No.: 263.

Renewed Facility Operating License No. DPR–32: Amendment changes the license and the technical specifications.

Date of initial notice in ***Federal Register***: December 16, 2008 (73 FR 76414). The supplement dated February 20, 2009 provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated April 8, 2009.

No significant hazards consideration comments received: No.

Notice of Issuance of Amendments to Facility Operating Licenses and Final Determination of No Significant Hazards Consideration and Opportunity for a Hearing (Exigent Public Announcement or Emergency Circumstances)

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application for the amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules

and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Because of exigent or emergency circumstances associated with the date the amendment was needed, there was not time for the Commission to publish, for public comment before issuance, its usual Notice of Consideration of Issuance of Amendment, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing.

For exigent circumstances, the Commission has either issued a **Federal Register** notice providing opportunity for public comment or has used local media to provide notice to the public in the area surrounding a licensee's facility of the licensee's application and of the Commission's proposed determination of no significant hazards consideration. The Commission has provided a reasonable opportunity for the public to comment, using its best efforts to make available to the public means of communication for the public to respond quickly, and in the case of telephone comments, the comments have been recorded or transcribed as appropriate and the licensee has been informed of the public comments.

In circumstances where failure to act in a timely way would have resulted, for example, in derating or shutdown of a nuclear power plant or in prevention of either resumption of operation or of increase in power output up to the plant's licensed power level, the Commission may not have had an opportunity to provide for public comment on its no significant hazards consideration determination. In such case, the license amendment has been issued without opportunity for comment. If there has been some time for public comment but less than 30 days, the Commission may provide an opportunity for public comment. If comments have been requested, it is so stated. In either event, the State has been consulted by telephone whenever possible.

Under its regulations, the Commission may issue and make an amendment immediately effective, notwithstanding the pendency before it of a request for a hearing from any person, in advance of the holding and completion of any required hearing, where it has determined that no significant hazards consideration is involved.

The Commission has applied the standards of 10 CFR 50.92 and has made a final determination that the amendment involves no significant hazards consideration. The basis for this determination is contained in the documents related to this action. Accordingly, the amendments have been issued and made effective as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.12(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the application for amendment, (2) the amendment to Facility Operating License, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment, as indicated. All of these items are available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* 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.*

The Commission is also offering an opportunity for a hearing with respect to the issuance of the amendment. Within 60 days after the date of publication of this notice, any person(s) whose interest may be affected by this action may file a request for a hearing and a petition to intervene with respect to issuance of the amendment to the subject facility operating license. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland, and electronically on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/.* If there are problems in accessing the document, contact the PDR Reference staff at 1 (800) 397–4209, (301) 415–4737, or by e-mail to *pdr.resource@nrc.gov.* If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.[1] Contentions shall be limited to matters within the scope of the amendment

[1] To the extent that the applications contain attachments and supporting documents that are not publicly available because they are asserted to contain safeguards or proprietary information, petitioners desiring access to this information should contact the applicant or applicant's counsel and discuss the need for a protective order.

under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Each contention shall be given a separate numeric or alpha designation within one of the following groups:

1. Technical—primarily concerns/issues relating to technical and/or health and safety matters discussed or referenced in the applications.

2. Environmental—primarily concerns/issues relating to matters discussed or referenced in the environmental analysis for the applications.

3. Miscellaneous—does not fall into one of the categories outlined above.

As specified in 10 CFR 2.309, if two or more petitioners/requestors seek to co-sponsor a contention, the petitioners/requestors shall jointly designate a representative who shall have the authority to act for the petitioners/requestors with respect to that contention. If a petitioner/requestor seeks to adopt the contention of another sponsoring petitioner/requestor, the petitioner/requestor who seeks to adopt the contention must either agree that the sponsoring petitioner/requestor shall act as the representative with respect to that contention, or jointly designate with the sponsoring petitioner/requestor a representative who shall have the authority to act for the petitioners/requestors with respect to that contention.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing. Since the Commission has made a final determination that the amendment involves no significant hazards consideration, if a hearing is requested, it will not stay the effectiveness of the amendment. Any hearing held would take place while the amendment is in effect.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule, which the NRC promulgated on August 28, 2007, (72 FR 49139). The E-Filing process requires participants to submit and serve adjudicatory documents over the internet or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least five (5) days prior to the filing deadline, the petitioner/requestor must contact the Office of the Secretary by e-mail at *HEARINGDOCKET@NRC.GOV,* or by calling (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances in which the petitioner/requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each petitioner/requestor will need to download the Workplace Forms Viewer™ to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The Workplace Forms Viewer™ is free and is available at *http://www.nrc.gov/site-help/e-submittals/install-viewer.html.* Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.*

Once a petitioner/requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the filer submits its documents through EIE. To be timely, an electronic filing must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically may seek assistance through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html* or by calling the NRC electronic filing Help Desk, which is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays. The electronic filing Help Desk can be contacted by telephone at 1–866–672–7640 or by e-mail at *MSHD.Resource@nrc.gov.*

Participants who believe that they have a good cause for not submitting documents electronically must file a motion, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, *Attention:* Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, *Attention:* Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Non-timely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer, or the Atomic Safety and Licensing Board that the petition and/or request should be granted and/or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp,* unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such

information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Florida Power and Light Company, Docket Nos. 50–250 and 50–251, Turkey Point Plant, Units 3 and 4, Miami-Dade County, Florida

Date of amendment request: April 15, 2009.

Description of amendment request: The amendments revised Technical Specification (TS) 3.9.10, Water Level—Reactor Vessel by eliminating control rods from the Applicability, Action and surveillance requirement during refueling operations. The change is consistent with Standard Technical Specifications—Westinghouse Plants, NUREG–1431, Revision 3.

Date of issuance: April 15, 2009.

Effective date: As of the date of issuance and shall be implemented prior to lifting the Unit 3 reactor vessel closure head.

Amendment Nos.: 239 and 234.

Facility Operating License Nos. (DPR–31 and DPR–41): Amendments revised the technical specifications.

Public comments requested as to proposed no significant hazards consideration (NSHC): No.

The Commission's related evaluation of the amendment, finding of emergency circumstances, state consultation, and final NSHC determination are contained in a safety evaluation dated April 15, 2009.

Attorney for licensee: M.S. Ross, Attorney, Florida Power & Light, P.O. Box 14000, Juno Beach, Florida 33408–0420.

NRC Branch Chief: Thomas H. Boyce.

Dated at Rockville, Maryland, this 24th day of April 2009.

For the Nuclear Regulatory Commission.

Joseph G. Giitter,

Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E9–10039 Filed 5–4–09; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

[NRC–2009–0191]

[Docket No. 030–35869]

Notice of Availability of Environmental Assessment and Finding of No Significant Impact for License Amendment to Byproduct Nuclear Materials License No. 06–28699–03, for Termination of the License and Unrestricted Release of the Swiss Army Brand, Incorporated Facility Located in Shelton, CT

AGENCY: Nuclear Regulatory Commission.

ACTION: Issuance of Environmental Assessment and Finding of No Significant Impact for License Amendment.

FOR FURTHER INFORMATION CONTACT: Thomas K. Thompson, Sr. Health Physicist, Commercial and R&D Branch, Division of Nuclear Materials Safety, Region I, 475 Allendale Road, King of Prussia, Pennsylvania 19406; telephone (610) 337–5303; fax number (610) 337–5269; or by *e-mail: thomas.thompson@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is considering the issuance of an amendment to byproduct materials License No. 06–28699–03. This license is held by Swiss Army Brands, Inc. (the licensee) for its facility located at 65 Trap Falls Road, Shelton, Connecticut (the Facility). Issuance of the amendment would authorize release of the Facility for unrestricted use and termination of the NRC license. The Licensee requested this action in a letter dated March 19, 2008. The NRC has prepared an Environmental Assessment (EA) in support of this proposed action in accordance with the requirements of Title 10, *Code of Federal Regulations* (CFR), Part 51 (10 CFR Part 51). Based on the EA, the NRC has concluded that a Finding of No Significant Impact (FONSI) is appropriate with respect to the proposed action. The amendment will be issued to the Licensee following the publication of this FONSI and EA in the **Federal Register.**

II. Environmental Assessment

Identification of Proposed Action

The proposed action would approve the Licensee's March 19, 2008, license amendment request, resulting in release of the Facility for unrestricted use and the termination of its NRC materials license. License No. 06–28699–03 was issued on November 20, 2001, pursuant to 10 CFR Part 30, and has been amended periodically since that time. This license authorized the Licensee to use tritiated (containing hydrogen-3) luminous painted dials for assembly on watches and alarm clocks.

The Facility is a one-story building of approximately 82,550 square feet, containing warehouse spaces, office spaces and laboratories. Within the Facility, use of licensed materials was largely confined to the 3,520 square foot watch repair area. The Facility is located in a mixed residential/commercial area. Within the Facility, the radionuclide of concern was hydrogen-3 because the half-life of this isotope is greater than 120 days.

In September 2007, the Licensee last handled watches containing tritium, ceased licensed activities and initiated a survey of the affected areas of the Facility. Based on the Licensee's historical knowledge of the site and the conditions of the Facility, the Licensee determined that only routine decontamination activities, in accordance with the NRC-approved operating radiation safety procedures, would be required. The Licensee was not required to submit a decommissioning plan to the NRC because worker cleanup activities and procedures are consistent with those approved for routine operations. The Licensee conducted surveys of the Facility and provided information to the NRC to demonstrate that it meets the criteria in Subpart E of 10 CFR Part 20 for unrestricted release and for license termination.

Need for the Proposed Action

The Licensee has ceased conducting licensed activities at the Facility, and seeks the unrestricted use of its Facility and the termination of its NRC materials license. Termination of its license would end the Licensee's obligation to pay annual license fees to the NRC.

Environmental Impacts of the Proposed Action

The historical review of licensed activities conducted at the Facility shows that such activities involved use of the following radionuclide with a half-life greater than 120 days: Hydrogen-3.

The Licensee conducted a final status survey in January 2008. This survey covered the areas of use in the Facility. The final status survey report was received March 12, 2008. The Licensee demonstrated compliance with the radiological criteria for unrestricted release as specified in 10 CFR 20.1402

by using the screening approach described in NUREG–1757, ''Consolidated Decommissioning Guidance,'' Volume 2. The radionuclide-specific derived concentration guideline levels (DCGLs), developed by the NRC, which comply with the dose criterion in 10 CFR 20.1402, were not exceeded. These DCGLs define the maximum amount of residual radioactivity on building surfaces, equipment, and materials, and in soils, that will satisfy the NRC requirements in Subpart E of 10 CFR Part 20 for unrestricted release. The Licensee's final status survey results were below these DCGLs and are in compliance with the As Low As Reasonably Achievable (ALARA) requirement of 10 CFR 20.1402. The NRC thus finds that the Licensee's final status survey results are acceptable. Based on its review, the staff has determined that the affected environment and any environmental impacts associated with the proposed action are bounded by the impacts evaluated by the ''Generic Environmental Impact Statement in Support of Rulemaking on Radiological Criteria for License Termination of NRC-Licensed Nuclear Facilities'' (NUREG–1496) Volumes 1–3 (ML042310492, ML042320379, and ML042330385). The staff finds there were no significant environmental impacts from the use of radioactive material at the Facility. The NRC staff reviewed the docket file records and the final status survey report to identify any non-radiological hazards that may have impacted the environment surrounding the Facility. No such hazards or impacts to the environment were identified. The NRC has identified no other radiological or non-radiological activities in the area that could result in cumulative environmental impacts.

The NRC staff finds that the proposed release of the Facility for unrestricted use and the termination of the NRC materials license is in compliance with 10 CFR 20.1402. Based on its review, the staff considered the impact of the residual radioactivity at the Facility and concluded that the proposed action will not have a significant effect on the quality of the human environment.

Environmental Impacts of the Alternatives to the Proposed Action

Due to the largely administrative nature of the proposed action, its environmental impacts are small. Therefore, the only alternative the staff considered is the no-action alternative, under which the staff would leave things as they are by simply denying the amendment request. This no-action alternative is not feasible because it conflicts with 10 CFR 30.36(d), requiring that decommissioning of byproduct material facilities be completed and approved by the NRC after licensed activities cease. The NRC's analysis of the Licensee's final status survey data confirmed that the Facility meets the requirements of 10 CFR 20.1402 for unrestricted release and for license termination. Additionally, denying the amendment request would result in no change in current environmental impacts. The environmental impacts of the proposed action and the no-action alternative are therefore similar, and the no-action alternative is accordingly not further considered.

Conclusion

The NRC staff has concluded that the proposed action is consistent with the NRC's unrestricted release criteria specified in 10 CFR 20.1402. Because the proposed action will not significantly impact the quality of the human environment, the NRC staff concludes that the proposed action is the preferred alternative.

Agencies and Persons Consulted

NRC provided a draft of this Environmental Assessment to the State of Connecticut, Department of Environmental Protection, Division of Radiation, for review on February 9, 2009. The State replied by electronic mail on April 9, 2009, indicating they agreed with the conclusions of the Environmental Assessment.

The NRC staff has determined that the proposed action is of a procedural nature, and will not affect listed species or critical habitat. Therefore, no further consultation is required under Section 7 of the Endangered Species Act. The NRC staff has also determined that the proposed action is not the type of activity that has the potential to cause effects on historic properties. Therefore, no further consultation is required under Section 106 of the National Historic Preservation Act.

III. Finding of No Significant Impact

The NRC staff has prepared this EA in support of the proposed action. On the basis of this EA, the NRC finds that there are no significant environmental impacts from the proposed action, and that preparation of an environmental impact statement is not warranted. Accordingly, the NRC has determined that a Finding of No Significant Impact is appropriate.

IV. Further Information

Documents related to this action, including the application for license 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 Agency-wide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The documents related to this action are listed below, along with their ADAMS accession numbers.

1. NRC License No. 06–28699–03, Amendment 4, issued December 20, 2006 (ML063550135);
2. Termination request dated March 19, 2008 (ML080940220);
3. Additional information on termination request dated May 12, 2008 (ML081540221);
4. Additional information on termination request dated March 5, 2008 (ML080940229);
5. Additional information on termination request received October 8, 2008 (ML083120214);
6. Additional information on termination request dated December 2, 2008 (ML083430273);
7. License issued November 20, 2001 (ML013330202);
8. Inspection report dated September 17, 2007 (ML072630308);
9. NUREG–1757, ''Consolidated NMSS Decommissioning Guidance'';
10. Title 10 *Code of Federal Regulations,* Part 20, Subpart E, ''Radiological Criteria for License Termination'';
11. Title 10, *Code of Federal Regulations,* Part 51, ''Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions''; and
12. NUREG–1496, ''Generic Environmental Impact Statement in Support of Rulemaking on Radiological Criteria for License Termination of NRC–Licensed Nuclear Facilities.''

If you do not have access to ADAMS, or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov.* These documents may also be viewed electronically on the public computers located at the NRC's PDR, O 1F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee.

Dated at King of Prussia, Pennsylvania this 28th day of April 2009.

For the Nuclear Regulatory Commission.

James P. Dwyer,

Chief, Commercial, Research and Development Branch, Division of Nuclear Materials Safety, Region I.

[FR Doc. E9–10343 Filed 5–4–09; 8:45 am]

BILLING CODE 7590–01–P

POSTAL SERVICE

International Product Change—Royal Mail Group Inbound Air Parcel Post Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add the Royal Mail Group Inbound Air Parcel Post Agreement to the Competitive Products List pursuant to 39 U.S.C. 3642.

DATES: May 5, 2009.

FOR FURTHER INFORMATION CONTACT: Margaret M. Falwell, 703–292–3576.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that it has filed with the Postal Regulatory Commission a Request of United States Postal Service to Add Royal Mail Inbound Air Parcel Post Agreement to the Competitive Product List, and Notice of Filing (Under Seal) Contract and Enabling Governor's Decision. Documents are available at *http://www.prc.gov,* Docket Nos. MC2009–24 and CP2009–28.

Neva R. Watson,

Attorney, Legislative.

[FR Doc. E9–10355 Filed 5–4–09; 8:45 am]

BILLING CODE 7710–12– P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11734 and #11735]

Arkansas Disaster #AR–00030

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Arkansas (FEMA–1834–DR), dated 04/28/2009.

Incident: Severe Storms and Tornadoes.

Incident Period: 04/09/2009.

Effective Date: 04/28/2009.

Physical Loan Application Deadline Date: 06/29/2009.

Economic Injury (EIDL) Loan Application Deadline Date: 01/28/2010.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 04/28/2009, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties:

Ashley, Howard, Miller, Polk, Sevier.

The Interest Rates are:

	Percent
Other (Including Non-Profit Organizations) With Credit Available Elsewhere	4.500
Businesses and Non-Profit Organizations Without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 11734C and for economic injury is 11735C.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. E9–10312 Filed 5–4–09; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11732 and #11733]

FLORIDA Disaster #FL–00040

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for the State of Florida (FEMA–1831–DR), dated 04/28/2009.

Incident: Severe Storms, Flooding, Tornadoes, and Straight-line Winds.

Incident Period: 03/26/2009 and continuing.

DATES: Effective Date: 04/28/2009.

Physical Loan Application Deadline Date: 06/29/2009.

Economic Injury (EIDL) Loan Application Deadline Date: 01/28/2010.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 04/28/2009, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties (Physical Damage and Economic Injury Loans):

Calhoun, Hamilton, Holmes, Jackson, Lafayette, Liberty, Madison, Okaloosa, Santa Rosa, Suwannee, Walton, Washington.

Contiguous Counties (Economic Injury Loans Only):

Florida: Bay, Columbia, Dixie, Escambia, Franklin, Gadsden, Gilchrist, Gulf, Jefferson, Leon, Taylor, Wakulla.

Alabama: Covington, Escambia, Geneva, Houston.

Georgia: Brooks, Echols, Lowndes, Seminole.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners with Credit Available Elsewhere	4.375
Homeowners without Credit Available Elsewhere	2.187
Businesses with Credit Available Elsewhere	6.000
Other (Including Non-Profit Organizations) with Credit Available Elsewhere	4.500
Businesses and Non-Profit Organizations without Credit Available Elsewhere	4.000
For Economic Injury:	
Businesses & Small Agricultural Cooperatives without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 117326 and for economic injury is 117330.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. E9–10307 Filed 5–4–09; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11730 and #11731]

Alabama Disaster #AL–00021

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Alabama (FEMA–1835–DR), dated 04/28/2009.

Incident: Severe Storms, Flooding, Tornadoes, and Straight-line Winds.

Incident Period: 03/25/2009 through 04/03/2009.

Effective Date: 04/28/2009.

Physical Loan Application Deadline Date: 06/29/2009.

Economic Injury (EIDL) Loan Application Deadline Date: 01/28/2010.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 04/28/2009, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties:

Baldwin, Bullock, Butler, Choctaw, Clarke, Coffee, Covington, Crenshaw, Dale, Dallas, Elmore, Geneva, Henry, Houston, Lamar, Marengo, Perry, Russell, Washington, Wilcox.

The Interest Rates are:

	Percent
Other (Including Non-Profit Organizations) With Credit Available Elsewhere	4.500.
Businesses and Non-Profit Organizations Without Credit Available Elsewhere	4.000.

The number assigned to this disaster for physical damage is 11730B and for economic injury is 11731B.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. E9–10310 Filed 5–4–09; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11705 and #11706]

Minnesota Disaster Number MN–00021

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 3.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of Minnesota (FEMA–1830–DR), dated 04/09/2009 .

Incident: Severe Storms and Flooding.

Incident Period: 03/16/2009 and continuing.

Effective Date: 04/29/2009.

Physical Loan Application Deadline Date: 06/08/2009.

Economic Injury (EIDL) Loan Application Deadline Date: 01/09/2010.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing And Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of Minnesota, dated 04/09/2009, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Cook.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. E9–10314 Filed 5–4–09; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11728 and #11729]

South Carolina Disaster #SC–00009

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of South Carolina dated 04/29/2009.

Incident: Severe storms and tornadoes.

Incident Period: 04/10/2009 through 04/11/2009.

Effective Date: 04/29/2009.

Physical Loan Application Deadline Date: 06/29/2009.

Economic Injury (EIDL) Loan Application Deadline Date: 01/29/2010.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties:

Abbeville, Aiken.

Contiguous Counties:

South Carolina: Anderson, Barnwell, Edgefield, Greenville, Greenwood, Laurens, Lexington, McCormick, Orangeburg, Saluda.

Georgia: Burke, Elbert, Richmond.

The Interest Rates are:

	Percent
Homeowners with Credit Available Elsewhere:	4.375
Homeowners without Credit Available Elsewhere:	2.187
Businesses with Credit Available Elsewhere:	6.000
Businesses & Small Agricultural Cooperatives without Credit Available Elsewhere:	4.000
Other (Including Non-Profit Organizations) with Credit Available Elsewhere:	4.500
Businesses and Non-Profit Organizations without Credit Available Elsewhere:	4.000

The number assigned to this disaster for physical damage is 11728 C and for economic injury is 11729 0.

The States which received an EIDL Declaration # are South Carolina, Georgia.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: April 29, 2009.

Karen G. Mills,

Administrator.

[FR Doc. E9–10313 Filed 5–4–09; 8:45 am]

BILLING CODE 8025–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 28717; File No. 812–13618]

Citibank, N.A.; Notice of Application

April 29, 2009.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from certain requirements of rule 3a–7(a)(4)(i) under the Act.

SUMMARY: *Summary of Application:* Applicant requests an order that would permit an issuer of asset-backed securities that is not registered as an investment company under the Act in reliance on rule 3a-7 under the Act (an ''Issuer'') to appoint the applicant as a trustee to the Issuer when the applicant is affiliated with an underwriter for the Issuer's securities.

Applicant: Citibank, N.A.

DATES: *Filing Dates:* The application was filed on December 30, 2008 and amended on April 23, 2009.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on May 22, 2009, and should be accompanied by proof of service on the applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090. Applicant, 388 Greenwich Street, 14th Floor, New York, NY 10013.

FOR FURTHER INFORMATION CONTACT: Jean E. Minarick, Senior Counsel, at (202) 551–6811, or Julia Kim Gilmer, Branch Chief, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicant's Representations

1. The applicant is a subsidiary of Citigroup, Inc.[1] Citigroup Inc. is a global financial services organization whose lines of business include global cards, consumer banking, an institutional clients group (including transaction services such as agency/trust), global wealth management and corporate services. The applicant is frequently selected to act as trustee in connection with asset-backed securities issued by Issuers.

2. An asset-backed securities transaction typically involves the transfer of assets by a seller, usually by a ''sponsor,'' to a special purpose corporate or trust entity that is established for the sole purpose of acting as the Issuer and is structured to be bankruptcy remote and the subsequent issuance of asset-backed securities (''ABS'') to investors by the Issuer (an ''ABS Transaction''). The parties to an ABS Transaction enter into several transaction agreements that provide for the holding of the assets by the Issuer and define the rights and responsibilities of the parties to the transaction (''Transaction Documents''). The operative Transaction Document governing the trustee is referred to herein as the ''Agreement.''

3. The sponsor of an ABS Transaction assembles the pool of assets by purchasing or funding them, describes them in the offering materials, and retains the underwriter to sell interests in the assets to investors. The sponsor determines the structure, drafts the documents, and prices the ABS Transactions. The sponsor selects the other parties to the ABS Transaction, including the underwriter, the servicer, and the trustee.

4. The servicer, either directly or through subservicers, manages the assets held by the Issuer. The servicer pays the income from the assets held by the Issuer over to the trustee, and the trustee uses the income, as instructed by the servicer and provided by the Agreement, to pay interest and principal on the ABS, to fund reserve accounts and purchases of additional assets, and to make other payments including fees owed to the trustee and other parties to the ABS Transaction.

5. The sponsor of an ABS Transaction selects the trustee. In selecting a trustee, the sponsor generally seeks to obtain customary trust administrative and related services for the Issuer at minimal cost. In some instances, other parties to an ABS Transaction may provide recommendations to a sponsor about potential trustees. An underwriter for an ABS Transaction also may provide advice to the sponsor about trustee selection based on the underwriter's knowledge of the pricing and expertise offered by a particular trustee in light of the contemplated transaction.

6. If an underwriter affiliated with the applicant recommends a trustee to a sponsor, both the underwriter's recommendation and any selection of the applicant by the sponsor will be based upon customary market considerations of pricing and expertise, among other things, and the selection will result from an arms-length negotiation between the sponsor and the applicant. Applicant will not price its services as trustee in a manner designed to facilitate its affiliate being named underwriter.

7. The trustee's role in an ABS Transaction is specifically defined by the Agreement, and under the Agreement the trustee is not expected or required to perform discretionary functions. The responsibilities of the trustee as set forth in the Agreement are narrowly circumscribed and limited to those expressly accepted by the trustee. The trustee negotiates the provisions applicable to it directly with the sponsor and is then appointed by and enters into the Agreement with the Issuer.

8. The trustee usually becomes involved in an ABS Transaction after the substantive economic terms have been negotiated between the sponsor and the underwriters. The trustee does not monitor any service performed by, or obligation of, an underwriter, whether or not the underwriter is affiliated with the trustee. In the unlikely event that the applicant, in acting as trustee to an Issuer for which an affiliate acts as underwriter, becomes obligated to enforce any of the affiliated underwriter's obligations to the Issuer, the applicant will resign as trustee for the Issuer consistent with the requirements of rule 3a–7(a)(4)(i). In

[1] The applicant also requests that the order apply to an Issuer's appointment, now or in the future, of any other entity controlling, controlled by, or under common control (as defined in section 2(a)(9) of the Act) with the applicant as a trustee for an Issuer. The applicant represents that any other entity relying on this relief now or in the future will comply with the terms and conditions of the application. Any existing entity currently intending to rely on the requested order has been named as an applicant.

such an event, the applicant will incur the costs associated with the Issuer's procurement of a successor trustee.

9. The sponsor selects one or more underwriters to purchase the Issuer's securities and resell them or to privately place them with buyers obtained by the underwriter. The sponsor enters into an underwriting agreement with the underwriter that sets forth the responsibilities of the underwriter with respect to the distribution of the ABS and includes representations and warranties regarding, among other things, the underwriter and the quality of the Issuer's assets. The obligations of the underwriter under the underwriting agreement are enforceable against the underwriter only by the sponsor.

10. The underwriter may assist the sponsor in the organization of an Issuer by providing advice, based on its expertise in ABS Transactions, on the structuring and marketing of the ABS. This advice may relate to the risk tolerance of investors, the type of collateral, the predictability of the payment stream, the process by which payments are allocated and down-streamed to investors, the way that credit losses may affect the trust and the return to investors, whether the collateral represents a fixed set of specific assets or accounts, and the use of forms of credit enhancements to transform risk-return profile of the underlying collateral. Any involvement of an underwriter in the organization of an Issuer that occurs is limited to helping determine the assets to be pooled, helping establish the terms of the ABS to be underwritten, and providing the sponsor with a warehouse line of credit with which to purchase the pool assets.

11. An underwriter may provide advice to a sponsor regarding the sponsor's selection of a trustee for the Issuer; however, an underwriter's role in structuring a transaction would not extend to determining the obligations of a trustee, and the underwriter is not a party to the Agreement. The underwriter is not a party to any of the Transaction Documents and, except for arrangements involving credit or credit enhancement for an Issuer or remarketing agent activities, typically has no role in the operation of the Issuer after its issuance of securities. The applicant represents that although an underwriter typically may provide credit or credit enhancement for an Issuer or engage in remarketing agent activities, an underwriter affiliated with the applicant will not so provide or so engage.

Applicant's Legal Analysis

1. Rule 3a–7 provides Issuers that would otherwise fall within the definition of investment company under section 3(a) of the Act with an exclusion from the definition of investment company. Under rule 3a–7, an Issuer that meets certain conditions is deemed not to be an investment company under section 3(a) of the Act. One of rule 3a–7's conditions, set forth in paragraph (a)(4)(i), requires, among other things, that the Issuer appoint a trustee that is not affiliated with the Issuer or with any person involved in the organization or operation of the Issuer (the ''Independent Trustee Requirement''). Applicant states that the phrase ''person involved in the organization and operation of the Issuer'' includes an underwriter, and rule 3a–7(a)(4)(i) therefore prohibits an Issuer from appointing a trustee that is affiliated with an underwriter.

2. Section 6(c) of the Act gives the Commission the authority to exempt any person or transaction or any class of persons or transactions from any provision of the Act, or from any rule thereunder, if and to the extent such exemption is necessary or appropriate in the public interest; is consistent with the protection of investors; and the purposes fairly intended by the policy and provisions of the Act.

3. Applicant requests exemptive relief under section 6(c) of the Act from rule 3a–7(a)(4)(i) under the Act to the extent necessary to permit an Issuer to appoint the applicant as a trustee to the Issuer when the applicant is affiliated with an underwriter involved in the organization of the Issuer. Applicant submits that the requested exemptive relief from the Independent Trustee Requirement is necessary and appropriate in the public interest, is consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act due to changes in the banking industry, due to the timing and nature of the roles of the trustee and the underwriter and because the requested relief is consistent with the policies and purposes underlying the Independent Trustee Requirement and rule 3a–7.

4. Applicant states that when rule 3a–7 was proposed in 1992, virtually all trustees were unaffiliated with the other parties involved in an ABS Transaction. Applicant states that consolidation within the financial industry, as well as economic and other business factors resulted in a significant decrease in the number of bank trustees providing services to Issuers. Applicant also states that bank consolidation has been accompanied by the expansion of banks into investment banking and that banks and bank affiliates are now significant participants in securities underwriting, particularly for ABS Transactions. Applicant further states that due to these banking industry changes, most trustees that provide services to Issuers, including the applicant, have affiliations with underwriters to Issuers. Applicant states that, as a result, when an affiliate of applicant is selected to underwrite ABS in an ABS Transaction, rule 3a–7(a)(4)(i)'s Independent Trustee Requirement generally prevents applicant from serving as trustee for the Issuer. Applicant states that the Independent Trustee Requirement imposes an unnecessary regulatory limitation on trustee selection and causes market distortions by leading to the selection of trustees for reasons other than customary market considerations of pricing and expertise. This result is disadvantageous to the ABS market and to ABS investors.

5. Applicant submits that due to the nature and timing of the roles of the trustee and the underwriter, applicant's affiliation with an underwriter would not result in a conflict of interest or possibility of overreaching that could harm investors. Applicant states that the trustee's role begins with the Issuer's issuance of its securities, and the trustee performs its role over the life of the Issuer. Applicant states that, in contrast, the underwriter is chosen early in the ABS Transaction process, may help to structure the ABS Transaction, distributes the Issuer's securities to investors, and generally has no further role subsequent to the distribution of the Issuer's securities. Applicant further states that an ABS trustee does not monitor the distribution of securities or any other activity performed by underwriters and there is no opportunity for a trustee and an affiliated underwriter to act in concert to benefit themselves at the expense of holders of the ABS either prior to or after the closing of the ABS Transaction.

6. Applicant states that the trustee is neither expected nor required to exercise discretion or judgment. Applicant further states that the trustee's role is limited to administrative functions pursuant to the applicable Agreement. Applicant states that the trustee of the Issuer has virtually no discretion to pursue anyone in any regard other than preserving and realizing on the assets. Applicant states that trustees are not required to pursue securities law or fraud claims on behalf of debt holders and may often be foreclosed from such enforcement

because debt holders may have different and conflicting rights.

7. Applicant submits that the concerns underlying the Independent Trustee Requirement are not implicated if the trustee for an Issuer is independent of the sponsor, servicer, and credit enhancer for the Issuer, but is affiliated with an underwriter for the Issuer, because, in that situation no single entity would act in all capacities in the issuance of the ABS and the operation of an Issuer. Applicant states that applicant would continue to act as an independent party safeguarding the assets of any Issuer regardless of an affiliation with an underwriter of the ABS. Applicant submits that the concern that affiliation could lead to a trustee monitoring the activities of an affiliate also is not implicated by a trustee's affiliation with an underwriter, because, in practice, a trustee for an Issuer does not monitor the distribution of securities or any other activity performed by underwriters. Applicant further states that the requested relief would be consistent with the broader purpose of rule 3a–7 of not hampering the growth and development of the structured finance market, to the extent consistent with investor protection.

Applicant's Conditions

The applicant agrees that any order granting the requested relief will be subject to the following conditions:

1. The applicant will not be affiliated with any person involved in the organization or operation of the Issuer in an ABS Transaction other than the underwriter.

2. The applicant's relationship to an affiliated underwriter will be disclosed in writing to all parties involved in an ABS Transaction, including the rating agencies and the ABS holders.

3. An underwriter affiliated with the applicant will not be involved in the operation of an Issuer, and its involvement in the organization of an Issuer will extend only to determining the assets to be pooled, assisting in establishing the terms of the ABS to be underwritten, and providing the sponsor with a warehouse line of credit with which to purchase the pool assets.

4. An affiliated person of the applicant, including an affiliated underwriter, will not provide credit or credit enhancement to an Issuer if the applicant serves as trustee to the Issuer.

5. An underwriter affiliated with the applicant will not engage in any remarketing agent activities, including involvement in any auction process in which ABS interest rates, yields, or dividends are reset at designated intervals in any ABS Transaction

6. All of an affiliated underwriter's contractual obligations pursuant to the underwriting agreement will be enforceable by the sponsor.

7. Consistent with the requirements of rule 3a–7(a)(4)(i), the applicant will resign as trustee for the Issuer if applicant becomes obligated to enforce any of an affiliated underwriter's obligations to the Issuer.

8. The applicant will not price its services as trustee in a manner designed to facilitate its affiliate being named underwriter.

For the Commission, by the Division of Investment Management, under delegated authority.

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–10254 Filed 5–4–09; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Monday, May 4, 2009 at 9 a.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(5), (7), and (10) and 17 CFR 200.402(a)(5), (7), and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Paredes, as duty officer, voted to consider the item listed for the Closed Meeting in closed session, and determined that no earlier notice thereof was possible.

The subject matter of the Closed Meeting scheduled for Monday, May 4, 2009 will be:

Institution of an injunctive action; and

institution of an administrative proceeding of an enforcement nature.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 551–5400.

Dated: April 30, 2009.

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–10400 Filed 5–1–09; 11:15 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59834; File No. SR–NYSEAmex–2009–14]

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Amex Equities Rules 1000, 60 and 123C To Be More Consistent With the Trading Characteristics of Securities Traded on NYSE Amex

April 28, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 20, 2009, NYSE Amex LLC (''NYSE Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Amex Equities Rule 1000 (''Automatic Execution of Limit Orders Against Orders Reflected in Exchange Published Quotation''), NYSE Amex Equities Rule 60 (''Dissemination of Quotations'') and NYSE Amex Equities Rule 123C (''Market on the Close Policy and Expiration Procedures'') to be more consistent with the trading characteristics of securities traded on NYSE Amex. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com*.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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

NYSE Amex LLC (''NYSE Amex'' or ''Exchange''), formerly the American Stock Exchange LLC and NYSE Alternext US LLC,[3] proposes to amend NYSE Amex Equities Rule 1000 (''Automatic Execution of Limit Orders Against Orders Reflected in Exchange Published Quotation''), NYSE Amex Equities Rule 60 (''Dissemination of Quotations'') and NYSE Amex Equities Rule 123C (''Market on the Close Policy and Expiration Procedures'') to be more consistent with the trading characteristics of securities traded on NYSE Amex.

Specifically, the Exchange proposes to amend NYSE Amex Equities Rule 1000 to allow securities priced at $1000 or higher (''high-priced securities'') to be eligible for automatic execution and make a conforming amendment to NYSE Amex Equities Rule 60(d)(iii)(B)(I)–(II). The Exchange also seeks to amend NYSE Amex Equities Rule 123C(5) to reduce the order imbalance size required for mandatory imbalance publications at 3:40 p.m. and 3:50 p.m. from 50,000 shares to 25,000 shares.

a. Background

As described more fully in a related rule filing,[4] 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 US LLC, and continues to operate as a national securities exchange registered under Section 6 of the Securities Exchange Act of 1934, as amended (the ''Act'').[5] The effective date of the Merger was October 1, 2008.

In connection with the Merger on December 1, 2008, the Exchange 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 Amex Trading Systems'') are operated by the New York Stock Exchange (''NYSE'') on behalf of the Exchange.[6]

As part of the Equities Relocation, NYSE Amex adopted NYSE Rules 1–1004, subject to such changes as necessary to apply the Rules to the Exchange, as the NYSE Amex Equities Rules to govern trading on the NYSE Amex Trading Systems.[7] The NYSE Amex 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 Amex Equities Rules as necessary to conform with rule changes to corresponding NYSE Rules filed by the NYSE.

NYSE Amex Equities Rules 1000(a)(vi) and 60(d)(iii)(B)(I)–(II), as adopted from the NYSE, provide that high-priced securities, *i.e.*, securities priced above $1,000, are ineligible for automatic executions. High-priced securities are traded manually by the assigned Designated Market-Maker (''DMM'').

NYSE Amex Equities Rule 123C, as adopted from the NYSE, sets forth the procedures for the entry of market at-the-close (''MOC'') and limit at-the-close (''LOC'') orders.[8] Included in these procedures is the requirement that 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 disseminate a publication informing the investing public of the disparity.[9] In addition, a DMM may, with Floor Official approval, disseminate an imbalance publication even if the disparity is less than 50,000 shares if 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 publication.

b. Proposed Amendments

As previously discussed, NYSE Amex adopted NYSE Rules 1–1004, subject to minor changes as necessary to apply those rules as NYSE Amex Equities Rules on the NYSE Amex trading Floor. Since the implementation of these rules on December 1, 2008, the Exchange has determined that NYSE Amex Equities Rule 1000, NYSE Amex Equities Rule 60 and NYSE Amex Equities Rule 123C, as applied, are inconsistent with the trading characteristics of its securities. Accordingly, the Exchange seeks to amend these rules to provide regulatory imbalance information and automatic execution that is more aligned with the trading activity and volume on its Floor.

The Exchange proposes to amend NYSE Amex Equities Rule 1000 to make high-priced securities eligible for automatic execution. Prior to the Exchange's relocation and implementation of Amex Equities Rules, all securities, including high-priced securities, traded on the Amex Exchange, were automatically executed.[10] Given the specific market characteristics of NYSE Amex, the Exchange believes it is appropriate to make high-priced securities eligible for automatic execution because such automation benefits the NYSE Amex market participant and serves the public interest. Liquidity in NYSE Amex-listed securities is more dispersed among multiple market centers than securities traded on the NYSE. As such, high-priced securities on NYSE Amex must be eligible for immediate and automatic execution in order to effectively compete for order flow with protected quotes.

Accordingly, the Exchange proposes to rescind section (a)(vi) from NYSE Amex Equities Rule 1000, thereby allowing high-priced securities to be

[3] On March 3, 2009, the Exchange submitted a rule filing to change its name from NYSE Alternext US LLC to NYSE Amex LLC (SR–NYSEALTR–2009–24).

[4] *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).

[5] 15 U.S.C. 78f.

[6] *See* Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex 2008–63) (approving the Equities Relocation).

[7] *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) (implementing 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 Amex 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 Amex Equities to track changes to corresponding NYSE Rule 62).

[8] 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.''

[9] NYSE Amex Equities Rule 123C(5).

[10] Amex Legacy Rules established the automatic execution of securities traded on the Amex. *See* Amex Rule 128A—AEMI (Automatic Execution), Amex Rule 123—AEMI (Manner of Bidding and Offering), and Amex Rule 126—AEMI (Precedence of Bids and Offers). Auto-Ex Eligible Securities are defined in Amex Rule 128A—AEMI as ''all ETFs, equities, and securities that trade like equities traded on the Exchange.''

automatically executed on the Exchange. In addition, the Exchange seeks to make conforming changes to NYSE Amex Equities Rule 60. The Exchange proposes to amend section (d)(iii)(B)(I) and (II) in order to have all high-priced securities autoquoted like all other securities pursuant to the provision of NYSE Amex Equities Rule 60.

The Exchange further proposes to amend NYSE Amex Equities Rule 123C to reduce the share volume required to disseminate mandatory imbalance publications at 3:40 p.m. and 3:50 p.m. from 50,000 shares to 25,000 shares. Prior to the adoption of NYSE Amex Equities Rule 123C, Amex Rule 131A governed entry and execution of MOC and LOC orders as part of the closing transaction. Pursuant to Amex Rule 131A, a specialist was required to disseminate an imbalance publication if there was a buy or a sell disparity in the amount of 25,000 shares.

Exchange-listed securities are significantly different from those securities listed on the NYSE which overall have a much higher Average Daily Volume (''ADV'') and therefore are more likely to have MOC/LOC orders that result in imbalances of 50,000 shares or more. Conversely, a MOC/LOC imbalance of 25,000–50,000 shares in an NYSE Amex listed security is generally significant given the typically lower ADV of such securities; thus, publication of an imbalance is appropriate. The Exchange reviewed trading statistics of MOC/LOC orders submitted to NYSE Amex and found that from January 2, 2009–January 20, 2009, NYSE Amex only had six out of 248 securities that had received MOC/LOC orders for shares totaling more than 50,000 shares. This represented 2.4% of NYSE Amex MOC/LOC orders that met this 50,000 share threshold. Additionally, none of the trading imbalances in the 247 Amex securities ever totaled 50,000 shares.

Given this information, NYSE Amex proposes to amend NYSE Amex Equities Rule 123C to reduce the order imbalance size required for mandatory imbalance publication from 50,000 to 25,000 shares. Currently, an imbalance of 25,000 shares would not be subject to the mandatory publication requirement. The DMM on the Exchange would not be required to publish an imbalance of 25,000 shares unless the DMM determined, with Floor Official approval, that such imbalance was significantly greater than the average daily volume in the security. The Exchange believes that reducing the share volume from 50,000 to 25,000 shares will result in more transparency for NYSE Amex market participants and promotes the principles of a free and open market which benefits the public interest.

The Exchange believes that the reduction of the size parameter for mandatory publishing of imbalances is appropriate for the Exchange's listed securities because it provides mandatory imbalance publications consistent with trading volume on the Exchange, thus providing investors with more accurate information about disparities in MOC/LOC orders consistent with the trading volume on the Exchange.

2. Statutory Basis

The basis under the Act for the proposed rule change is the requirement under Section 6(b)(5),[11] which requires that an exchange have rules that are designed 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 Exchange believes that the proposed amendments are consistent with these objectives. Currently DMMs manually trade NYSE Amex high-priced securities. This proposed rule change would allow for these high-priced securities to be eligible for automatic execution and auto-quoting which would allow NYSE Amex to protect its quote and remain competitive with the other market centers. Furthermore, reducing the mandatory publication of imbalances to 25,000 shares provides more transparency to the NYSE Amex market participants. NYSE Amex submits that these proposed rule changes remove impediments to and perfect the mechanism of a free and open market.

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.

[11] 15 U.S.C. 78f(b)(5).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [12] and subparagraph (f)(6) of Rule 19b–4 thereunder.[13]

A proposed rule change filed under 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[14] However, Rule 19b–4(f)(6)(iii) [15] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay and designate the proposed rule change operative upon filing. The Exchange stated that the waiver of this period will allow orders in high-priced securities to effectively compete as protected quotations. In addition, the Exchange stated that waiver of the operative delay will allow the Exchange to conform the mandatory publication requirements to the market characteristics of the Exchange, benefitting NYSE Amex market participants and the public interest. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission designates the proposal operative upon filing.[16]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors,

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6).

[14] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[15] *Id.*

[16] For purposes only of waiving the 30-day operative delay of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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–NYSEAmex–2009–14 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–NYSEAmex–2009–14. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of 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–NYSEAmex–2009–14 and should be submitted on or before May 26, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–10171 Filed 5–4–09; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59838; File No. SR–NYSEArca–2009–36]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change Relating to NYSE Arca Equities Rule 7.10 Governing Clearly Erroneous Executions

April 28, 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 April 27, 2009, NYSE Arca, Inc. (''NYSE Arca'' or 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 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 Arca Equities Rule 7.10 governing clearly erroneous executions. The text of the proposed rule change is attached as Exhibit 5 to the 19b-4 form. A copy of this filing is available on the Exchange's Web site at *www.nyse.com,* at the Exchange's principal office and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend NYSE Arca Rule 7.10 in order to improve the Exchange's rule regarding clearly erroneous executions. The proposed changes are part of a market-wide effort designed to provide transparency and finality with respect to clearly erroneous executions. This effort seeks to achieve consistent results for participants across U.S. equities exchanges while maintaining a fair and orderly market, protecting investors and protecting the public interest. The proposed changes are more fully discussed below.

Definition

The Exchange will maintain the meaning of the definition of a clearly erroneous execution, but proposes to add clarifying language with respect to cancelled trades. The proposed change identifies that a transaction made in clearly erroneous error and agreed to be canceled by both parties or determined by the Corporation to be clearly erroneous will be removed ''from the Consolidated Tape.''[3] A trade will only be removed from the Consolidated Tape when the determination is deemed final and any applicable appeals have been exhausted.

ETP Holder Initiated Review Requests

The Exchange proposes to amend NYSE Arca Rule 7.10(b) to update the procedures for requesting a review of a clearly erroneous transaction. First, the proposed rule would require that requests for review be made only by electronic mail (''email'') or other electronic means specified from time to time by the Exchange. Under the current policy the Exchange also allows requests to be made via telephone and facsimile. Requiring requests for review to be made via email creates a standard format that can easily be logged and tracked. The Exchange will publish the email address or other electronic means to be used for all clearly erroneous filings in a circular distributed to Equity Trading Permit (''ETP'') Holders.[4]

The Exchange further proposes that requests for review must be received by

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[17] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] For purposes of this Rule, ''removed from the Consolidate Tape'' means that a subsequent message will be sent to the Consolidated Tape indicating that a previously executed trade has been cancelled.

[4] NYSE Arca Rule 1.1(n) defines an ETP Holder as a ''sole proprietorship, partnership, corporation, limited liability company or other organization in good standing that has been issued an ETP.''

the Exchange within 30 minutes of the execution time for orders initially routed to and executed on the Exchange. The Exchange proposes that ETP Holders submit certain essential identifying information with the request including the time of the transaction(s), security symbol(s), number of shares, price(s), side (bought or sold), and factual basis for believing that the trade is clearly erroneous. The current rule requires requests for review to be received within 15 minutes of the execution and does not specify what information is required. The Exchange believes that 30 minutes is an appropriate time frame that offers the requesting party sufficient time to gather and submit all required information.

The proposed rule also requires the Exchange to notify the counterparty to a trade upon receipt of a timely filed request for review that satisfies the numerical guidelines set forth within the Rule. This proposed language eliminates the requirement that counterparties be notified of every request for a ruling and instead requires notice only when a request is filed in a timely manner and satisfies the Numerical Guidelines. This change alleviates the burden on the Exchange of notifying the counterparty when a request for review does not merit a ruling.

The Exchange proposes to amend NYSE Arca Rule 7.10 to allow an Officer of the Corporation or such other employee designee (''Officer'') of NYSE Arca to request additional information from each party to a transaction under review. Parties to the review will have 30 minutes from the time of the request to provide additional supporting information.

Routed Executions

The Exchange proposes to give other market centers an additional 30 minutes from the receipt of their participant's timely filing to request a ruling, but no longer than 60 minutes from the time of the execution under review. This provision accounts for those executions initially directed to an away market center and subsequently routed by that away market center to the Exchange.

For example, assume an order is initially routed by a participant to Market Center A and subsequently routed to NYSE Arca where the order is executed at a price outside of the Numerical Guidelines. This provision generally requires Market Center A to file with the Exchange within 30 minutes from the time it receives its participant's timely filed request for review. This provision caps the filing deadline for an away market center at 60 minutes from the time of the execution under review.

Threshold Factors

Currently, the Exchange's Clearly Erroneous Execution rule does not identify specific numeric guidelines for determining what constitutes a clearly erroneous transaction. The current rule simply provides that ''an Officer of the Corporation shall review the transaction and determine whether it is clearly erroneous, with a view toward maintaining a fair and orderly market and the protection of investors and the public interest.'' [5] In practice, the Exchange currently incorporates the informal guidelines set forth in the Clearly Erroneous Execution policy published on its website.[6] The Exchange proposes adding certain numerical thresholds to the Rule that explicitly state what constitutes a clearly erroneous execution.

Numerical Guidelines

The proposed numerical guidelines state that a transaction executed during the Core Trading Session [7] or the Opening [8] and Late Trading Session [9] may be found to be clearly erroneous only if the price of the transaction to buy is greater, or less in the case of a sale, than the reference price by an amount that equals or exceeds the numerical guidelines for a particular transaction category. The Reference Price shall be equal to the Consolidated Last Sale immediately prior to the execution under review, unless unusual circumstances are present. The proposed guidelines for sales between $0.00 and $25.00 are 10% for the Core Trading Session and 20% for the Opening and Late Trading Sessions. The proposed guidelines for sales between $25.01 and $50.00 are 5% for the Core Trading Session and 10% for Opening and Late Trading Sessions. The proposed guidelines for sales greater than $50.00 are 3% for the Core Trading Session and 6% for Opening and Late Trading Sessions. A filing involving five or more securities by the same ETP Holder will be aggregated into a single filing called a ''Multi-Stock Event.'' In the case of a Multi-Stock Event, the proposed guidelines are 10% for the Core Trading Session and 10% for the Opening and Late Trading Sessions. In the case of Leveraged ETF/ETN securities, the above guidelines are to be multiplied by the leverage multiplier of the security. Executions that do not meet or exceed the Numerical Guidelines will not be eligible for review under this section. The following chart summarizes the proposed Numerical Guidelines.

Reference Price: Consolidated Last Sale	Core Trading Session Numerical Guidelines (Subject transaction's % difference from the Consolidated Last Sale):	Opening and Late Trading Session Numerical Guidelines (Subject transaction's % difference from the Consolidated Last Sale):
Between $0.00 and $25.00	10%	20%
Between $25.01 and $50.00	5%	10%
Greater than $50.00	3%	6%
Multi-Stock Event—Filings involving five or more securities by the same ETP Holder will be aggregated into a single filing.	10%	10%
Leveraged ETF/ETN securities	Core Trading Session Numerical Guidelines multiplied by the leverage multiplier (i.e. 2×).	Core Trading Session Numerical Guidelines multiplied by the leverage multiplier (i.e. 2×)

[5] NYSE Arca Rule 7.10(b).

[6] *http://www.nyse.com/pdfs/Arca_Erroneous_Execution.pdf.*

[7] The Core Trading Session begins for each security at ''6:30:00 am (Pacific Time) or at the conclusion of the Market Order Auction, whichever comes later, and conclude at 1:00:00 pm (Pacific Time).'' NYSE Arca Rule 7.34(a)(2).

[8] The Opening Session begins at ''1:00:00 am (Pacific Time) and conclude[s] at the commencement of the Core Trading Session.'' NYSE Arca Rule 7.34(a)(1).

[9] The Late Trading Session begins ''following the conclusion of the Core Trading Session and conclude[s] at 5:00:00 pm (Pacific Time).'' NYSE Arca Rule 7.34(a)(3).

Establishing Numerical Guidelines within the Rule brings regulatory transparency and consistency in the application of the rules of the Exchange. These Numerical Guidelines represent the general consensus approach and were developed based on the collective experiences of a market-wide group. The Exchange believes that the Thresholds established are fair and appropriate and apply evenly to all participants.

Unusual Circumstances

NYSE Arca further proposes that in Unusual Circumstances the Exchange may, in its discretion and with a view toward maintaining a fair and orderly market, use a Reference Price other than the consolidated last sale. Unusual Circumstances may include periods of extreme market volatility, sustained illiquidity, or widespread system issues. Other Reference Prices that the Exchange may use would include the consolidated inside price, the consolidated opening price, the consolidated prior close, or the consolidated last sale prior to a series of executions.

The following example explains the use of a Reference Price equal to the consolidated last sale prior to a series of executions.

ABC has a consolidated last sale of $10.00. During the Core Trading Session Customer A enters a market order to buy 10,000 shares, although it had intended a market order for 1,000 shares. The size of the order is such that the order sweeps the NYSE Arca Book, which reflects 1,000 shares of liquidity offered at each of following prices. Executions occur, moving through the depth of Book, as follows:

Trade #1—1000 shares @ $10.00 (9000 remaining)
Trade #2—1000 shares @ $10.20 (8000 remaining)
Trade #3—1000 shares @ $10.40 (7000 remaining)
Trade #4—1000 shares @ $10.60 (6000 remaining)
Trade #5—1000 shares @ $10.80 (5000 remaining)
Trade #6—1000 shares @ $11.00 (4000 remaining)
Trade #7—1000 shares @ $11.20 (3000 remaining)
Trade #8—1000 shares @ $11.40 (2000 remaining)
Trade #9—1000 shares @ $11.60 (1000 remaining)
Trade #10—1000 shares @ $11.80 (complete)

Thus, to be eligible for review, a transaction must be at a price that is at least 10% higher than the consolidated last sale prior to the series of executions. Customer A could request a ruling for trades #6 through #10, priced at $11.00 and above, but trades #1 through #5 would not be eligible for review.

Under the proposed rule the Exchange may also use a higher numerical guideline if, after market participants have been alerted to erroneous activity, the price of the security returns toward its prior trading range but continues to trade beyond the price it would have normally been broken.

Joint Market Rulings

In the interest of achieving consistency across markets, the Exchange proposes that, in events that involve other markets, the Exchange would have the ability to use a different Reference Price and/or Numerical Guideline. In these instances the Reference Price would be determined based on a consensus among the Exchanges where the transactions occurred. Furthermore, when a ruling is made across markets, the Exchange may determine that the ruling is not eligible for appeal because immediate finality is necessary to maintain a fair and orderly market and to protect investors and the public interest.

Additional Factors

The proposed amendments to NYSE Arca Rule 7.10 also enumerate some additional factors that an Officer may consider when determining whether an execution is clearly erroneous. These factors include, but are not limited to, system malfunctions or disruptions, volume and volatility for the security, derivative securities products that correspond to greater than 100% in the direction of a tracking index, news released for the security, whether trading in the security was recently halted/resumed, whether the security is an IPO, whether the security was subject to a stock-split, reorganization, or other corporate action, overall market conditions, Opening and Late Session executions, validity of the consolidated tapes trades and quotes, consideration of primary market indications, and executions inconsistent with the trading pattern in the stock. Each additional factor shall be considered with a view toward maintaining a fair and orderly market, the protection of investors and the public interest.

Numerical Guidelines Applicable to Volatile Market Opens

The Exchange proposes to give the Exchange the ability to expand the Numerical Guidelines applicable to transactions occurring between 9:30 a.m. and 10 a.m. based on the disseminated value of the S & P 500 Futures at 9:15 a.m. When the S & P Futures are up or down 3% at 9:15 a.m., the Numerical Guidelines are doubled. When the S & P Futures are up or down 5% at 9:15 a.m., the Numerical Guidelines are tripled. The Exchange believes that the S&P 500 futures contract is an appropriate and reliable barometer of market activity prior to the market opening due to its broad based market coverage and deep liquidity. Using the S&P 500 Futures disseminated value at 9:15 a.m. as the barometer of market activity, the Exchange is providing a transparent means of offering adjusted guidelines in times of volatile market activity.

Outlier Transactions

The proposed amendments to NYSE Arca Rule 7.10 provide that an Officer may consider requests for review received after thirty minutes, but not longer than sixty minutes after the execution in question in the case of an Outlier Transaction. An Outlier Transaction is a transaction where, (1) the execution price of the security is greater than three times the current Numerical Guidelines, or (2) the execution price of the security breaches the 52-week high or low, in which case the Exchange may consider Additional Factors to determine if the transaction qualifies for review or if the Corporation shall decline to act.

Review Procedures

Initial Determination

The Exchange proposes removing language that currently allows an Officer to modify one or more of the terms of a transaction under review. Under the proposed rule, the Officer of the Exchange will only have the authority to break the trades or rule to let the trades stand. This change attempts to remove the subjectivity from the rule that is necessitated by an adjustment.

The Exchange also proposes adding language stating that a determination shall be made generally within 30 minutes of receipt of the complaint, but in no case later than the start of Core Trading on the following trading day. Rulings made outside of 30 minutes by an Officer will not fail for lack of timeliness. The guideline simply provides participants an appropriate expectation that a ruling will generally be made within 30 minutes, and in no case later than the start of Core Trading on the following trading day.

Appeals

The Exchange proposes to amend the appeals procedure for trades that are deemed to be clearly erroneous. First,

the Exchange will no longer accept appeal requests via facsimile. Similar to the proposed language for an initial request for a ruling, all appeal requests must be made via email.

The current rule provides that the Exchange shall review and render a decision upon an appeal within a timeframe provided by the Exchange. The proposed rule offers more definite guidelines to ensure the expedient resolution of appeals. It requires the Exchange to review appeals as soon as practicable, but generally on the same day as the executions under review. Appeals received between 3 ET and the close of trading in the Late Trading Session should be made as soon as practicable, but in no case later than the trading day following the date of the execution under review. Appeals will not fail for lack of timeliness. This revised provision provides participants a reasonable expectation of when a ruling on appeal will generally be made.

Further, the proposed rule declares that any determination made by an Officer or by the CEE Panel shall be rendered without prejudice as to the right of the parties to the transaction to submit their dispute to arbitration. This provision simply clarifies the fact that nothing in the proposed rule limits or impedes the rights of the parties to arbitrate their dispute.

System Disruption and Malfunctions

Currently, within the System Disruptions and Malfunctions section of the rule, after an Officer determines that a trade was clearly erroneous he may declare the transaction null and void or modify the trade to attempt to achieve and equitable rectification of the error. The proposed Rule eliminates the Exchange's ability to modify a clearly erroneous execution. The Exchange must either uphold or nullify the execution based upon the findings of the Officer reviewing the execution.

The proposed Rule provides that, in the event of a disruption or a malfunction, an Officer of the Corporation or other senior level employee designee will rely on the proposed numerical guidelines in determining whether an execution is clearly erroneous. However, the Officer or senior level employee may also use a lower Numerical Guideline if necessary to maintain a fair and orderly market, protect investors, and protect the public interest. The proposed rule also adds that actions taken under these circumstances must be taken within 30 minutes of detection of the erroneous transaction in the ordinary case, and by no later than the start of the Core Trading Session on the day following the date of the execution under review when extraordinary circumstances exist.

Officers Acting on Their Own Motion

The Exchange proposes to add a section to the Rule that will grant Officers the ability to act on their own motion to review potentially erroneous executions. Under the current rule, Officers have the ability to act upon their own motion only in the event of a system disruption or malfunction. The proposed rule would allow an Officer of the Corporation or other senior level employee designee to review executions and rely on the Numerical Guidelines, under any circumstance. In extraordinary circumstances an Officer or senior level employee may apply a lower Numerical Guideline if it is determined that such action is necessary to maintain a fair and orderly market or protect investors and the public interest. In some instances the Exchange may detect a single execution that breaches the Numerical Guidelines but is not the subject of a ruling request. This provision gives the Exchange the ability to review such executions. Additionally, in practice, clearly erroneous executions commonly involve multiple parties and multiple executions. In such instances, all affected parties may not request a ruling. The Exchange proposes this provision to permit an Officer to rule on a group of transactions related to the same occurrence or event as a whole, without a formal request for a ruling from every affected party.

Trade Nullification for UTP Securities that are Subject of Initial Public Offerings

The proposed rule also modifies NYSE Arca's policy on trade nullification and for UTP securities that are subject to initial public offerings. Under the proposed rule, Officers must either declare an opening transaction null and void or decline to take action, but can no longer be adjusted. Furthermore, the proposed rule requires that, in extraordinary circumstances, the reviewing Officer may take action by no later than the start of Core Trading on the day following the date of the execution under review.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[10] of the Securities Exchange Act of 1934 (the ''Exchange Act''), in general, and furthers the objectives of Section 6(b)(5)[11] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The proposed rule change provides transparency and finality for participants and creates consistent results across U.S. equities exchanges with respect to clearly erroneous executions. This proposed change further promotes the maintenance of a fair and orderly market, the protection of investors and the protection of 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.

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

Number SR–NYSEArca–2009–36 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–NYSEArca–2009–36. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2009–36 and should be submitted on or before May 26, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–10288 Filed 5–4–09; 8:45 am]

BILLING CODE 8010–01–P

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59825; File No. SR–NYSEAmex–2009–15]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by NYSE Amex LLC Amending Rule 935NY—Order Exposure Requirements

April 27, 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 April 21, 2009, NYSE Amex LLC (''NYSE Amex'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its rules governing order exposure requirements on the NYSE Amex System. This proposal will revise Rule 935NY. The text[4] of the proposed rule change is attached as Exhibit 5 to the 19b-4 form. A copy of this filing is available on the Exchange's Web site at *http://www.nyse.com,* at the Exchange's principal office and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Exchange requested that the Commission correct a typographical error in this sentence. Telephone conversation between Glenn Gsell, Managing Director, NYSE Amex, and Kristie Diemer, Special Counsel, Commission, on April 27, 2009.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to reduce the exposure period contained in Rule 935NY—Order Exposure Requirements, from three seconds to one second.

Rule 935NY provides that with respect to orders routed to the NYSE Amex System, Users may not execute as principal orders they represent as agent unless (i) agency orders are first exposed on the Exchange for at least three (3) seconds or (ii) the User has been bidding or offering on the Exchange for at least three (3) seconds prior to receiving an agency order that is executable against such bid or offer.

Specifically, order entry firms may not execute as principal, orders they represent as agent unless; [sic] (i) the agency order has first exposed on the NYSE Amex System for at least three seconds; [sic] (ii) the order entry firm has been bidding or offering for at least three seconds prior to receiving the agency order that is executable against such bid or offer. During this three-second exposure period, other market participants may enter orders to trade against the exposed order. Under this proposal, the exposure periods contained in Rule 935NY would be reduced to one second.

The Exchange notes that the existing three-second order exposure period contained in Rule 935NY, is not necessarily long enough to allow human interaction with the exposed orders. Rather, market participants on NYSE Amex are sufficiently automated that they can react to these orders electronically. In this context, NYSE Amex believes it would be in all market participants' best interest to minimize the exposure period to a time frame that continues to allow adequate time for market participants to electronically respond, while at the same time reducing any market risk associated with the longer exposure period. In this respect, the Exchange states that its experience with the three-second exposure time period indicates that one second would provide an adequate response time.[5] Accordingly, the Exchange does not believe it is necessary or beneficial to the orders being exposed to continue to subject

[5] There are numerous market participants on NYSE Amex that have the capability and already opt to respond within the first one second of the present three-second exposure period, currently in force for the NYSE Amex System.

them to market risk for a full three seconds.

Since NYSE Amex market participants have the ability [sic] react to these orders electronically, and regularly do so in less than one second, the Exchange believes that reducing the time period to one second will continue to afford sufficient time to ensure effective interaction with orders. At the same time, NYSE Amex believes that reducing the time period to one second will allow it to provide investors and other market participants with more timely executions, thereby reducing market risk.

A shortened exposure period would be fully consistent with the electronic nature of the NYSE Amex System. In order to substantiate that market participants on NYSE Amex would not be disadvantaged by a reduced exposure period, the Exchange conducted a survey of Amex Trading Permit Holders (''ATP Holders'') to find out whether they had the systems capability available that would allow them to respond in a meaningful way within the proposed timeframe.[6] The Exchange surveyed 48 member firms, representing 132 ATP Holders, all of whom regularly access the Exchange on an electronic basis,[7] regarding the proposed change to Rule 935NY, specifically the Exchange asked; 1. ''What is the approximate turnaround time for your firm to take in, process and respond to trading interest posted on NYSE Amex Options?'' and 2. ''Do you foresee any problems if NYSE Amex Options reduces the exposure time from three seconds to one second?'' Of the 6 different member firms that responded to the Exchange's survey, four indicated that their response time was less than one second, one declined to comment as to their response time while the sixth said that they were not exactly sure of their response time. None of the responding ATP Firms anticipated any problems related to order processing if the Exchange was to reduce the exposure period to one second. In addition, none of the responding ATP Holders indicated to the Exchange that they were opposed to the reduced exposure period.[8]

Based on the findings of the survey, the Exchange believes that the proposed exposure period will continue to provide sufficient time for market participants to respond, and compete for orders, while also reducing some of the risks associated with a prolonged exposure period.

2. Statutory Basis

NYSE Amex believes that the proposed rule change is consistent with Section 6(b) of the Act[9] in general, and furthers the objectives of Section 6(b)(5) of the Act[10] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. In particular, the Exchange believes that the proposed rule change will provide investors with more timely execution of their options orders, while ensuring that there is an adequate exposure of all orders on NYSE Amex.

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

The Exchange has requested accelerated approval of this proposed rule change prior to the 30th day after the date of publication of the notice in the **Federal Register**. The Commission is considering granting accelerated approval of the proposed rule change at the end of a 15-day comment period.

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–NYSEAmex–2009–15 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–NYSEAmex–2009–15. 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 Section, 100 F Street, NE., Washington, DC 20549–1090 on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at NYSE Amex's principal office. All comments received will be posted without change; the Commission does

[6] NYSE Amex introduced a new trading system on March 1, 2009. In order to allow sufficient time for ATP Holders to evaluate the new system, the Exchange requested ATP Holders respond to the survey by April 1, 2009.

[7] Collectively, these 132 ATP Holders participated in excess of 90% of all electronic orders executed on the NYSE Amex System during the month of March 2009. The remaining 10% of transactions generally consisted of customer orders executed against other customer orders, or orders executed by non-ATP Holder Broker Dealers. The Exchange did not survey ATP Holders who act as Floor Brokers and transact business strictly on a manual basis.

[8] One respondent did indicate that it ''might be hard to respond that rapidly'' when asked about the proposed one-second exposure period, but then went on to state that they felt the Exchange should make the change in order to match other options Exchanges (rules).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

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–NYSEAmex–2009–15 and should be submitted on or before May 20, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–10287 Filed 5–4–09; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59819; File No. SR–SCCP–2009–02]

Self-Regulatory Organizations; Stock Clearing Corporation of Philadelphia; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Certificate of Incorporation of The NASDAQ OMX Group, Inc.

April 23, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on April 2, 2009, Stock Clearing Corporation of Philadelphia (''SCCP'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which items have been prepared primarily by SCCP. SCCP filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[2] and Rule 19b–4(f)(3)[3] thereunder so that the proposal was effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

SCCP is filing this proposed rule change with regard to proposed changes to the Restated Certificate of Incorporation (''Certificate'') of its parent corporation, The NASDAQ OMX Group, Inc. (''NASDAQ OMX''). The proposed rule change will be implemented as soon as practicable following filing with the Commission. The text of the proposed rule change is available at *http://www.nasdaqtrader.com/Trader.aspx?id=SCCPApprovedRules*, at SCCP's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, SCCP included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. SCCP has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.[4]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NASDAQ OMX is proposing to make amendments to its Certificate. As provided in Articles XI and XII of the NASDAQ OMX By-Laws, proposed amendments to the Certificate are to be reviewed by the Board of Directors of each self-regulatory subsidiary of NASDAQ OMX, and if any such proposed amendment must under Section 19 of the Act and the rules promulgated thereunder be filed with or filed with and approved by the Commission before such amendment may be effective, then such amendment shall not be effective until filed with or filed with and approved by the Commission as the case may be. The governing boards of NASDAQ OMX BX, Inc. (''BX''), NASDAQ OMX PHLX, Inc. (''PHLX''), The NASDAQ Stock Market LLC (''NASDAQ Exchange''), Boston Stock Exchange Clearing Corporation (''BSECC''), and SCCP have each reviewed the proposed change and determined that it should be filed with the Commission.[5] The changes to the Certificate are limited in scope, and under Delaware law, they do not require approval by the stockholders of NASDAQ OMX.

Specifically, NASDAQ OMX is proposing to restate without amendment its Certificate. The Certificate is composed of a previous Restated Certificate of Incorporation adopted in 2003 and numerous subsequent amendments, which under Delaware law are adopted as freestanding documents. However, Delaware law allows the various documents comprising a certificate of incorporation to be consolidated into a single restated certificate upon approval of a corporation's board of directors. The change will assist interested persons, including NASDAQ OMX stockholders and Commission staff, in reading the Certificate without having to review multiple documents. The restated Certificate reflects the deletion of both the Certificate of Designations, Preferences and Rights of Series D Preferred Stock, and the Certificate of Elimination that was recently filed with respect to it.[6] Since the latter component of the Certificate cancels the former, they are both deleted from the restated Certificate.

2. Statutory Basis

SCCP believes that the proposed rule change is consistent with provisions of Section 17A of the Act,[7] in general, and with Section 17A(b)(3)(A) of the Act[8] in particular in that it is designed to ensure that SCCP is so organized and has the capacity to be able to facilitate the prompt and accurate clearance and settlement of securities transactions. The proposed change will enhance the clarity of NASDAQ OMX's governance documents by restating the various documents comprising the Certificate as a single document.

(B) Self-Regulatory Organization's Statement on Burden on Competition

SCCP does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78s–1(b)(3)(A)(iii).

[3] 17 CFR 240.19b–4(f)(3).

[4] The Commission has modified parts of these statements.

[5] The NASDAQ Exchange, PHLX, BX, BSECC, and SCCP are each submitting this filing pursuant to Section 19(b)(3)(A)(iii) of the Act, 15 U.S.C. 78s(b)(3)(A)(iii).

[6] Securities Exchange Act Release No. 59460 (February 26, 2009), 74 FR 9841 (March 6, 2009) (SR–NASDAQ–2009–010, SR–BX–2009–009, SR–Phlx–2009–14); Securities Exchange Act Release No. 59496 (March 3, 2009), 74 FR 10626 (March 11, 2009) (SR–BSECC–2009–01); Securities Exchange Act Release No. 59494 (March 3, 2009), 74 FR 10642 (March 11, 2009) (SR–SCCP–2009–01).

[7] 15 U.S.C. 78q–1.

[8] 15 U.S.C. 78q–1(b)(3)(A).

19(b)(3)(A)(iii) of the Act[9] and Rule 19b–4(f)(3)[10] promulgated thereunder because the proposal change is concerned solely with the administration of SCCP. At any time within sixty days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–SCCP–2009–02 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–SCCP–2009–02. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of SCCP. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–SCCP–2009–02 and should be submitted on or before May 26, 2009.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[11]

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–10196 Filed 5–4–09; 8:45 am]

BILLING CODE 8010–01–P

[9] 15 U.S.C. 78s(b)(3)(A)(iii).

[10] 17 CFR 240.19b–4(f)(3).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59818; File No. SR–BSECC–2009–03]

Self-Regulatory Organizations; Boston Stock Exchange Clearing Corporation; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Certificate of Incorporation of The NASDAQ OMX Group, Inc.

April 23, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on April 2, 2009, Boston Stock Exchange Clearing Corporation (''BSECC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which items have been prepared primarily by BSECC. BSECC filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[2] and Rule 19b–4(f)(3)[3] thereunder so that the proposal was effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

BSECC is filing this proposed rule change with regard to proposed changes to the Restated Certificate of Incorporation (''Certificate'') of its parent corporation, The NASDAQ OMX Group, Inc. (''NASDAQ OMX''). The proposed rule change will be implemented as soon as practicable following filing with the Commission. The text of the proposed rule change is available at *http://www.nasdaqtrader.com/Trader.aspx?id=BSECCIE2009*, at BSECC's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, BSECC 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. BSECC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.[4]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NASDAQ OMX is proposing to make amendments to its Certificate. As provided in Articles XI and XII of the NASDAQ OMX By-Laws, proposed amendments to the Certificate are to be reviewed by the Board of Directors of each self-regulatory subsidiary of NASDAQ OMX, and if any such proposed amendment must under Section 19 of the Act and the rules promulgated thereunder be filed with or filed with and approved by the Commission before such amendment may be effective, then such amendment shall not be effective until filed with or filed with and approved by the Commission as the case may be. The governing boards of NASDAQ OMX BX, Inc. (''BX''), NASDAQ OMX PHLX, Inc. (''PHLX''), The NASDAQ Stock Market LLC (''NASDAQ Exchange''), BSECC, and Stock Clearing Corporation of Philadelphia (''SCCP'') have each reviewed the proposed change and determined that it should be filed with the Commission.[5] The changes to the Certificate are limited in scope, and under Delaware law, they do not require approval by the stockholders of NASDAQ OMX.

Specifically, NASDAQ OMX is proposing to restate without amendment

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78s–1(b)(3)(A)(iii).

[3] 17 CFR 240.19b–4(f)(3).

[4] The Commission has modified parts of these statements.

[5] The NASDAQ Exchange, PHLX, BX, BSECC, and SCCP are each submitting this filing pursuant to Section 19(b)(3)(A)(iii) of the Act, 15 U.S.C. 78s(b)(3)(A)(iii).

its Certificate. The Certificate is composed of a previous Restated Certificate of Incorporation adopted in 2003 and numerous subsequent amendments, which under Delaware law are adopted as freestanding documents. However, Delaware law allows the various documents comprising a certificate of incorporation to be consolidated into a single restated certificate upon approval of a corporation's board of directors. The change will assist interested persons, including NASDAQ OMX stockholders and Commission staff, in reading the Certificate without having to review multiple documents. The restated Certificate reflects the deletion of both the Certificate of Designations, Preferences and Rights of Series D Preferred Stock and the Certificate of Elimination that was recently filed with respect to it.[6] Since the latter component of the Certificate cancels the former, they are both deleted from the restated Certificate.

2. Statutory Basis

The proposed rule change is consistent with Section 17A of the Act[7] in general and with Section 17A(b)(3)(A) of the Act[8] in particular because it is designed to ensure that BSECC is so organized and has the capacity to be able to facilitate the prompt and accurate clearance and settlement of securities transactions. The proposed change will enhance the clarity of NASDAQ OMX's governance documents by restating the various documents comprising the Certificate as a single document.

(B) Self-Regulatory Organization's Statement on Burden on Competition

BSECC does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

[6] Securities Exchange Act Release No. 59460 (February 26, 2009), 74 FR 9841 (March 6, 2009) (SR–NASDAQ–2009–010, SR–BX–2009–009, SR–Phlx–2009–14); Securities Exchange Act Release No. 59496 (March 3, 2009), 74 FR 10626 (March 11, 2009) (SR–BSECC–2009–01); Securities Exchange Act Release No. 59494 (March 3, 2009), 74 FR 10642 (March 11, 2009) (SR–SCCP–2009–01).

[7] 15 U.S.C. 78q–1.

[8] 15 U.S.C. 78q–1(b)(3)(A).

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)(iii) of the Act[9] and Rule 19b–4(f)(3)[10] promulgated thereunder because the proposal change is concerned solely with the administration of BSECC. At any time within sixty 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–BSECC–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–BSECC–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 BSECC. 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–BSECC–2009–03 and should be submitted on or before May 26, 2009.

[9] 15 U.S.C. 78s(b)(3)(A)(iii).

[10] 17 CFR 240.19b–4(f)(3).

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[11]

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–10195 Filed 5–4–09; 8:45 am]

BILLING CODE 8010–01–P

[11] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Delegation of Authority No. 325]

Delegation by the Deputy Secretary of the Authorities of the Under Secretary for Arms Control and International Security to Rose E. Gottemoeller

By virtue of the authority vested in the Secretary by the laws of the United States, including the Foreign Assistance Act of 1961, the Arms Export Control Act, the Foreign Affairs Reform and Restructuring Act of 1998, and the State Department Basic Authorities Act, as amended (22 U.S.C. 2651a), and delegated to me by Delegation of Authority 245–1, dated February 13, 2009, I hereby delegate to Rose E. Gottemoeller, Assistant Secretary for Verification, Compliance, and Implementation, to the extent authorized by law, all authorities. vested in the Under Secretary of State for Arms Control and International Security, including all authorities vested in the Secretary of State that have been or may be delegated to that Under Secretary.

Any authority covered by this delegation may also be exercised by the Secretary of State, the Deputy Secretary of State, the Deputy Secretary of State for Management and Resources, the Under Secretary for Political Affairs and the Under Secretary for Management.

This delegation shall expire upon the appointment and entry upon duty of an individual to serve as the Under

Secretary of State for Arms Control and International Security.

Delegation of Authority No. 321, dated January 16, 2009, is hereby revoked. With this exception, nothing in this delegation of authority shall be deemed to supersede any other delegation of authority, which shall remain in full force and effect during and after this delegation.

This delegation of authority shall be published in the **Federal Register**.

Dated: April 17, 2009.

James B. Steinberg,

Deputy Secretary, Department of State.

[FR Doc. E9–10348 Filed 5–4–09; 8:45 am]

BILLING CODE 4710–27–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–290 (Sub-No. 310X)]

Norfolk Southern Railway Company—Abandonment Exemption—in Floyd and Polk Counties, GA

Norfolk Southern Railway Company (NSR) has filed a verified notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* to abandon a 12.31-mile line of railroad between milepost 3.69–N and milepost 16.00–N, in Floyd and Polk Counties, GA.[1] The line traverses United States Postal Service Zip Codes 30124 and 30161.

NSR has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) no overhead traffic has moved over the line for at least 2 years and overhead traffic, if there were any, could be rerouted over other lines; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental report), 49 CFR 1105.8 (historic report), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an OFA has been received, this exemption will be effective on June 4, 2009, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[2] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[3] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by May 15, 2009.[4] Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by May 26, 2009, with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to NSR's representative: James R. Paschall, Senior General Attorney, Norfolk Southern Corporation, Three Commercial Place, Norfolk, VA 23510.

If the verified notice contains false or misleading information, the exemption is void *ab initio.*

NSR has filed environmental and historic reports that address the effects, if any, of the abandonment on the environment and historic resources. SEA will issue an environmental assessment (EA) by May 8, 2009. Interested persons may obtain a copy of the EA by writing to SEA (Room 1100, Surface Transportation Board, Washington, DC 20423–0001) or by calling SEA, at (202) 245–0305. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.] Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), NSR shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by NSR's filing of a notice of consummation by May 5, 2010, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at *www.stb.dot.gov.*

Decided: April 29, 2009.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. E9–10258 Filed 5–4–09; 8:45 am]

BILLING CODE 4915–01–P

[1] NSR also seeks exemption from the requirements of 49 U.S.C. 10904 (offers of financial assistance (OFA)). The Board will address the merits of this request in a separate decision.

[2] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis (SEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Service Rail Lines,* 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[3] Each OFA must be accompanied by the filing fee, which currently is set at $1,500. *See* 49 CFR 1002.2(f)(25).

[4] NSR states that it is not aware of any restriction on the title to the right-of-way that would affect the transfer of title or the use of property for other than rail purposes but will provide full title information promptly if it receives a proposal to acquire the property for public purposes.

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2008–0078]

Commercial Driver's License (CDL) Standards; Rotel North American Tours, LLC; Amendment of Exemption

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of amendment; request for comments.

SUMMARY: FMCSA announces that the Rotel North American Tours, LLC (Rotel), has applied for amendment of its existing exemption that permits 22 named drivers, employed by Rotel and possessing German CDLs, to operate commercial motor vehicles (CMVs) in the U.S. without a CDL issued by one of the States. Rotel proposes to amend the roster of 22 exempt Rotel drivers in order to substitute three new Rotel drivers for three drivers no longer employed by Rotel. The new Rotel drivers would be subject to all the terms and conditions of the current exemption, including its expiration date of July 30, 2010.

DATES: Comments must be received on or before May 20, 2009.

ADDRESSES: You may submit comments identified by Federal Docket Management System Number FMCSA–2008–0078 by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Telefax:* 1–202–493–2251.

• *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave., SE., West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.

• *Hand Delivery or Courier:* West Building, Ground Floor, Room W12–140, 1200 New Jersey Ave., SE., Washington, DC 20590, between 9 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the Agency name and docket number. For detailed instructions on submitting comments and additional information on the exemption process, see the Public Participation heading below. Note that all comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov*, and follow the online instructions for accessing the dockets, or go to the street address listed above.

Privacy Act: You may 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 DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19476) or you may visit *http://DocketInfo.dot.gov*.

Public Participation: The Federal eRulemaking Portal is available 24 hours each day, 365 days each year. You may obtain electronic submission and retrieval help and guidelines under the ''help'' section of the Federal eRulemaking Portal Web site. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard, or print the acknowledgment page that appears after submitting comments online. Comments received after the comment closing date will be included in the docket, and we will consider late comments to the extent practicable.

FOR FURTHER INFORMATION CONTACT: Mr. Robert F. Schultz, Jr., FMCSA Driver and Carrier Operations Division, Office of Bus and Truck Standards and Operations: *Telephone:* 202–366–4325. *E-mail: MCPSD@dot.gov*.

SUPPLEMENTARY INFORMATION:

Background

Section 4007 of the Transportation Equity Act for the 21st Century (Pub. L. 105–178, 112 Stat. 107, June 9, 1998) amended 49 U.S.C. 31315 and 31136(e) to provide FMCSA authority to grant exemptions from its motor carrier safety regulations, including the HOS rules. The procedure for requesting an exemption is prescribed in 49 CFR part 381. FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted, and to comment on the request.

The Agency must review the safety analyses and public comments. Then it may grant the exemption for up to 2 years if it finds ''such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption'' (49 CFR 381.305). The decision of the Agency must be published in the **Federal Register** (49 CFR 381.315(b)) with the reason for denying or, in the alternative, the specific person or class of persons receiving the exemption, and the regulatory provision or provisions from which the exemption is granted. The notice must also specify the effective period of the exemption and its terms and conditions.

Rotel provides seasonal motorcoach tours for non-English speaking tourists. The service is unique because the drivers of these buses serve as the tour guides, providing oral commentary to the passengers in their native language, usually German. Rotel states that none of the States of the U.S. will issue CDLs to these drivers because they are not State residents. Until recent years, Rotel drivers were able to obtain a non-resident CDL from certain States. Rotel asserts that without the exemption from the requirement that its drivers have a CDL issued by a State, it would have to terminate these tour operations. Complete details of Rotel's operations can be found in its original application, dated August 27, 2007, which is contained in the docket of this notice.

On July 30, 2008, FMCSA granted, after notice and comment, Rotel's request to allow 22 drivers, each holding a German CDL, to operate Rotel motor coaches in the U.S. without a CDL issued by one of the States as required by 49 CFR 383.23 (73 FR 44313). FMCSA found that these drivers, operating specialty tour buses in the U.S., would ''likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption,'' in accordance with 49 CFR 381.305. The 2-year exemption expires on July 30, 2010.

Rotel's Request for Amendment

By letter dated February 6, 2009, supplemented by an e-mail message dated April 9, 2009, Rotel applied for an amendment to its exemption for the sole purpose of replacing three drivers on the original roster of 22 Rotel drivers approved for this exemption. Both documents are available in the docket for this notice. Rotel asks that Jens Radloff, Christian Hafner, and Ludwig Gerlsberger be dropped from that roster, and that, in their place, Rotel employees Klaus Endres, Sebastian Nicki, and Karl-Heinz Schmitz, non-residents of the U.S. and holders of German CDLs, be added to the roster as drivers exempt from the CDL licensing requirement. Rotel believes these three new drivers, like the non-resident Rotel drivers already operating under this exemption, possess sufficient knowledge, skills, and experience to ensure a level of safety that is equivalent to, or greater than, the level of safety that would be obtained by complying with the requirement for a U.S. CDL. If the Agency determines that this amendment should be granted, the three new drivers would be subject to the terms and conditions of the original Rotel exemption.

In accordance with 49 U.S.C. 31315(b)(4) and 31136(e), FMCSA requests public comments on Rotel's request for amendment of its exemption to allow it to substitute three new Rotel CDL drivers for three of the 22 original Rotel CDL drivers granted exemption from 49 CFR 383.23 on July 30, 2008. FMCSA will consider all comments received by close of business on May 20, 2009. All comments will be available for examination in the docket at the location listed under the **ADDRESSES** section of this notice. The Agency will consider to the extent practicable comments received in the public docket after the closing date of the comment period.

Issued on: April 28, 2009.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. E9–10209 Filed 5–4–09; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2006–25756]

Commercial Driver's License (CDL) Standards; Volvo Trucks North America, Inc.'s Exemption Application

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA previously announced its decision to renew Volvo Trucks North America, Inc.'s (Volvo) exemption for seven of its drivers to enable them to test-drive commercial motor vehicles (CMVs) in the United States without a commercial driver's license (CDL) issued by one of the States. FMCSA requested comment on the renewal of the exemption, but received no comments.

DATES: This exemption is effective from April 23, 2009 through April 23, 2011.

FOR FURTHER INFORMATION CONTACT: Mr. Richard Clemente, Driver and Carrier Operations Division (MC–PSD), Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. *Telephone:* 202–366–4325. *E-mail: MCPSD@dot.gov*.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31315 and 31136(e), FMCSA may grant or renew an exemption from the CDL requirements in 49 CFR 383.23 for a maximum two-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.'' FMCSA evaluated Volvo's application on its merits and decided to grant the renewal of the exemption for seven of Volvo's engineers and technicians for a two-year period, effective April 23, 2009, as previously announced in the **Federal Register** (74 FR 6204, February 5, 2009).

Comments

The Agency received no response to its request for public comments published in the **Federal Register** on February 5, 2009 (74 FR 6204).

Terms and Conditions for the Exemption

Based upon evaluation of the application for an exemption, FMCSA granted Volvo a renewal of the exemption from the Federal CDL requirement in 49 CFR 383.23 for seven drivers (Peter Hofsten, Thorbjorn Ohlund, Freddy Blixt, Johnny Adolfsson, Goran Alsen, Kjell Jansson, and Lars Svensson) to test-drive CMVs within the United States, subject to the following terms and conditions: (1) That these drivers are subject to drug and alcohol regulations, including testing, as provided in 49 CFR part 382, (2) that these drivers are subject to the same driver disqualification rules under 49 CFR parts 383 and 391 that apply to other CMV drivers in the U.S., (3) that these drivers keep a copy of the exemption in the vehicle they are driving at all times, (4) that Volvo notify FMCSA in writing of any accident, as defined in 49 CFR 390.5, involving one of the exempted drivers, and (5) that Volvo notify FMCSA in writing if any driver is convicted of a disqualifying offense described in section 383.51 or 391.15 of the FMCSRs.

The exemption will be revoked if: (1) The drivers for Volvo fail 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. 31315 and 31136.

Issued on: April 28, 2009.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. E9–10208 Filed 5–4–09; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2006–26367]

Motor Carrier Safety Advisory Committee Public Meeting

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of Motor Carrier Safety Advisory Committee Meeting.

SUMMARY: FMCSA announces that the Motor Carrier Safety Advisory Committee (MCSAC) will hold a committee meeting. The meeting is open to the public.

DATES: The MCSAC will hold two public sessions at its May meeting. The first will be held on Monday, May 18, 2009, from 10–11 a.m. (EDT), and will include a discussion between FMCSA management and the MCSAC committee on Task 09–02. This task was assigned at the MCSAC meeting on March 18 and asked the committee for suggestions on implementing a new cross-border trucking program between the United States and Mexico. The meeting will be held via conference call. Should you wish to participate, please contact Shannon L. Watson at (202) 385–2395 or via e-mail at *shannon.watson@dot.gov,* by Wednesday, May 13, to receive information on how to access the call.

The May 20, 2009, public meeting will be held from 1–4 p.m. (EDT).

ADDRESSES: The May 20 meeting will be held at the U.S. Department of Transportation, Media Center, West Building, Ground Floor, 1200 New Jersey Avenue, SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Mr. Jeffrey K. Miller, Chief, Strategic Planning and Program Evaluation Division, Office of Policy Plans and Regulation, Federal Motor Carrier Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590, (202) 366–5370, *mcsac@dot.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 4144 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU, Pub. L. 109–59) required the Secretary of the U.S. Department of Transportation to establish a Motor Carrier Safety Advisory Committee in FMCSA. The advisory committee provides advice and recommendations to the FMCSA Administrator on motor carrier safety programs and motor carrier safety regulations. The advisory committee operates in accordance with the Federal Advisory Committee Act (5 U.S.C. App. 2). The Committee is comprised of 15 members appointed by the Administrator.

II. Meeting Participation

Both meetings are open to the public. FMCSA invites participation by all interested parties, including motor carriers, drivers, and representatives of motor carrier associations. Please note that attendees for the May 20, 2009, meeting will need to be pre-cleared in advance of the meeting in order to expedite entry into the building. By May 13, 2009, please e-mail *mcsac@dot.gov* if you plan to attend the meeting to facilitate the pre-clearance security process. For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, please e-mail *mcsac@dot.gov* by May 13, 2009.

As a general matter, the Committee will allocate one hour for public comments on, May 20, 2009, from 3 p.m. to 4 p.m.. Individuals wishing to address the committee should send an

e-mail to *mcsac@dot.gov* by May 13, 2009. The time available will be divided among those who have signed up to address the committee, but no one will be allotted more than 15 minutes. For a copy of the agenda, please send an e-mail to *mcsac@dot.gov.*

Individuals with a desire to present written materials to the committee should submit written comments identified by Federal Docket Management System (FDMC) Docket Number FMCSA–2006–26367 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building, Room W12–140, Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Issued on: April 30, 2009.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. E9–10340 Filed 5–4–09; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–1998–4334; FMCSA–2000–7818; FMCSA–2002–12844; FMCSA–2002–13411; FMCSA–2003–14223; FMCSA–2005–20027; FMCSA–2006–26066; FMCSA–2006–25246]

Qualification of Drivers; Exemption Renewals; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA previously announced its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 23 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemptions will provide a level of safety that will be equivalent to, or greater than, the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Director, Medical Programs, 202–366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at *http://www.regulations.gov.*

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.'' The statute also allows the Agency to renew exemptions at the end of the 2-year period. The comment period ended on April 20, 2009.

Discussion of Comments

FMCSA received no comments in this proceeding.

Conclusion

The Agency has not received any adverse evidence on any of these drivers that indicates that safety is being compromised. Based upon its evaluation of the 23 renewal applications, FMCSA renews the Federal vision exemptions for Lucas R. Aleman, Rodger B. Anders, John D. Bolding, Jr., Timothy E. Coultas, Michael P. Curtin, Jimmy W. Deadwyler, William E. Dolson, Richard L. Elyard, Richard L. Elyard, James K. Holmes, Christopher J. Kane, William R. Mayfield, William R. Mayfield, Kirby G. Oathout, John J. Payne, James R. Petre, Zeljko Popovac, Jerald W. Rehnke, William E. Reveal, James R. Rieck, Duane L. Riendeau, Richie J. Schwendy, and Janusz Tyrpien.

In accordance with 49 U.S.C. 31136(e) and 31315, each renewal exemption will be valid for 2 years unless revoked earlier by FMCSA. The exemption will be revoked if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

Issued on: April 29, 2009.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. E9–10339 Filed 5–4–09; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF THE TREASURY

Open Meeting of the President's Economic Recovery Advisory Board (the PERAB)

AGENCY: Office of the Under Secretary for Domestic Finance, Treasury.

ACTION: Notice of meeting.

SUMMARY: The President's Economic Recovery Advisory Board will convene its first meeting on May 20, 2009, in the White House, 1600 Pennsylvania Avenue, NW., Washington, DC, beginning at 1 p.m. Eastern Time. The meeting will be open to the public.

DATES: The meeting will be held on May 20, 2009 at 1 p.m. Eastern Time.

ADDRESSES: The PERAB will convene its first meeting in the White House, 1600 Pennsylvania Avenue, NW., Washington, DC. The public is invited to submit written statements to the Advisory Committee by any of the following methods:

Electronic Statements

- Send written statements to the PERAB's electronic mailbox at *PERAB@do.treas.gov;* or

Paper Statements

- Send paper statements in triplicate to Michelle Greene, Designated Federal Officer, President's Economic Recovery Advisory Board, Office of the Under Secretary for Domestic Finance, Room 2326, Department of the Treasury, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

In general, all statements will be posted on the White House Web site (*http://www.whitehouse.gov*) without change, including any business or personal information provided such as names, addresses, e-mail addresses, or telephone numbers. The Department will also make such statements available for public inspection and copying in the Department's Library, Room 1428, Main Department Building, 1500 Pennsylvania Avenue, NW., Washington, DC 20220, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect statements by telephoning (202) 622–0990. All statements, including attachments and other supporting materials, received are part of the public

record and subject to public disclosure. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Michelle Greene, Designated Federal Officer, President's Economic Recovery Advisory Board, Office of the Under Secretary for Domestic Finance, Department of the Treasury, Main Department Building, 1500 Pennsylvania Avenue, NW., Washington, DC 20220, at (202) 622–2610.

SUPPLEMENTARY INFORMATION: In accordance with Section 10(a) of the Federal Advisory Committee Act, 5 U.S.C. App. II, § 10(a), and the regulations thereunder, Michelle Greene, Designated Federal Officer of the Advisory Board, has ordered publication of this notice that the PERAB will convene its first meeting on May 20, 2009, in the White House, 1600 Pennsylvania Avenue, NW., Washington, DC, beginning at 1 p.m. Eastern Time. The meeting will be open to the public. While the meeting room will accommodate a reasonable number of interested members of the public, space is limited. Because the meeting will be held in a secured facility, members of the public who plan to attend the meeting must contact the Office of the Under Secretary for Domestic Finance, at (202) 622–2610, by 5 p.m. Eastern Time May 13, 2009, to inform the Department of the desire to attend the meeting and to provide the information that will be required to facilitate entry into the White House. The purpose of this meeting is to discuss general organizational matters of the PERAB and begin discussing the issues impacting the strength and competitiveness of the Nation's economy.

Dated: April 30, 2009.

Andrew Mayock,

Executive Secretary.

[FR Doc. E9–10429 Filed 5–1–09; 11:15 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Community Development Financial Institutions Fund; Proposed Collection; Comment Request

ACTION: Notice and request for comments.

SUMMARY: The U.S. Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law No. 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the Community Development Financial Institutions Fund (the Fund), a government corporation within the Department of the Treasury, is soliciting comments concerning the ''New Markets Tax Credit (NMTC) Program—Community Development Entity (CDE) Certification Application'' (hereafter, the Application).

DATES: Written comments should be received on or before July 6, 2009 to be assured of consideration.

ADDRESSES: Direct all comments to Christopher J. Stever, Certification and Training Program Manager, Community Development Financial Institutions Fund, U.S. Department of the Treasury, 601 13th Street, NW., Suite 200 South, Washington, DC 20005, by e-mail to *cdfihelp@cdfi.treas.gov*, or by facsimile to (202) 622–7754. Please note that this is not a toll free number.

FOR FURTHER INFORMATION CONTACT: The Application may be obtained from the Fund's Web site at *http://www.cdfifund.gov.* Requests for additional information should be directed to Christopher J. Stever, Certification and Training Program Manager, Community Development Financial Institutions Fund, U.S. Department of the Treasury, 601 13th Street, NW., Suite 200 South, Washington, DC 20005, by e-mail to *cdfihelp@cdfi.treas.gov*, or by facsimile to (202) 622–7754. Please note that this is not a toll free number.

SUPPLEMENTARY INFORMATION:

Title: New Markets Tax Credit (NMTC) Program—Community Development Entity (CDE) Certification Application.

OMB Number: 1559–0014.

Abstract: Title I, subtitle C, section 121 of the Community Renewal Tax Relief Act of 2000 (the Act), as enacted in the Consolidated Appropriations Act, 2001 (Pub. L. No. 106–554, December 21, 2000), amended the Internal Revenue Code (IRC) by adding IRC 45D and created the NMTC Program. The Department of the Treasury, through the Fund, administers the NMTC Program, which provides an incentive to investors in the form of tax credits over seven years, which is expected to stimulate the provision of private investment capital that, in turn, will facilitate economic and community development in low-income communities. In order to qualify for an allocation of tax credits through the NMTC Program, an entity must be certified as a qualified Community Development Entity (CDE) and submit an allocation application to the Fund. Nonprofit entities and for-profit entities may be certified as CDEs by the Fund. In order to be certified as a CDE, an entity must be a domestic corporation or partnership, that: (1) Has a primary mission of serving or providing investment capital for low-income communities or low-income persons; and (2) maintains accountability to residents of low-income communities through their representation on any governing or advisory board of the entity.

Current Actions: Currently receiving and processing CDE certification applications.

Type of review: Extension.

Affected Public: CDEs and entities seeking CDE certification, including business or other for-profit institutions, nonprofit entities, and State, local and Tribal entities.

Estimated Number of Respondents: 300.

Estimated Annual Time Per Respondent: 4 hours.

Estimated Total Annual Burden Hours: 1,200 hours.

Requests For Comments: Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval. All comments will become a matter of public record and may be published on the Fund's Web site at *http://www.cdfifund.gov.* Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services required to provide information. The Fund specifically requests comments concerning ways the process of certification for subsidiary CDEs can be simplified.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Authority: 26 U.S.C. 45D; 31 U.S.C. 321; 26 CFR 1.45D–1.

Dated: April 29, 2009.

Donna Gambrell,

Director, Community Development Financial Institutions Fund.

[FR Doc. E9–10350 Filed 5–4–09; 8:45 am]

BILLING CODE 4810–70–P

DEPARTMENT OF VETERANS AFFAIRS

Joint Biomedical Laboratory Research and Development and Clinical Science Research and Development Services Scientific Merit Review Board; Notice of Meeting—Amendment

The Department of Veterans Affairs gives notice under the Public Law 92–463 (Federal Advisory Committee Act) that the teleconference meeting for the Cellular & Molecular Medicine subcommittee of the Joint Biomedical Laboratory Research and Development and Clinical Science Research and Development Services Scientific Merit Review Board has been changed from May 13, 2009, to May 26, 2009 at VA Central Office, 1722 Eye Street, NW., Washington, DC.

Those who plan to attend or would like to obtain a copy of minutes of the subcommittee meeting and roster of the members of the subcommittee should contact LeRoy G. Frey, PhD, Chief, Program Review (121F), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 at (202) 461–1664.

Dated: April 23, 2009.

By Direction of the Secretary.

E. Philip Riggin,

Committee Management Officer.

[FR Doc. E9–10298 Filed 5–4–09; 8:45 am]

BILLING CODE 8320–01–P

Federal Register

Tuesday,
May 5, 2009

Part II

Federal Reserve System

12 CFR Part 226
Truth in Lending; Proposed Rule

FEDERAL RESERVE SYSTEM

12 CFR Part 226

[Regulation Z; Docket No. R–1286]

Truth in Lending

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Proposed rule; request for public comment.

SUMMARY: On December 18, 2008, the Board adopted a final rule amending Regulation Z's provisions that apply to open-end (not home-secured) credit plans. The Board believes that clarification is needed regarding compliance with certain aspects of the final rule. Accordingly, in order to facilitate compliance, the Board proposes to amend specific portions of the regulations and official staff commentary.

DATES: Comments on the proposed amendments must be received on or before June 4, 2009. Comments on the Paperwork Reduction Act analysis set forth in Section V of this **Federal Register** notice must be received on or before July 6, 2009.

ADDRESSES: You may submit comments, identified by Docket No. R–1286, by any of the following methods:

- *Agency Web Site: http://www.federalreserve.gov*. Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm*.
- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *E-mail: regs.comments@federalreserve.gov*. Include the docket number in the subject line of the message.
- *Facsimile:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT: Benjamin K. Olson, Attorney, Amy Burke or Vivian Wong, Senior Attorneys, or Ky Tran-Trong or John Wood, Counsels, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, at (202) 452–3667 or 452–2412; for users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869.

SUPPLEMENTARY INFORMATION:

I. Background

On December 18, 2008, the Federal Reserve Board (Board) adopted a final rule amending Regulation Z's provisions that apply to open-end (not home-secured) credit. This rule was published in the **Federal Register** on January 29, 2009. *See* 74 FR 5244 (January 2009 Regulation Z Rule). On the same date, the Board, the Office of Thrift Supervision (OTS), and the National Credit Union Administration (NCUA) (collectively, the Agencies) adopted a final rule under the Federal Trade Commission Act (FTC Act) to protect consumers from unfair acts or practices with respect to consumer credit card accounts. This rule also was published in the **Federal Register** on January 29, 2009. *See* 74 FR 5498 (January 2009 FTC Act Rule). The effective date for both rules is July 1, 2010. *See* 74 FR 5388–5390; 74 FR 5548.

Since publication of the two rules, the Board has become aware that clarification is needed to resolve confusion regarding how institutions will comply with particular aspects of those rules. Accordingly, in order to provide guidance and facilitate compliance with the January 2009 Regulation Z Rule by the effective date, the Board proposes to amend portions of the regulations and the accompanying staff commentary. These proposed amendments are discussed in detail in Section III of this supplementary information. Similarly, elsewhere in today's **Federal Register**, the Agencies have proposed to amend certain aspects of the January 2009 FTC Act Rule (FTC Act Proposed Clarifications).

Although comment is requested on the proposed amendments, the Board emphasizes that the purpose of this rulemaking is to clarify and facilitate compliance with the consumer protections contained in the final rules, not to reconsider the need for—or the extent of—those protections. Thus, commenters are encouraged to limit their submissions accordingly. Finally, in order to ensure that any amendments can be adopted in final form with sufficient time for implementation prior to the effective date, comments regarding those amendments must be submitted within 30 days of publication in the **Federal Register**.[1]

II. Statutory Authority

In the supplementary information for the January 2009 Regulation Z Rule, the Board set forth the sources of its statutory authority under the Truth in Lending Act. *See* 74 FR 5249. For purposes of these proposed rules, the Board continues to rely on this legal authority.

III. Section-by-Section Analysis

Section 226.5a Credit and Charge Card Applications and Solicitations

5a(b) Required Disclosures

5a(b)(1) Annual Percentage Rate

To complement the proposed disclosure requirements for deferred or waived interest plans described in the supplementary information to §§ 226.7 and 226.16, the Board also proposes a new comment 5a(b)(1)–9 to clarify that an issuer offering a deferred or waived interest plan may not disclose a rate as 0% due to the possibility that the consumer may not be obligated for interest regarding the deferred or waived interest transaction. Given the contingent nature of deferred or waived interest programs, and the fact that interest is accruing at a non-zero rate on the account, the Board believes that a disclosure of a 0% rate could be misleading to consumers.

Section 226.6 Account-Opening Disclosures

6(b) Rules Affecting Open-End (Not Home-Secured) Plans

In addition to the specific proposed amendments to § 226.6 described below, the Board also is considering whether additional transition guidance is needed for creditors offering open-end credit secured by real property that may not be subject to § 226.5b because the real property is not the consumer's dwelling. The January 2009 Regulation Z Rule preserved certain existing rules, for example the rules under §§ 226.6, 226.7, and 226.9, for home-equity plans subject to § 226.5b pending the completion of the Board's separate review of the rules applicable to home-secured credit. Since publication of the January 2009 Regulation Z Rule, the Board understands that there is uncertainty regarding how creditors that offer open-end credit secured by real property, that

[1] As discussed elsewhere in the supplementary information to this proposed rule, commenters have 60 days to submit comments regarding the Paperwork Reduction Act analysis for the Board's proposed amendments to the January 2009 Regulation Z Rule.

may be unaware whether that property is, or remains, the consumer's dwelling, should comply with the January 2009 Regulation Z Rule. In particular, creditors offering such plans have asked whether they may comply with the existing disclosure requirements that were preserved for home-equity plans subject to § 226.5b or whether they need to comply with the new disclosure requirements set forth in the final rule for plans that are not subject to § 226.5b.

Pursuant to the January 2009 Regulation Z Rule, the new disclosure requirements apply to open-end credit that is not subject to § 226.5b. However, the Board believes that it may be appropriate to permit creditors offering open-end credit secured by real property that is not the consumer's dwelling to continue to comply with the existing rules (consistent with treatment of plans covered under § 226.5b) until the Board's review of the rules applicable to home-secured open-end credit is completed. At that time, the Board would determine the appropriate treatment for these plans. The Board solicits comment on the prevalence of such open-end credit plans and the burden that would be associated with determining whether such plans must comply with the new disclosure requirements contained in the January 2009 Regulation Z Rule or the existing rules (as applicable to plans subject to § 226.5b). The Board also solicits comment on whether it would be appropriate to subject these plans to the same disclosure requirements that apply to home-secured plans or whether they should be treated the same as other open-end (not home-secured) credit.

6(b)(1) Form of Disclosures; Tabular Format for Open-End (Not Home-Secured) Plans

The Board proposes to make two technical corrections to § 226.6(b)(1) and (b)(1)(ii) to delete parentheses that were inadvertently included in the rule due to a scrivener's error, without intended substantive change.

6(b)(2) Required Disclosures for Account-Opening Table for Open-End (Not Home-Secured) Plans

6(b)(2)(i) Annual Percentage Rate

Section 226.6(b)(2)(i) sets forth disclosure requirements for rates that apply to open-end (not home-secured) accounts. Under the January 2009 Regulation Z Rule, creditors generally must disclose the specific APRs that will apply to the account in the table provided at account opening. The Board, however, provided a limited exception to this rule where the APRs that creditors may charge vary by state for accounts opened at the point of sale. *See* § 226.6(b)(2)(i)(E). Pursuant to that exception, creditors imposing APRs that vary by state and providing the disclosures required by § 226.6(b) in person at the time an open-end (not home-secured) plan is established in connection with financing the purchase of goods or services may, at the creditor's option, disclose in the account-opening table either (1) the specific APR applicable to the consumer's account, or (2) the range of the APRs, if the disclosure includes a statement that the APR varies by state and refers the consumer to the account agreement or other disclosure provided with the account-opening summary table where the APR applicable to the consumer's account is disclosed, for example in a list of APRs for all states.

The Board is proposing to provide similar flexibility to the disclosure of APRs at the point of sale when rates vary based on the consumer's creditworthiness. Thus, the Board proposes to amend § 226.6(b)(2)(i)(E) to state that creditors providing the disclosures required by § 226.6(b) in person at the time an open-end (not home-secured) plan is established in connection with financing the purchase of goods or services may, at the creditor's option, disclose in the account-opening table either (1) the specific APR applicable to the consumer's account, or (2) the range of the APRs, if the disclosure includes a statement that the APR varies by state or depends on the consumer's creditworthiness, as applicable, and refers the consumer to an account agreement or other disclosure provided with the account-opening summary table where the APR applicable to the consumer's account is disclosed, for example in a separate document provided with the account-opening table.

The Board understands that if creditors are not given additional flexibility, some consumers could be disadvantaged because creditors may provide a single rate for all consumers rather than varying the rate, with some consumers receiving lower rates than would be offered under a single-rate plan. Thus, without the proposed change, some consumers may be harmed by receiving higher rates. Moreover, the Board believes the operational changes necessary to provide the specific APR applicable to the consumer's account in the table at point of sale when that rate depends on the consumer's creditworthiness may be too burdensome and increase creditors' risk of inadvertent noncompliance. Currently, creditors that establish open-end plans at point of sale provide account-opening disclosures at point of sale before the first transaction, with a reference to the APR in a separate document provided with the account agreement, and commonly provide an additional set of disclosures which reflect the actual APR for the account when, for example, a credit card is sent to the consumer. The Board believes that permitting creditors to provide the specific APR information outside of the table at point of sale, with the expectation that consumers will receive disclosures with the specific APR applicable to the consumer properly formatted in the account-opening table at a later time, would strike an appropriate balance between the burden on creditors and the need to disclose to consumers the specific APR applicable to the consumer's account in the account-opening table provided at point of sale. The consumer would receive a disclosure of the actual APR that applies to the account at the point of sale, but that rate could be provided in a separate document.

6(b)(4) Disclosure of Rates for Open-End (Not Home-Secured) Plans

6(b)(4)(ii) Variable-Rate Accounts

Section 226.6(b)(4)(ii) as adopted in the January 2009 Regulation Z Rule sets forth the rules for variable-rate disclosures at account-opening, including accuracy requirements for the disclosed rate. The accuracy standard as adopted provides that a disclosed rate is accurate if it is in effect as of a ''specified date'' within 30 days before the disclosures are provided. *See* § 226.6(b)(4)(ii)(G).

Currently, creditors generally update rate disclosures provided at point of sale only when the rates have changed. The Board understands that some confusion has arisen as to whether the new rule as adopted literally requires that the account-opening disclosure specify a date as of which the rate was accurate, and that this date must be within 30 days of when the disclosures are given. Such a requirement could pose operational challenges for disclosures provided at point of sale as it would require creditors to reprint disclosures periodically, even if the variable rate has not changed since the last time the disclosures were printed.

The Board did not intend such a result. Requiring creditors to update rate disclosures to specify a date within the past 30 days would impose a burden on creditors with no corresponding benefit to consumers, where the disclosed rate is still accurate within the last 30 days

before the disclosures are provided. Accordingly, the Board proposes to revise the rule to clarify that a variable rate is accurate if it is a rate as of a specified date and this rate was in effect within the last 30 days before the disclosures are provided.

Section 226.7 Periodic Statement

7(b) Rules Affecting Open-End (Not Home-Secured) Plans

Deferred or waived interest plans. Comment 7(b)–1, as adopted in the January 2009 Regulation Z Rule, provides guidance on periodic statement disclosures for deferred interest transactions for open-end (not home-secured) plans, such as plans that permit a consumer to avoid interest charges if a purchase balance is paid in full by a certain date. The comment permits, but does not generally require, creditors to disclose during the promotional period information about accruing interest, balances subject to interest rates, and the date by which the balance must be paid in full to avoid interest. Comment 7(b)–1 as adopted indicated that guidance in the comment does not apply to card issuers that are subject to 12 CFR 227.24 or similar law, because in the January 2009 FTC Act Rule, the Agencies had concluded that deferred interest programs, as currently designed and marketed, were inconsistent with the general prohibition on the application of increased rates to existing balances.

As discussed in the supplementary information to the FTC Act Proposed Clarifications, the Board and other Agencies are proposing to clarify that creditors may continue to offer deferred or waived interest programs where the consumer will not be obligated to pay interest that accrues on a balance if that balance is paid in full by a specified date or within a specified period of time. Any such programs, however, would be fully subject to the protections set forth in the January 2009 FTC Act Rule as amended by the FTC Act Proposed Clarifications, as well as to disclosure requirements under Regulation Z discussed in this **Federal Register**. These protections would apply to all deferred or waived interest plans and not solely those covered by the January 2009 FTC Act Rule.

The Board believes that it is important that consumers receive clear disclosures regarding deferred or waived interest balances and interest accruing during the term of a deferred or waived interest program, in order to ensure that consumers understand the terms of the promotion and can tailor their account usage and payment patterns accordingly. As a result, the Board is proposing several revisions to comment 7(b)–1 to require creditors to provide consumers with pertinent information throughout the life of a deferred or waived interest promotion.

First, the Board believes that it is important for a consumer to be informed of the amount of interest charges that are accruing and for which the consumer will be obligated if the consumer does not repay a deferred or waived interest balance in full by the relevant due date. Comment 7(b)–1 would therefore be amended to require creditors offering deferred or waived interest programs to disclose information about accruing interest balances for such programs. The Board also proposes that each periodic statement be required to disclose the amount of the deferred or waived interest balance on which interest may be imposed, so that consumers will be aware of the amount that they are required to pay to avoid being obligated for the deferred or waived interest amount.

The Board also is proposing to add a new § 226.7(b)(14) to require creditors to include on a consumer's periodic statement, for two billing cycles immediately preceding the date on which deferred or waived interest transactions must be paid in full in order to avoid the imposition of interest charges, a disclosure that the consumer must pay such transactions in full by that date in order to avoid being obligated for the accrued interest. The Board also proposes several complementary changes to comment 7(b)–1 to provide additional guidance on compliance with this disclosure requirement. The Board believes that it is important for consumers to receive this notice in the last two billing cycles prior to the deferred or waived interest due date. This would ensure that consumers are reminded of the terms of the deferred or waived interest promotion close to the date on which full payment is due, in order to give consumers an opportunity to pay off any deferred or waived interest balance and take advantage of the terms of the promotion.

In particular, proposed § 226.7(b)(14) would require creditors offering deferred or waived interest programs to disclose on the front of the periodic statement the date in a future cycle by which the balance on the deferred or waived interest transaction must be paid in full to avoid interest charges. This disclosure would be required to be provided on each periodic statement for the last two billing cycles immediately preceding such date. Creditors may, but would not be required to, include this disclosure on prior statements. If the deferred or waived interest period's duration is such that the reminder cannot be given for the last two billing cycles immediately preceding the deferred or waived interest due date, for example if the deferred interest period is less than two months, proposed comment 7(b)–1.iv clarifies that the disclosure must be included on every periodic statement during the deferred or waived interest period. Proposed comment 7(b)–1.iv sets forth examples of how this timing requirement would operate.

Proposed Sample G–18(H) sets forth model language for making the disclosure required by proposed § 226.7(b)(14). The language used to make the disclosure under § 226.7(b)(14) would be required to be substantially similar to Sample G–18(H).

Finally, in a technical amendment, the Board proposes to amend the terminology of comment 7(b)–1 to refer to both deferred and waived interest programs. The provisions in proposed § 226.7(b)(14) and comment 7(b)–1 would apply to all types of deferred or waived interest programs, regardless of the particular nomenclature used to describe a specific plan. In a conforming technical change, the Board proposes to amend comment 5(b)(2)(ii)–1, which cross-references comment 7(b)–1, to refer to deferred and waived interest transactions.

Interest and Fees for Acquired or Modified Accounts. To highlight the overall cost of a credit account to consumers, the January 2009 Regulation Z Rule requires creditors to disclose the total amount of interest charges and fees for the statement period and calendar year to date. *See* § 226.7(b)(6). New comments 7(b)(6)–6 and –7 would clarify a creditor's obligations under § 227.7(b)(6) when it acquires a plan or account from another creditor or when the underlying account relationship with the creditor is changed in some way, for example, if a retail credit card account is upgraded to a cobranded general purpose credit card account or if a credit card account is replaced with another credit card product with different or additional features. The proposed comments would generally provide that the creditor must include the interest charges and fees incurred by the consumer prior to the account acquisition or change in the aggregate totals provided for the statement period and calendar year to date after the change. At the creditor's option, it may add the prior charges and fees to the disclosed totals following the change, or it may provide separate totals for each

time period. The proposed comments would not apply when the consumer opens a new plan or account with another creditor and transfers balances from the old plan or account. Comment is requested regarding the operational issues associated with carrying over cost totals in the circumstances described in the proposed commentary.

Section 226.9 Subsequent Disclosure Requirements

226.9(c) Change in Terms

9(c)(2) Rules Affecting Open-end (Not Home-secured) Plans

Relationship between § 226.9(b) and (c). Section 226.9(c)(2) generally requires creditors to provide 45 days' advance notice prior to a change in any term that must be disclosed in the account-opening summary table. For changed terms that must be disclosed in the account-opening summary table, creditors must similarly provide a summary of that change in a tabular format. Notice is not required in certain specified circumstances, including if the change involves a reduction of any component of a finance or other charge or where future credit privileges have been suspended or an account or plan has been terminated. The Board proposes to amend § 226.9(c)(2)(iv) to provide that notice is also not required when the change in terms is applicable only to a check or checks that access a credit card account and the changed terms are disclosed on or with the checks in accordance with § 226.9(b)(3).

Under § 226.9(b)(3), if a creditor mails or delivers a check that accesses a credit card account, it must disclose certain key terms applicable to the check, including any discounted promotional rate and when that rate will expire; the type of rate that will apply to the checks after expiration of the discounted promotional rate and the applicable APR; the date by which the consumer must use the checks in order to qualify for any discounted promotional rate; and any transaction fees applicable to the checks. These key terms must be disclosed in a tabular format on the front of the page containing the checks.

The format and location requirements were informed through consumer testing conducted on behalf of the Board, which indicated that consumers were more likely to notice and understand the terms applicable to the checks when these terms were presented in this manner. In light of these requirements, requiring an additional tabular disclosure for a change in terms about the access check terms could create consumer confusion and would likely provide little consumer benefit. The Board also believes that given the enhanced disclosure requirements, a 45-day notice period before consumers may use a check would be unnecessary.

The proposed exception in § 226.9(c)(2)(iv) is limited to circumstances where the consumer has been provided disclosures pursuant to § 226.9(b)(3) in connection with a check that accesses a credit card account. Thus, the exception would not permit a creditor to make a balance transfer offer by other means, such as by telephone or written solicitation, on finance charge terms higher than those previously disclosed for a balance transfer, unless the creditor also complies with the notice and advance timing requirements of § 226.9(c) before the new fee or rate can be applied to the offer.

The exception also would extend only to a check accompanied by the § 226.9(b)(3) disclosures and not to terms applicable to other features of the consumer's account. A creditor would not be permitted to use a set of checks and § 226.9(b)(3) disclosures, for example, to change the rate applicable when a consumer uses his or her credit card to take a cash advance at an ATM machine. For example, assume the rate that typically applies to the checks is the issuer's cash advance rate, currently 20%, and the issuer intends to prospectively increase the cash advance rate to 25%. Under the proposal, the issuer could send a set of checks disclosing the 25% rate in the table required by § 226.9(b)(3), and would not be required to provide an additional 45 days' advance notice indicating that the 25% rate applies to those checks. The issuer would, however, be required to send 45 days' advance notice pursuant to § 226.9(c)(2) prior to changing the cash advance rate applicable to the consumer's account to 25% (for access other than by a check accompanied with the § 226.9(b)(3) disclosure).

Proposed comment 9(c)(2)–4 would clarify the relationship between the change-in-terms requirements in § 226.9(c) and the notice provisions of § 226.9(b) that apply when a creditor adds a credit feature or delivers a credit access device for an existing open-end plan. The proposed comment would provide that notwithstanding any notice provided under § 226.9(b) (except for a notice provided under § 226.9(b)(3) as discussed above), a creditor must also satisfy the change-in-terms notice requirements under § 226.9(c), where applicable, including any advance notice requirement. For example, if a creditor adds a balance transfer feature to an account more than 30 days after account-opening disclosures are provided, it must give the finance charge disclosures for the balance transfer feature under § 226.9(b) as well as provide a change in terms notice under § 226.9(c). This notice must be provided at least 45 days prior to the effective date of the change.[2] Similarly, if a creditor makes a balance transfer offer on finance charge terms that are higher than those previously disclosed for balance transfers, it would also generally be required to provide a change-in-terms notice 45 days in advance of the effective date of the change. The proposed comment also provides that a creditor may provide a single notice under § 226.9(c) to satisfy the notice requirements of both § 226.9(b) and (c).

Change-in-terms requirements for temporary rate reductions. The Board believes that clarification is needed as to the relationship between the guidance in comment 9(c)(2)(iv)–2 regarding how to disclose skip payment features and the general timing, format, and content requirements of § 226.9(c)(2), for temporary rate reductions offered on an existing account. In general, under § 226.9(c)(2)(iv), no advance notice need be given prior to the reduction of any component of a finance charge. However, under § 226.9(c)(2)(i), 45 days' advance written notice is required prior to a rate increase. Comment 9(c)(2)(iv)–2 provides guidance as to how a creditor that is offering a skip payment feature or interest waiver may comply with the requirements of § 226.9(c)(2)(iv). This guidance was intended to address only the limited circumstances where a creditor offers a feature that permits a consumer to skip a payment or payments or where a creditor intends to waive interest charges due on the account, without changing the contractual rate of interest applicable to the consumer's balances. This comment was not intended to alter the notice requirements of § 226.9(c)(2) for promotional rate offers, where the creditor lowers the rate applicable to the consumer's account and subsequently increases the rate. However, as drafted the comment may create confusion because it refers to any temporary reductions in finance charges.

To clarify that advance notice in accordance with the requirements of § 226.9(c)(2) is required prior to increasing a consumer's rate following a rate reduction, the Board proposes to amend comment 9(c)(2)(iv)–2 by including language indicating that

[2] If the creditor changes a term required to be disclosed in the account-opening table, the creditor must also provide a summary of the change in a tabular format under § 226.9(c)(2)(iii)(B).

creditors offering a temporary reduction in an interest rate must provide a notice in accordance with the timing requirements of § 226.9(c)(2)(i) and the content and format requirements of § 226.9(c)(2)(ii)(A) and (B) prior to resuming the original rate.

Specific consumer agreement exception. Section 226.9(c)(2)(i) provides that the 45-day advance notice timing requirement does not apply if the consumer has agreed to a particular change. In this case, notice must be given before the effective date of the change. Comment 9(c)(2)(i)–3 states that the provision is intended for use in ''unusual instances,'' such as when a consumer substitutes collateral or when the creditor may advance additional credit only if a change relatively unique to that consumer is made. The comment further provides examples of actions that do not constitute specific consumer agreement, including the consumer's acceptance of an account agreement that contains a general reservation of the right to change terms or the consumer's use of the account. Thus, the comment recognizes that the change in terms notice requirements generally cannot be waived or forfeited by the consumer.

The Board is proposing to amend the comment to emphasize the limited scope of the exception and provide that the exception applies ''solely'' to the unique circumstances specifically identified in the comment. The proposed comment would also add an example of an occurrence that would not be considered an ''agreement'' for purposes of relieving the creditor of its responsibility to provide an advance change-in-terms notice. This example would state that an ''agreement'' does not include a consumer's request to reopen a closed account or to upgrade an existing account to another account offered by the creditor with different credit or other features. Thus, a creditor would be required to provide the consumer 45 days' advance notice before increasing the rate for new transactions or increasing the amount of any applicable fees to the account in those circumstances.

226.9(g) Increase in Rates Due to Delinquency or Default or as a Penalty

Section 226.9(g)(4) sets forth exceptions to the general requirement to provide 45 days' advance notice before increasing a rate due to the consumer's delinquency or default or as a penalty. Section 226.9(g)(4)(i) as adopted in the January 2009 Regulation Z Rule provides a specific exception to the notice requirement when the consumer's rate is increased due to the consumer's failure to comply with the terms of a workout arrangement, provided that the annual percentage rate applicable to a category of transactions following any such increase does not exceed the rate that applied to that category of transactions prior to commencement of the workout arrangement. This exception is intended to encourage institutions to continue offering workout arrangements that reduce rates to consumers in serious default, while also ensuring that a consumer who enters into such an arrangement but is unable to comply with its terms is not charged a rate that exceeds the rate that applied prior to the arrangement without first receiving advance notice of that rate increase.

The Board understands that there is some confusion as to whether this exception also applies to temporary hardship arrangements that assist consumers in overcoming financial difficulties by lowering the annual percentage rate for a period of time. For example, if an account becomes seriously delinquent, the institution may reduce the rate that applies to the outstanding balance from the penalty rate to a rate of zero on the condition that the consumer make payments that will cure the delinquency within a specified period of time. If the consumer successfully cures the delinquency in accordance with the terms of the temporary hardship arrangement, the institution may choose to raise the annual percentage rate to the rate that applied prior to commencement of the temporary hardship arrangement. Because such arrangements can provide important benefits to consumers, the Board proposes to amend § 226.9(g)(4)(i) to clarify that the exception also applies to temporary hardship arrangements.

The Board also proposes to revise § 226.9(g)(4)(iii) for consistency with the terminology used in 12 CFR 227.24 and similar regulation, without intended substantive change, by deleting references to ''outstanding balances.''

In a technical amendment, the Board proposes to designate as comment 9(g)(4)(ii)–1 commentary that was placed with commentary to § 226.9(g)(4)(ii) but was not numbered due to a scrivener's error.

The Board also proposes several amendments to comment 9(g)–1 for consistency and conformity with substantively similar amendments published elsewhere in today's **Federal Register** as part of the FTC Act Proposed Clarifications. For example, the Board proposes to correct a typographical error in comment 9(g)–1.iii.C, and to clarify the fact patterns presented in comments 9(g)–1.i and 9(g)–1.iii.

Section 226.12 Special Credit Card Provisions

Section 226.13 Billing Error Resolution

Comment 12(b)–3 states that a card issuer must investigate claims in a reasonable manner before imposing liability for an unauthorized use, and sets forth guidance on conducting an investigation of a claim. Comment 13(f)–3 contains similar guidance for a creditor investigating a billing error claim. The January 2009 Regulation Z Rule amended both comments to specifically provide that a card issuer (or creditor) may not require a consumer to submit an affidavit or to file a police report as a condition of investigating a claim. These additions reflected the Board's concerns that such requests could cause a chilling effect on a consumer's ability to assert his or her error resolution rights.

In the supplementary information discussing the amended comments, the Board recognized that in some cases, a card issuer may need to provide some form of certification indicating that the cardholder's claim is legitimate, for example, to obtain documentation from a merchant relevant to a claim or to pursue chargeback rights. Accordingly, the Board stated that a card issuer could ''require'' the cardholder to provide a signed statement supporting the asserted claim, provided that the act of providing the signed statement would not subject the cardholder to potential criminal penalty. *See* 74 FR at 5363. The final comments, however, did not reflect the ability of the card issuer (or creditor) to require a consumer signed statement for these types of circumstances. Instead, the text of the final comments stated that a card issuer (or creditor) could ''request'' a signed statement. Accordingly, comments 12(b)–3 and 13(f)–3 would be amended to conform to the Board's intent as stated in the supplementary information to the January 2009 Regulation Z Rule.

Section 226.16 Advertising

TILA Section 143, implemented by the Board in § 226.16, governs advertisements of open-end credit plans. 15 U.S.C. 1663. In May 2008, the Board proposed requirements regarding the advertising of deferred interest offers in order to improve consumer awareness of the terms of such offers. However, the Board and other Agencies concluded in the January 2009 FTC Act Rule that deferred interest programs, as currently designed, are inconsistent with the general prohibition on the application of increased rates to existing balances and prohibited issuers subject to the January 2009 FTC Act Rule from

establishing such programs. Consequently, the Board withdrew the proposed advertising requirements related to deferred interest offers from the January 2009 Regulation Z Rule.

Although the January 2009 FTC Act Rule prohibited deferred interest programs, the Agencies noted that institutions were not prohibited from offering promotional programs that provide similar benefits to consumers, such as programs where interest is assessed on purchases at a disclosed rate for a period of time but the interest charged is waived or refunded if the principal is paid in full by the end of that period. Recognizing that the distinction between deferred interest and waived or refunded interest programs has caused confusion, the Agencies are proposing in the FTC Act Proposed Clarifications to clarify that creditors may offer promotional programs where the consumer will not be obligated to pay interest that accrues on a balance if that balance is paid in full by a specified date or within a specified period of time. However, such programs remain fully subject to the consumer protections set forth in the January 2009 FTC Act Rule as amended by the FTC Act Proposed Clarifications.

In light of the FTC Act Proposed Clarifications, the Board also is proposing new advertising requirements in § 226.16(h), similar to those proposed in May 2008, for deferred, waived, or refunded interest programs in order to better inform consumers of the terms of these offers. The Board believes that these advertising requirements will complement the new periodic statement disclosures for such programs that are discussed in the supplementary information to § 226.7(b).

16(h) Deferred or Waived Interest Offers

The Board is proposing to use its authority under TILA Section 143(3) to add a new § 226.16(h) to require additional disclosures in advertisements in order to improve information consumers receive about the terms of deferred or waived interest offers. 15 U.S.C. 1663(3). The new disclosure requirements would apply to advertisements that use terms such as ''no interest,'' ''no payments,'' ''deferred interest,'' ''same as cash,'' or similar terms in describing these offers.[3] In summary, the proposed rules would require that the deferred or waived interest period be disclosed in immediate proximity to each deferred interest triggering term. For advertisements stating ''no interest'' or a similar term, the fact that the balance must be paid in full by the end of the deferred or waived interest period also would need to be disclosed in immediate proximity to that term. The proposal also would require that certain additional information about the terms of the deferred or waived interest offer be disclosed in close proximity to the first statement of a deferred interest triggering term. Each of these proposals is discussed in more detail below.

16(h)(1) Scope

The new requirements for deferred or waived interest offers under proposed § 226.16(h) would apply to any advertisement of such offers for open-end (not home-secured) plans, and would not be limited to credit card plans. In addition, the rules would apply to promotional materials accompanying applications or solicitations made available by direct mail or electronically, as well as applications or solicitations that are publicly available. The Board believes that the proposed disclosures under this section would be beneficial to consumers whether the offer is applicable to a consumer credit card account or any other open-end (not home-secured) plan.

16(h)(2) Definitions

The Board proposes to define ''deferred or waived interest'' in new § 226.16(h)(2) as finance charges on balances or transactions that a consumer is not obligated to pay if those balances or transactions are paid in full by a specified date. The term would not, however, include finance charges the creditor allows a consumer to avoid in connection with a recurring grace period. Therefore, an advertisement including information on a recurring grace period that could potentially apply each billing period, would not be subject to the additional disclosure requirements under § 226.16(h). Proposed comment 16(h)–1 clarifies that deferred or waived interest offers also do not include offers that allow a consumer to defer payments during a specified time period, and under which the consumer is not obligated under any circumstances for any interest or other finance charges that could be attributable to that period. The comment also clarifies that skip payment programs that allow a consumer to avoid making a minimum payment for one or more billing cycles but where interest continues to accrue and be imposed during that period are not deferred or waived interest offers. Furthermore, proposed comment 16(h)–2 specifies that deferred or waived interest offers do not include zero percent APR offers where a consumer is not obligated under any circumstances for interest attributable to the time period the zero percent APR was in effect, although such offers may be considered promotional rates under § 226.16(g)(2)(i).

Furthermore, the Board proposes to define the ''deferred or waived interest period'' for purposes of proposed § 226.16(h) as the maximum period from the date the consumer becomes obligated for the balance or transaction until the specified date that the consumer must pay the balance or transaction in full in order to avoid finance charges on such balance or transaction. To clarify the meaning of deferred or waived interest period, the Board is proposing to include a new comment 16(h)–3 to state that the advertisement need not include the end of an informal ''courtesy period'' in disclosing the deferred or waived interest period. For example, an advertisement may state that the deferred interest period is six months, even if the creditor in practice extends that period by several days, for example, to coincide with the payment due date for other transactions that are not subject to a deferred interest plan.

16(h)(3) Stating the Deferred or Waived Interest Period

General rule. The Board is proposing a new § 226.16(h)(3) to require that advertisements of deferred or waived interest plans disclose the deferred or waived interest period clearly and conspicuously in immediate proximity to each statement of a deferred interest triggering term. New § 226.16(h)(3) also would require such advertisements that use the phrase ''no interest'' or similar term to describe the possible avoidance of interest obligations under the deferred or waived interest program to state ''if paid in full'' in a clear and conspicuous manner preceding the disclosure of the deferred or waived interest period. For example, as described in proposed comment 16(h)–7, an advertisement might state ''no interest if paid in full within 6 months'' or ''no interest if paid in full by December 31, 2010.'' The Board is proposing to require these disclosures because of concerns that the statement ''no interest,'' in the absence of additional details about the applicable conditions of the offer may confuse consumers who might not understand that they need to pay their balances in

[3] For ease of reference, the supplementary information to proposed § 226.16(h) refers generically to these terms as ''deferred interest triggering terms.''

full by a certain date in order to avoid the obligation to pay interest.

Immediate proximity. Proposed comment 16(h)–4 provides guidance on the meaning of ''immediate proximity'' by establishing a safe harbor for disclosures made in the same phrase. Therefore, if the deferred or waived interest period is disclosed in the same phrase as each statement of a deferred interest triggering term (for example, ''no interest if paid in full within 12 months'' or ''no interest if paid in full by December 1, 2010'' the deferred or waived interest period would be deemed to be in immediate proximity to the statement.

Clear and conspicuous standard. The Board proposes to amend comment 16–2.ii to provide that advertisements clearly and conspicuously disclose the deferred or waived interest period only if the information is equally prominent to each statement of a deferred interest triggering term. Proposed comment 16–2.ii states that if the disclosure of the deferred or waived interest period is the same type size as the statement of the deferred interest triggering term, it will be deemed to be equally prominent. The Board believes that requiring equal prominence for the disclosure of the deferred or waived interest period will call attention to the nature and significance of that information by ensuring that the information is at least as significant as the terms to which it relates. Furthermore, applying an equally prominent standard would be consistent with the treatment of certain disclosures related to promotional rates.

The Board also proposes to clarify in comment 16–2.ii that the equally prominent standard applies only to written and electronic advertisements. This approach is consistent with the treatment of written and electronic advertisements of promotional rates. Because equal prominence is a difficult standard to measure outside the context of written and electronic advertisements, the Board believes that the guidance on clear and conspicuous disclosures set forth in proposed comment 16–2.ii, should apply solely to written and electronic advertisements. Disclosure of the deferred or waived interest period under § 226.16(h)(3) for non-written, non-electronic advertisements, while not required to meet the specific clear and conspicuous standard in comment 16–2.ii would nonetheless be subject to the general clear and conspicuous standard set forth in comment 16–1.

16(h)(4) Stating the Terms of the Deferred or Waived Interest Offer

In order to ensure that consumers are informed of the terms applicable to a deferred or waived interest offer, the proposal would require disclosure of key terms of such an offer in a prominent location closely proximate to the first listing of a statement of a deferred interest triggering term. First, the Board proposes to require a statement that if the balance or transaction is not paid within the deferred or waived interest period, interest will be charged from the date the consumer became obligated for the balance or transaction. Second, the Board also proposes to require a statement, if applicable, that interest can also be charged from the date the consumer became obligated for the balance or transaction if the consumer's account is in default prior to the end of the deferred or waived interest period.

To facilitate compliance with this provision, the Board proposes model language in Sample G–22 in Appendix G. Proposed § 226.16(h)(4) would require that advertisements of deferred or waived interest offers use language similar to Sample G–22. The Board is proposing that language be ''similar,'' rather than ''substantially similar,'' in recognition of the fact that creditors may need to modify or supplement the model language to accurately describe the terms of a particular promotion. For issuers subject to the January 2009 FTC Act Rule or similar law, the proposed language would reflect that interest can be charged from the date the consumer became obligated for the balance or transaction only if the consumer fails to pay the balance subject to the deferred or waived interest program in full or makes a payment that is more than 30 days late.[4] For creditors that are not subject to the January 2009 FTC Act Rule or similar law, such as a creditor that offers a deferred or waived interest program in connection with a line of credit, the Board proposes separate model language.

While most advertisements of deferred or waived interest offers describe the conditions required to take advantage of the offer, the conditions may be placed in a location that is not easily noticed or stated in terms that are not easily understood. Thus, as discussed below, the proposal would require this information to be in a prominent location closely proximate to the first listing of a statement of ''no interest,'' ''no payments,'' ''deferred interest'' or similar term regarding interest and payments under the deferred interest period.

Prominent location closely proximate. The Board is proposing guidance on the meaning of ''prominent location closely proximate to the first listing'' in comments 16(h)–5 and 16(h)–6. This guidance is similar to, and intended to be consistent with, the provisions in § 226.16(g) that apply to advertisements of promotional rates. Proposed comment 16(h)–5 would provide that if the additional disclosures required under proposed § 226.16(h)(4) are in the same paragraph as the first listing of a deferred interest triggering term, they would be deemed to be in a prominent location closely proximate to the statement. Information appearing in a footnote would not be deemed to be in a prominent location closely proximate to the statement. The Board believes that the safe harbor under proposed comment 16(h)–5 is, and should be, more flexible than the safe harbor for ''immediate proximity'' under proposed comment 16(h)–4 above.

First listing. Proposed comment 16(h)–6 provides that the first listing of a statement of a deferred interest triggering term is the most prominent listing of one of these statements (on the front side of the first page of the principal promotional document). Consistent with the rules for promotional rates in § 226.16(g), the proposed comment borrows the concept of ''principal promotional document'' from the FTC's definition of the term under its regulations promulgated under the FCRA. 16 CFR § 642.2(b). Under the proposal, if none of these statements is listed on the principal promotional document or there is no principal promotional document, the first listing of one of these statements would be deemed to be the most prominent listing of the statement on the front side of the first page of each document containing one of these statements. The Board also proposes that the listing with the largest type size be a safe harbor for determining which listing is the most prominent. The proposed comment notes that a catalog or other multiple-page advertisement would be considered one document for these purposes, consistent with comment 16(c)–1.

Because both the rules for advertising of promotional rates in § 226.16(g) and proposed § 226.16(h)(4) require disclosures closely proximate to the ''first listing'' of a rate or a statement, respectively, the Board believes that the

[4] This statement is intended to be consistent with substantive restrictions in the January 2009 FTC Act Rule and FTC Act Proposed Clarifications which would not permit an issuer to revoke a deferred or waived interest program unless the consumer's payment is more than 30 days late.

guidance on what constitutes the ''first listing'' should be consistent for both rules.

Segregation. The Board also proposes comment 16(h)–7 to clarify that the information required under proposed § 226.16(h)(4) need not be segregated from other information the advertisement discloses about the deferred or waived interest offer. This may include triggered terms that the advertisement is required to disclose under § 226.16(b). The comment is consistent with the Board's approach on many other required disclosures under Regulation Z. *See* comment 5(a)–2. Moreover, the Board believes flexibility is warranted to allow advertisers to provide other information that may be essential for the consumer to evaluate the offer, such as a minimum purchase amount to qualify for the deferred or waived interest offer.

Clear and conspicuous disclosure. The Board is proposing to amend comment 16–2.ii to require equal prominence only for the disclosure of the information required under § 226.16(h)(3). Therefore, disclosures under proposed § 226.16(h)(4) would not be required to be equally prominent to the first listing of the deferred interest triggering statement. Because of the amount of information the Board is proposing to require under § 226.16(h)(4)(i) and (ii), the Board believes that requiring equal prominence to the triggering statement for this information would render the advertisement difficult to read and confusing to consumers.

Non-written, non-electronic advertisements. The Board believes providing flexibility in how advertisers may present information to consumers in a non-written, non-electronic context is appropriate due to the time and space constraints of such media. Therefore, consistent with the approach adopted for advertisements of promotional rate offers in the January 2009 Regulation Z Rule and the approach in proposed § 226.16(h)(3) discussed above, the Board is proposing that only written or electronic advertisements be subject to the requirement to provide the disclosures required by proposed § 226.16(h)(4) in a prominent location closely proximate to the first listing of a deferred interest triggering term. For non-written, non-electronic advertisements, the information required under § 226.16(h)(4)(i), and (ii) would be included in the advertisement, but would not be subject to any proximity or formatting requirements other than the general requirement that information be clear and conspicuous, as contemplated under comment 16–1.

16(h)(5) Envelope Excluded

The Board proposes to exclude envelopes or other enclosures in which an application or solicitation is mailed, or banner advertisements or pop-up advertisements linked to an electronic application or solicitation from the requirements of proposed § 226.16(h)(4). This proposed exception is consistent with the approach adopted for promotional rate advertisements in the January 2009 Regulation Z Rule. Interested consumers generally look at the contents of an envelope or click on the link in a banner advertisement or pop-up advertisement in order to learn more about an offer instead of relying solely on the information on an envelope, banner advertisement, or pop-up advertisement. Given the limited space that envelopes, banner advertisements, and pop-up advertisements have to convey information, the Board believes the burden of providing the information proposed under § 226.16(h)(4) on these types of communications would likely exceed any benefit to consumers.

Appendix G—Open-End Model Forms and Clauses

The Board proposes to revise Model Form G–10(A) to insert a row disclosing any grace period on purchases applicable to the account, in accordance with the requirements set forth in § 226.5a(b)(5). This row was inadvertently omitted from Model Form G–10(A) as published in the **Federal Register** on January 29, 2009.

The Board also proposes to revise the minimum payment warning set forth on Sample Form G–18(G) for conformity with Sample Clause G–18(C), without any intended substantive change to the requirements of the final rule.

As discussed in the supplementary information to §§ 226.7(b)(14) and 226.16(h), the Board proposes to adopt model language for the disclosures required to be given in connection with deferred or waived interest programs as Samples G–18(H) and G–22. The Board notes that proposed Sample G–22 contains two model clauses, one for use by credit card issuers subject to 12 CFR 227.24 or similar law and one for other creditors. The model clause for issuers subject to 12 CFR 227.24 reflects the fact that, under those rules, an issuer may only revoke a deferred or waived interest program if the consumer's payment is more than 30 days late. The Board proposes to add a new comment App. G–12 to clarify which creditors should use each of the model clauses in proposed Sample G–22.

The Board also proposes a technical correction to comment App. G–5.v.C. As adopted in the January 2009 Regulation Z Rule, comment App. G–5.v.C refers to cross-references in the samples of the table provided on or with applications and solicitations and the table provided at account opening. However, cross-references were not included in those samples because they are not a disclosure required by the January 2009 Regulation Z Rule. Accordingly, the Board proposes to delete the examples mentioning cross-references from comment App. G–5.v.C.

IV. Regulatory Flexibility Analysis

Section VIII of the supplementary information to the January 2009 Regulation Z Rule sets forth the Board's analysis under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The Board notes that the amendments in this proposed rulemaking would require small entities that offer deferred or waived interest programs to comply with new disclosure requirements for periodic statements and advertisements, as discussed in the supplementary information to the amendments to §§ 226.7 and 226.16. Because the proposed amendments are a continuation of the January 2009 Regulation Z Rule and would not, if adopted, alter the analysis and determination accompanying the January 2009 Regulation Z Rule, the Board continues to rely on that analysis and determination for purposes of this rulemaking.

V. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3506; 5 CFR Part 1320 Appendix A.1), the Board reviewed the proposed rule under the authority delegated to the Board by the Office of Management and Budget (OMB). The collection of information that is required by this proposed rule is found in 12 CFR part 226. The Federal Reserve may not conduct or sponsor, and an organization is not required to respond to, this information collection unless the information collection displays a currently valid OMB control number. The OMB control number is 7100–0199.

This information collection is required to provide benefits for consumers and is mandatory (15 U.S.C. 1601 *et seq.*). Since the Federal Reserve does not collect any information, no issue of confidentiality arises. The respondents/recordkeepers are creditors and other entities subject to Regulation Z, including for-profit financial institutions and small businesses.

TILA and Regulation Z are intended to ensure effective disclosure of the costs and terms of credit to consumers. For open-end credit, creditors are required to, among other things, disclose information about the initial costs and terms and to provide periodic statements of account activity, notice of changes in terms, and statements of rights concerning billing error procedures. Regulation Z requires specific types of disclosures for credit and charge card accounts and home equity plans. For closed-end loans, such as mortgage and installment loans, cost disclosures are required to be provided prior to consummation. Special disclosures are required in connection with certain products, such as reverse mortgages, certain variable-rate loans, and certain mortgages with rates and fees above specified thresholds. TILA and Regulation Z also contain rules concerning credit advertising. Creditors are required to retain evidence of compliance for twenty-four months (§ 226.25), but Regulation Z does not specify the types of records that must be retained.

Under the PRA, the Federal Reserve accounts for the paperwork burden associated with Regulation Z for the state member banks and other creditors supervised by the Federal Reserve that engage in lending covered by Regulation Z and, therefore, are respondents under the PRA. Appendix I of Regulation Z defines the Federal Reserve-regulated institutions as: State member banks, branches and agencies of foreign banks (other than federal branches, federal agencies, and insured state branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act. Other federal agencies account for the paperwork burden imposed on the entities for which they have administrative enforcement authority. The current total annual burden to comply with the provisions of Regulation Z is estimated to be 688,607 hours for the 1,138 Federal Reserve-regulated institutions that are deemed to be respondents for the purposes of the PRA. To ease the burden and cost of complying with Regulation Z (particularly for small entities), the Federal Reserve provides model forms, which are appended to the regulation.

The proposed rule would impose a one-time increase in the total annual burden under Regulation Z for all respondents regulated by the Federal Reserve by 27,312 hours, from 688,607 hours to 715,919 hours.

The total estimated burden increase, as well as the estimates of the burden increase associated with each major section of the proposed rule as set forth below, represents averages for all respondents regulated by the Federal Reserve. The Federal Reserve expects that the amount of time required to implement each of the proposed changes for a given institution may vary based on the size and complexity of the respondent. Furthermore, the burden estimate for this rulemaking does not include the burden addressing provisions from the Mortgage Disclosure Improvement Act of 2008 (Docket No. R–1340) or Higher Education Opportunity Act (Docket No. R–1353) announced in separate proposed rulemakings.

The Federal Reserve estimates that 1,138 respondents regulated by the Federal Reserve would take, on average, 16 hours (two business days) to update their systems for periodic statements to comply with the proposed disclosure requirements in § 226.7. In addition, the Federal Reserve estimates that the 1,138 respondents would take, on average, 8 hours (one business day) to update their systems for advertising to comply with the proposed disclosure requirements in § 226.16. This one-time revision would increase the burden by 27,312 hours.

The other federal agencies are responsible for estimating and reporting to OMB the total paperwork burden for the institutions for which they have administrative enforcement authority. They may, but are not required to, use the Federal Reserve's burden estimation methodology. Using the Federal Reserve's method, the total current estimated annual burden for institutions regulated by the federal financial agencies, including Federal Reserve-supervised institutions, would be approximately 13,568,725 hours. The proposed rule would impose a one-time increase in the estimated annual burden by 412,800 hours to 13,981,525 hours. The above estimates represent an average across all respondents regulated by federal financial agencies and reflect variations between institutions based on their size, complexity, and practices. All covered institutions, of which there are approximately 17,200, potentially are affected by this collection of information, and thus are respondents for purposes of the PRA.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the Federal Reserve's functions; including whether the information has practical utility; (2) the accuracy of the Federal Reserve's estimate of the burden of the proposed information collection, including the cost of compliance; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology. Comments on the collection of information should be sent to Michelle Shore, Federal Reserve Board Clearance Officer, Division of Research and Statistics, Mail Stop 151–A, Board of Governors of the Federal Reserve System, Washington, DC 20551, with copies of such comments sent to the Office of Management and Budget, Paperwork Reduction Project (7100–0199), Washington, DC 20503.

List of Subjects in 12 CFR Part 226

Advertising, Consumer protection, Federal Reserve System, Reporting and recordkeeping requirements, Truth in Lending.

Text of Proposed Revisions

Certain conventions have been used to highlight the proposed revisions. New language is shown inside ►bold-type arrows◄ while language that would be deleted is set off with ❚bold-type brackets❚.

For the reasons set forth in the preamble, the Board proposes to further amend Regulation Z, 12 CFR part 226, as amended at 74 FR 5559, January 29, 2009, as set forth below:

PART 226—TRUTH IN LENDING (REGULATION Z)

1. The authority citation for part 226 continues to read as follows:

Authority: 12 U.S.C. 3806; 15 U.S.C. 1604, 1637(c)(5), and 1639(l).

2. Section 226.6 is amended as follows:

A. Paragraph (b)(1) introductory text is revised.

B. Paragraph (b)(1)(ii) is revised.

C. Paragraph (b)(2)(i)(E) is revised.

D. Paragraph (b)(4)(ii)(G) is revised.

§ 226.6 Account-opening disclosures.

* * * * *

(b) *Rules affecting open-end (not home-secured) plans.* The requirements of paragraph (b) of this section apply to plans other than home-equity plans subject to the requirements of § 226.5b.

(1) *Form of disclosures; tabular format for open-end (not home-secured) plans.* Creditors must provide the account-opening disclosures specified in paragraphs (b)(2)(i) through (b)(2)(v) (except for (b)(2)(i)(D)(*2*)) and (b)(2)(vii) through (b)(2)(xiv) of this section❚)❚ in the form of a table with the headings,

content, and format substantially similar to any of the applicable tables in G–17 in Appendix G to this part.

* * * * *

(ii) *Location.* Only the information required or permitted by paragraphs (b)(2)(i) through (b)(2)(v) (except for (b)(2)(i)(D)(*2*)) and (b)(2)(vii) through (b)(2)(xiv) of this section[)] shall be in the table. Disclosures required by paragraphs (b)(2)(i)(D)(*2*), (b)(2)(vi) and (b)(2)(xv) of this section shall be placed directly below the table. Disclosures required by paragraphs (b)(3) through (b)(5) of this section that are not otherwise required to be in the table and other information may be presented with the account agreement or account-opening disclosure statement, provided such information appears outside the required table.

* * * * *

(2) * * *

(i) * * *

(E) *Point of sale where APRs vary by state*► *or based on creditworthiness*◄. Creditors imposing annual percentage rates that vary by state► or based on the consumer's creditworthiness◄ and providing the disclosures required by paragraph (b) of this section in person at the time the open-end (not home-secured) plan is established in connection with financing the purchase of goods or services may, at the creditor's option, disclose pursuant to paragraph (b)(2)(i) of this section in the account-opening table►;

(*1*) The◄ [the] specific annual percentage rate applicable to the consumer's account, or

►(*2*) The◄ [the] range of the annual percentage rates, if the disclosure includes a statement that the annual percentage rate varies by state ►or will be determined based on the consumer's creditworthiness ◄and refers the consumer to the account agreement or other disclosure provided with the account-opening table where the annual percentage rate applicable to the consumer's account is disclosed. A creditor may not list annual percentage rates for multiple states in the account-opening table.

* * * * *

(4) * * *

(ii) * * *

(G) A rate is accurate if it is a rate as of a specified date ►and this rate was in effect◄ within the last 30 days before the disclosures are provided.

* * * * *

3. Section 226.7 is amended by adding paragraph (b)(14) to read as follows:

§ 226.7 Periodic statement.

* * * * *

(b) * * *

►(14) *Deferred or waived interest transactions.* For accounts with an outstanding balance subject to a deferred or waived interest program, the date by which that outstanding balance must be paid in full in order to avoid the obligation to pay finance charges on such balance must be disclosed on the front of the periodic statement for two billing cycles immediately preceding the billing cycle in which such date occurs. The disclosure provided pursuant to this paragraph must be substantially similar to Sample G–18(H) in Appendix G to this part.◄

* * * * *

4. Section 226.9 is amended as follows:

A. Paragraph (c)(2)(iv) is revised.

B. Paragraph (g)(4)(i) introductory text is revised.

C. Paragraphs (g)(4)(i)(A) and (B) are revised

D. Paragraph (g)(4)(iii) is revised.

§ 226.9 Subsequent disclosure requirements.

* * * * *

(c) * * *

(2) * * *

(iv) *Notice not required.* For open-end plans (other than home equity plans subject to the requirements of § 226.5b), a creditor is not required to provide notice under this section when the change involves charges for documentary evidence; a reduction of any component of a finance or other charge; suspension of future credit privileges (except as provided in paragraph (c)(2)(v) of this section) or termination of an account or plan; [or] when the change results from an agreement involving a court proceeding►; or if the change is applicable only to a check or checks that access a credit card account and the changed terms are disclosed on or with the checks in accordance with § 226.9(b)(3)◄.

* * * * *

(g) * * *

(4) *Exceptions.* (i) *Workout* ►*and temporary hardship*◄ *arrangements.* A creditor is not required to provide a notice pursuant to paragraph (g)(1) of this section if a rate applicable to a category of transactions is increased ►due to the consumer's completion of a workout or temporary hardship arrangement or◄ as a result of the consumer's default, delinquency or as a penalty, in each case for failure to comply with the terms of a workout ►or temporary hardship◄ arrangement between the creditor and the consumer, provided that:

(A) The rate following any such increase does not exceed the rate that applied to the category of transactions prior to commencement of the workout ►or temporary hardship◄ arrangement; or

(B) If the rate that applied to a category of transactions prior to the commencement of the workout ►or temporary hardship◄ arrangement was a variable rate, the rate following any such increase is a variable rate determined by the same formula (index and margin) that applied to the category of transactions prior to commencement of the workout ►or temporary hardship◄ arrangement.

* * * * *

(iii) *Certain rate increases applicable to outstanding balances.* A creditor is not required to provide a notice pursuant to paragraph (g)(1) of this section prior to increasing [the] ►a◄ rate [applicable to an outstanding balance as defined in 12 CFR § 227.24(a)(2), if:] ►pursuant to 12 CFR 227.24(b)(4) or similar law, if:◄

(A) The creditor previously provided a notice pursuant to paragraph (g)(1) of this section containing the content specified in paragraph (g)(3) of this section;

(B) After that notice is provided but prior to the effective date of the rate increase or rate increases disclosed in the notice pursuant to paragraph (g)(3)(i)(B) of this section, the consumer fails to make a required minimum periodic payment within 30 days from the due date for that payment; and

(C) The rate increase [applicable to outstanding balances] ►pursuant to 12 CFR 227.24(b)(4) or similar law◄ takes effect on the effective date set forth in the notice.

5. Section 226.16 is amended by adding new paragraph (h) to read as follows:

§ 226.16 Advertising.

* * * * *

►(h) *Deferred or waived interest offers.* (1) *Scope.* The requirements of this paragraph apply to any advertisement of an open-end credit plan not subject to § 226.5b, including promotional materials accompanying applications or solicitations subject to § 226.5a(c) or accompanying applications or solicitations subject to § 226.5a(e).

(2) *Definitions.* ''Deferred interest'' or ''waived interest'' means finance charges accrued on balances or transactions that a consumer is not obligated to pay or that will be waived or refunded to a consumer if those balances or transactions are paid in full by a specified date. The maximum

period from the date the consumer becomes obligated for the balance or transaction until the specified date by which the consumer must pay the balance or transaction in full in order to avoid finance charges, or receive a waiver or refund of finance charges, is the ''deferred interest period'' or ''waived interest period.'' ''Deferred interest'' or ''waived interest'' does not include any finance charges the consumer is not obligated to pay in connection with any recurring grace period.

(3) *Stating the deferred or waived interest period.* If a deferred or waived interest offer is advertised, the deferred or waived interest period must be stated in a clear and conspicuous manner in the advertisement. If the phrase ''no interest'' or similar term regarding the possible avoidance of interest obligations under the deferred or waived interest program is stated, the term ''if paid in full'' must also be stated in a clear and conspicuous manner preceding the disclosure of the deferred or waived interest period in the advertisement. If the deferred or waived interest offer is advertised in a written or electronic advertisement, the deferred or waived interest period and, if applicable, the term ''if paid in full'' must also be stated in immediate proximity to each statement of ''no interest,'' ''no payments,'' ''deferred interest,'' ''same as cash,'' or similar term regarding interest or payments during the deferred or waived interest period.

(4) *Stating the terms of the deferred or waived interest offer.* If any deferred or waived interest offer is advertised, the information in paragraphs (h)(4)(i) and (h)(4)(ii) of this section must be stated in the advertisement, in language similar to Samples G–22 in appendix G to this part. If the deferred or waived interest offer is advertised in a written or electronic advertisement, the information in paragraphs (h)(4)(i), and (h)(4)(ii) of this section must also be stated in a prominent location closely proximate to the first statement of ''no interest,'' ''no payments,'' ''deferred interest,'' ''same as cash,'' or similar term regarding interest or payments during the deferred or waived interest period.

(i) A statement that interest will be charged from the date the consumer becomes obligated for the balance or transaction subject to the deferred or waived interest offer if the balance or transaction is not paid in full within the deferred or waived interest period; and

(ii) A statement, if applicable, that interest will be charged from the date the consumer incurs the balance or transaction subject to the deferred or waived interest offer if the account is in default before the end of the deferred or waived interest period.

(5) *Envelope excluded.* The requirements in paragraph (h)(4) of this section do not apply to an envelope or other enclosure in which an application or solicitation is mailed, or to a banner advertisement or pop-up advertisement linked to an application or solicitation provided electronically.◀

6. Appendix G to Part 226 is amended by:

A. Revising Forms G–10(A) and G–18(G).

B. Adding new Forms G–18(H) and G–22.

Appendix G to Part 226—Open-End Model Forms and Clauses

* * * * *

BILLING CODE 6210–01–P

G-10(A) Applications and Solicitations Model Form (Credit Cards)

Interest Rates and Interest Charges	
Annual Percentage Rate (APR) for Purchases	[Purchase rate] [Description that rate varies and how it is determined, if applicable]
APR for Balance Transfers	[Balance transfer rate] [Description that rate varies and how it is determined, if applicable]
APR for Cash Advances	[Cash advance rate] [Description that rate varies and how it is determined, if applicable]
Penalty APR and When it Applies	[Penalty rate] [Description of events that may result in the penalty rate] [Description of how long penalty rate may apply]
[How to Avoid Paying Interest on Purchases/ Paying Interest]	[Description of grace period for purchases or statement that no grace period applies]
[Minimum Interest Charge]/[Minimum Charge]	[Description of minimum interest charge or minimum charge]
For Credit Card Tips from the Federal Reserve Board	[Reference to Board's website]

Fees	
[Annual Fee]/[Set-up and Maintenance Fees]	[Notice of available credit, if applicable] [Description of fees for availability or issuance of credit, such as an annual fee, if applicable]
Transaction Fees	
• Balance Transfer	[Description of balance transfer fee]
• Cash Advance	[Description of cash advance fee]
• Foreign Transaction	[Description of foreign transaction fee]
Penalty Fees	
• Late Payment	[Description of late payment fee]
• Over-the-Credit Limit	[Description of over-the-credit limit fee]
• Returned Payment	[Description of returned payment fee]
Other Fees	
• Required [insert name of required insurance, or debt cancellation or suspension coverage]	[Description of cost of insurance, or debt cancellation or suspension plans] [Cross reference to additional information, if applicable]

How We Will Calculate Your Balance: [Description of balance computation method]

Loss of Introductory APR: [Circumstances in which introductory rate may be revoked and rate that applies if introductory rate is revoked, if applicable]

[Description that rate that applies after introductory rate is revoked varies and how it is determined, if applicable]

G-18(G) Periodic Statement Form

XXX Bank Credit Card Account Statement
Account Number XXXX XXXX XXXX XXXX
February 21, 2012 to March 22, 2012

Summary of Account Activity

Previous Balance	$80.52
Payments	-$50.00
Other Credits	+$0.00
Purchases	+$52.13
Balance Transfers	+$0.00
Cash Advances	+$0.00
Past Due Amount	+$0.00
Fees Charged	**+$37.00**
Interest Charged	**+$0.00**
New Balance	$119.65
Credit limit	$2,000.00
Available credit	$1,880.35
Statement closing date	3/22/2012
Days in billing cycle	30

QUESTIONS?

Call Customer Service	1-XXX-XXX-XXXX
Lost or Stolen Credit Card	1-XXX-XXX-XXXX

Payment Information

New Balance	$119.65
Minimum Payment Due	$10.00
Payment Due Date	4/20/12

Late Payment Warning: If we do not receive your minimum payment by the date listed above, you may have to pay a $35 late fee and your APRs may be increased up to the Penalty APR of 28.99%.

Minimum Payment Warning: If you make only the minimum payment on time each month and no other amounts are added to the balance, we estimate that it will take you approximately 13 months to pay off the balance shown on this statement.

Please send billing inquiries and correspondence to:
PO Box XXXX, Anytown, Anystate XXXXX

Notice of Changes to Your Interest Rates

You have triggered the Penalty APR of 28.99%. This change will impact your account as follows:

Transactions made on or after 4/2/12: As of 5/10/12, the Penalty APR will apply to these transactions. We may keep the APR at this level indefinitely.

Transactions made before 4/2/12: Current rates will continue to apply to these transactions. However, if you become more than 30 days late on your account, the Penalty APR will apply to those balances as well.

Transactions

Reference Number	Trans Date	Post Date	Description of Transaction or Credit	Amount
			Payments and Other Credits	
854338203FS8OO0Z5	2/25	2/25	Pymt Thank You	$50.00–
			Purchases	
5884186PS0388W6YM	2/22	2/23	Store #1	$2.05
0544400060ZLV72VL	2/24	2/25	Store #2	$2.11
55541860705RDYD0X	2/24	2/25	Store #3	$4.63
554328608008W90M0	2/24	2/25	Store #4	$4.95
054830709LYMRPT4L	2/24	2/25	Store #5	$7.35
564891561545KOSHD	2/25	2/26	Store #6	$4.35
841517877845AKOJIO	2/25	2/26	Store #7	$2.35
895848561561894KOH	2/26	2/27	Store #8	$7.68
1871556189456SAMKL	2/26	2/27	Store #9	$4.76
2564894185189LKDFID	2/27	2/28	Store #10	$2.87
55542818705RASD0X	3/1	3/2	Store #11	$3.76
178105417841045784	3/2	3/6	Store #12	$2.35
8456152156181SDSA	3/5	3/12	Store #13	$2.92

(transactions continued on next page)

NOTICE: SEE REVERSE SIDE FOR IMPORTANT INFORMATION

Please detach this portion and return with your payment to insure proper credit. Retain upper portion for your records.

Account Number:	**XXXX XXXX XXXX XXXX**
New Balance	**$119.65**
Minimum Payment Due	**$10.00**
Payment Due Date	**4/20/12**

AMOUNT ENCLOSED: $

Please indicate address change and additional cardholder requests on the reverse side.

XXX Bank
P.O. Box XXXX
Anytown, Anystate XXXXX

FORM G-18(G) Periodic Statement Form (continued)

XXX Bank Credit Card Account Statement
Account Number XXXX XXXX XXXX XXXX
February 21, 2012 to March 22, 2012

Transactions (cont.)

Reference Number	Trans Date	Post Date	Description of Transaction or Credit	Amount
			Fees	
9525156489SFD4545Q	2/23	2/23	Late Fee	$35.00
56415615647OJSNDS	3/22	3/22	Minimum Charge	$2.00
			TOTAL FEES FOR THIS PERIOD	$37.00
			Interest Charged	
			Interest Charge on Purchases	$0.00
			Interest Charge on Cash Advances	$0.00
			TOTAL INTEREST FOR THIS PERIOD	$0.00

2012 Totals Year-to-Date	
Total fees charged in 2012	$90.14
Total interest charged in 2012	$18.27

Interest Charge Calculation

Your **Annual Percentage Rate (APR)** is the annual interest rate on your account.

Type of Balance	Annual Percentage Rate (APR)	Balance Subject to Interest Rate	Interest Charge
Purchases	14.99% (v)	$113.80	$0.00
Cash Advances	21.99% (v)	$0.00	$0.00
Balance Transfers	0.00%	$0.00	$0.00

(v) = Variable Rate

BILLING CODE 4310–01–C

►G–18(H) Deferred or Waived Interest Periodic Statement Clause

[You must pay your promotional balance in full by [date] to avoid paying accrued interest charges.]◄

►G–22 Deferred or Waived Interest Offer Clauses

(a) For Issuers Subject to 12 CFR 227.24 or Similar Law.

[Interest will be charged to your account from the purchase date if the purchase balance is not paid in full within the/by [deferred interest period/date] or if you make a late payment.]

(b) For Creditors Not Subject to 12 CFR 227.24 or Similar Law.

[Interest will be charged to your account from the purchase date if the purchase balance is not paid in full within the/by [deferred interest period/date] or if your account is otherwise in default.] ◄

7. In Supplement I to Part 226:

A. In § 226.5, Paragraph 5(b)(2)(ii)., paragraph 2. is revised.

B. In § 226.5a, 5a(b)(1), paragraph 9. is added.

C. In § 226.7:

(i) In 7(b), paragraph 1. is revised.

(ii) In 7(b)(6), paragraphs 6. and 7. are added.

D. In § 226.9:

(i) In 9(c)(2), paragraph 4. is added.

(ii) In 9(c)(2)(i), paragraph 3. is revised.

(iii) In 9(c)(2)(iv), paragraph 2. is revised.

(iv) In 9(g), paragraphs 1.i., 1.iii. introductory text, and 1.iii.C. are revised.

(v) In 9(g)(4)(ii), the undesignated paragraph is designated as paragraph 1.

E. In § 226.12, in 12(b), paragraph 3.vi. is revised.

F. In § 226.13, in 13(f), paragraph 3.i.F. is revised.

G. In § 226.16:

(i) Paragraphs 1 and 2 are revised.

(ii) Paragraph 16(h) is added.

H. In Appendix G, paragraph 5.v.C. is revised and paragraph 12. is added.

Supplement I to Part 226—Official Staff Interpretations

Subpart B—Open-End Credit

§ 226.5—General Disclosure Requirements

* * * * *

5(b) Time of disclosures.

* * * * *

5(b)(2) Periodic statements.

* * * * *

Paragraph 5(b)(2)(ii).

* * * * *

2. *Deferred* ►*or waived*◄ *interest transactions.* See comment 7(b)–1.iv.

* * * * *

§ 226.5a—Credit and Charge Card Applications and Solicitations

* * * * *

5a(b) Required disclosures.

* * * * *

5a(b)(1) Annual percentage rate.

* * * * *

►9. *Deferred or waived interest transactions.* An issuer offering a deferred or waived interest plan, such as a promotional program that provides that a consumer will not be obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time, may not disclose a 0% rate as the rate applicable to deferred or waived interest transactions if there are any circumstances under which the consumer will be obligated for interest on such transactions for the waived or deferred interest period.◄

* * * * *

§ 226.7—Periodic Statement

* * * * *

7(b) Rules affecting open-end (not home-secured) plans.

1. *Deferred* ►*or waived*◄ *interest transactions.* Creditors offer a variety of payment plans for purchases that permit consumers to avoid interest charges if the purchase balance is paid in full by a certain date. The following provides guidance for a deferred ►or waived◄ interest plan where, for example, no interest charge is imposed on a $500 purchase made in January if the $500 balance is paid by March 31. [The following guidance does not apply to card issuers that are subject to 12 CFR § 227.24 or similar law

which does not permit the assessment of deferred interest.]

i. *Annual percentage rates.* Under § 226.7(b)(4), creditors must disclose each annual percentage rate that may be used to compute the interest charge. Under some plans with a deferred ►or waived◄ interest feature, if the deferred ►or waived◄ interest balance is not paid by a certain date, March 31 in this example, interest charges applicable to the billing cycles between the date of purchase in January and March 31 may be imposed. Annual percentage rates that may apply to the deferred ►or waived◄ interest balance ($500 in this example) if the balance is not paid in full by March 31 must appear on periodic statements for the billing cycles between the date of purchase and March 31. However, if the consumer does not pay the deferred ►or waived◄ interest balance by March 31, the creditor is not required to identify, on the periodic statement disclosing the interest charge for the deferred ►or waived◄ interest balance, annual percentage rates that have been disclosed in previous billing cycles between the date of purchase and March 31.

ii. *Balances subject to periodic rates.* Under § 226.7(b)(5), creditors must disclose the balances subject to interest during a billing cycle. The deferred interest balance ($500 in this example) is not subject to interest for billing cycles between the date of purchase and March 31 in this example. Periodic statements sent for those billing cycles should not include the deferred interest balance in the balance disclosed under § 226.7(b)(5). [At the creditor's option, t] ►T◄his amount [may] ►must◄ be separately disclosed on periodic statements [provided it is] ►and◄ identified by a term other than the term used to identify the balance disclosed under § 226.7(b)(5) (such as ''deferred interest balance''). During any billing cycle in which an interest charge on the deferred ►or waived◄ interest balance is debited to the account, the balance disclosed under § 226.7(b)(5) should include the deferred ►or waived◄ interest balance for that billing cycle.

iii. *Amount of interest charge.* Under § 226.7(b)(6)(ii), creditors must disclose interest charges imposed during a billing cycle. For some deferred ►or waived◄ interest purchases, the creditor may impose interest from the date of purchase if the deferred ►or waived◄ interest balance ($500 in this example) is not paid in full by March 31 in this example, but otherwise will not impose interest for billing cycles between the date of purchase and March 31. Periodic statements for billing cycles preceding March 31 in this example should not include in the interest charge disclosed under § 226.7(b)(6)(ii) the amounts a consumer may owe if the deferred ►or waived◄ interest balance is not paid in full by March 31. In this example, the February periodic statement should not identify as interest charges interest attributable to the $500 January purchase. [At the creditor's option, t] ►T◄his amount [may] ►must◄ be separately disclosed on periodic statements [provided it is] ►and◄identified by a term other than ''interest charge'' (such as ''contingent interest charge'' or ''deferred interest charge''). The interest charge on a deferred ►or waived◄ interest balance should be reflected on the periodic statement under § 226.7(b)(6)(ii) for the billing cycle in which the interest charge is debited to the account.

iv. [*Grace period.*] ►*Due date to avoid obligation for finance charges under a deferred or waived interest program.* Section 226.7(b)(14) requires disclosure on periodic statements of the date by which any outstanding balance subject to a deferred or waived interest program must be paid in full in order to avoid the obligation for finance charges on such balance. This disclosure must appear on the front of the periodic statement for two billing cycles immediately preceding the billing cycle in which the disclosed date occurs. However, if the duration of the deferred or waived interest period is such that the reminder cannot be given for the last two billing cycles immediately preceding the disclosed date, the disclosure must be included on all periodic statements during the deferred or waived interest period.◄ Assuming monthly billing cycles ending at month-end and a [grace period ending on] ►payment due date of◄ the 25th of the following month ►for balances not subject to the deferred or waived interest program◄, the following [are four] examples illustrat►e◄[ing] how a creditor may comply with the requirement ►in § 226.7(b)(14)◄ to disclose the [grace period] ►date by which payment in full of balances subject to the deferred or waived interest program must occur in order to avoid the obligation to pay finance charges◄ applicable to a deferred ►or waived◄ interest balance ($500 in this example) [and with the 14-day rule for mailing or delivering periodic statements before imposing finance charges (see § 226.5)]:

A. [The creditor could include the $500 purchase on the periodic statement reflecting account activity for February and sent on March 1 and] ►If the creditor◄ identif[y]►ies◄ March 31 as the payment-due date for the $500 purchase►, the creditor must include the $500 purchase and its due date on the periodic statement reflecting activity for January sent on February 1, and the periodic statement reflecting activity for February sent on March 1◄. (►For the periodic statement reflecting account activity for February sent on March 1,◄ [T] ►t◄he creditor could also identify March 31 as the payment-due date for any other amounts that would normally be due on March 25.)

B. [The creditor could include the $500 purchase on the periodic statement reflecting activity for March and sent on April 1 and identify April 25 as the payment-due date for the $500 purchase,] ►If the creditor opts to delay the end of the deferred or waived interest period to coincide with the end of the grace period for balances not subject to the deferred or waived interest program by◄ permitting the consumer to avoid finance charges if the $500 is paid in full by April 25►, the creditor must include the $500 purchase and its due date on the periodic statement reflecting activity for February sent on March 1, and the periodic statement reflecting activity for March sent on April 1◄. ►The creditor could also include the $500 purchase and its due date on ►the periodic statement reflecting activity for January sent on February 1.◄

C. ►If the purchase was made in December (instead of January), ◄[T]►t◄he creditor ►must include the $500 purchase and its due date on the periodic statement reflecting activity for January sent on February 1 and the periodic statement reflecting activity for February sent on March 1. The creditor ►also◄ could include the $500 purchase and its due date on ►the periodic statement reflecting activity for December sent on January 1◄[each periodic statement sent during the deferred interest period (January, February, and March in this example)].

D. If the due date for the deferred ►or waived◄ interest balance is [March 7]►February 20◄ (instead of March 31), the creditor ►must◄ [could] include the $500 purchase and its due date on the periodic statement reflecting activity for January and sent on February 1[, the most recent statement sent at least 14 days prior to the due date].

* * * * *

7(b)(6) Charges imposed.

* * * * *

►6. *Acquired accounts.* An institution that acquires an account or plan must include, as applicable, fees and charges imposed on the account or plan prior to the acquisition in the aggregate disclosures provided under § 226.7(b)(6) for the acquired account or plan. Alternatively, the institution may provide separate totals reflecting activity prior and subsequent to the account or plan acquisition. For example, a creditor that acquires an account or plan on August 12 of a given calendar year may provide one total for the period from January 1 to August 11 and a separate total for the period beginning on August 12.

7. *Account upgrades.* A creditor that upgrades, or otherwise changes, a consumer's plan to a different open-end credit plan must include, as applicable, fees and charges imposed for that portion of the calendar year prior to the upgrade or change in the consumer's plan in the aggregate disclosures provided pursuant to § 226.7(b)(6) for the new plan. For example, assume a consumer has incurred $125 in fees for the calendar year to date for a retail credit card account, which is then replaced by a cobranded credit card account also issued by the creditor. In this case, the creditor must reflect the $125 in fees incurred prior to the replacement of the retail credit card account in the calendar year-to-date totals provided for the cobranded credit card account. Alternatively, the institution may provide two separate totals reflecting activity prior and subsequent to the plan upgrade or change.◄

* * * * *

§ 226.9—Subsequent Disclosure Requirements

* * * * *

9(c) Change in terms.

* * * * *

9(c)(2) Rules affecting open-end (not home-secured) plans.

* * * * *

►4. *Relationship to § 226.9(b).* If a creditor adds a feature to the account on the type of terms otherwise required to be disclosed under § 226.6, the creditor must satisfy: the requirement to provide the finance charge disclosures for the added feature under § 226.9(b); and any applicable requirement to provide a change-in-terms notice under § 226.9(c), including any advance notice that must be provided. For example, if a creditor adds a balance transfer feature to an account more than 30 days after account-opening disclosures are provided, it must give the finance charge disclosures for the balance transfer feature under § 226.9(b) as well as comply with the change-in-terms notice requirements under § 226.9(c), including providing notice of the change at least 45 days prior to the effective date of the change. Similarly, if a creditor makes a balance transfer offer on finance charge terms that are higher than those previously disclosed for balance transfers, it would also generally be required to provide a change-in-terms notice at least 45 days in advance of the effective date of the change. A creditor may provide a single notice under § 226.9(c) to satisfy the notice requirements of both paragraphs (b) and (c) of § 226.9. For checks that access a credit card account subject to the disclosure requirements in § 226.9(b)(3), a creditor is not subject to the notice requirements under § 226.9(c) even if the applicable rate or fee is higher than those previously disclosed for such checks. Thus, for example, the creditor need not wait 45 days before applying the new rate or fee for transactions made using such checks, but the creditor must make the required disclosures on or with the checks in accordance with § 226.9(b)(3). ◄

* * * * *

9(c)(2)(i) Changes where written advance notice is required

* * * * *

3. *Timing—advance notice not required.* Advance notice of 45 days is not necessary—that is, a notice of change in terms is required, but it may be mailed or delivered as late as the effective date of the change if the consumer agrees to the particular change. This provision is ►solely◄ intended for use in the unusual instance when a consumer substitutes collateral or when the creditor can advance additional credit only if a change relatively unique to that consumer is made, such as the consumer's providing additional security or paying an increased minimum payment amount. Therefore, the following are not ''agreements'' between the consumer and the creditor for purposes of § 226.9(c)(2)(i): The consumer's general acceptance of the creditor's contract reservation of the right to change terms; the consumer's use of the account (which might imply acceptance of its terms under state law); [and] the consumer's acceptance of a unilateral term change that is not particular to that consumer, but rather is of general applicability to consumers with that type of account►; and the consumer's request to reopen a closed account or to upgrade an existing account to another account offered by the creditor with different credit or other features◄.

* * * * *

9(c)(2)(iv) Notice not required.

* * * * *

2. *Skip features.* If a credit program allows consumers to skip or reduce one or more payments during the year, or involves temporary reductions in finance charges, no notice of the change in terms is required either prior to the reduction or upon resumption of the higher rates or payments if these features are explained on the account-opening disclosure statement (including an explanation of the terms upon resumption). For example, a merchant may allow consumers to skip the December payment to encourage holiday shopping, or a teacher's credit union may not require payments during summer vacation. Otherwise, the creditor must give notice prior to resuming the original schedule or rate, even though no notice is required prior to the reduction. The change-in-terms notice may be combined with the notice offering the reduction. For example, the periodic statement reflecting the reduction or skip feature may also be used to notify the consumer of the resumption of the original schedule or rate, either by stating explicitly when the higher payment or charges resume or by indicating the duration of the skip option. Language such as ''You may skip your October payment,'' or ''We will waive your interest charges for January'' may serve as the change-in-terms notice. ►However, a creditor offering a temporary reduction in an interest rate must provide a notice in accordance with the timing requirements of § 226.9(c)(2)(i) and the content and format requirements of § 226.9(c)(2)(ii)(A) and (B) prior to resuming the original rate.◄

* * * * *

9(g) Increase in rates due to delinquency or default or as a penalty.

1. * * *

i. Assume that, at account opening on January 1 of year one, an issuer discloses, in accordance with the applicable notice requirements of § 226.6, that that the annual percentage rate for purchases is a non-variable rate of 15% and will apply for six months. The issuer also discloses that, after six months, the annual percentage rate for purchases will be a variable rate that is currently 18% and will be adjusted quarterly by adding a margin of 8 percentage points to a publicly-available index not under the issuer's control. ►Furthermore,◄[Finally,] the issuer discloses that the annual percentage rate for cash advances is the same variable rate that will apply to purchases after six months. ►Finally, the bank discloses that a non-variable penalty rate of 30% may apply if the consumer makes a late payment. ◄The payment due date for the account is the twenty-fifth day of the month and the required minimum periodic payments are applied to accrued interest and fees but do not reduce the purchase and cash advance balances.

* * * * *

iii. Assume that, at account opening on January 1 of year one, a issuer discloses in accordance with the applicable notice requirements in § 226.6 that the annual percentage rate for purchases is a variable rate determined by adding a margin of 6 percentage points to a publicly-available index outside of the issuer's control. The issuer also discloses that a non-variable penalty rate of 28% may apply if the consumer makes a late payment. The due date for the account is the fifteenth of the month. On May 30 of year two, the account has an outstanding purchase balance of $1,000. On May 31, the creditor provides a notice pursuant to § 226.9(c) informing the consumer of a new variable rate that will apply effective July 16 for all purchases made on or after June 8 (calculated by using the same index and an increased margin of 8 percentage points). On June 7, the consumer makes a $500 purchase. On June 8, the consumer makes a $200 purchase. On June 25, the issuer has not received the payment due on June 15 and provides the consumer with a notice pursuant to § 226.9(g) stating that the penalty rate of 28% will apply as of August 9 to all transactions made on or after July 3 that includes the content required by § 226.9(g)(3)(i) ►and states that if the consumer becomes more than 30 days late, the penalty rate will apply to all balances on the account◄. On July 4, the consumer makes a $300 purchase.

* * * * *

C. Same facts as paragraph A. above except the payment due on June 15 of year two is received on July 20. The issuer is permitted under 12 CFR 227.24 or similar law to apply the 28% penalty rate to all balances on the account and to future transactions because it has not received payment within 30 days after the due date. Because the issuer provided a notice pursuant to § 226.9(g) on June ►25◄[24] disclosing the 28% penalty rate, the issuer may apply the 28% penalty rate to all balances on the account as well as any future transactions on August 9 without providing an additional notice pursuant to § 226.9(g).

* * * * *

9(g)(4) Exceptions.

9(g)(4)(ii) Decrease in credit limit.

►1. ◄The following illustrates the requirements of § 226.9(g)(4)(ii). Assume that a creditor decreased the credit limit applicable to a consumer's account and sent a notice pursuant to § 226.9(g)(4)(ii) on January 1, stating among other things that the penalty rate would apply if the consumer's balance exceeded the new credit limit as of February 16. If the consumer's balance exceeded the credit limit on February 16, the creditor could impose the penalty rate on that date. However, a creditor could not apply the penalty rate if the consumer's balance did not exceed the new credit limit on February 16, even if the consumer's balance had exceeded the new credit limit on several dates between January 1 and February 15. If the consumer's balance did not exceed the new credit limit on February 16 but the consumer conducted a transaction on February 17 that caused the balance to exceed the new credit limit, the general rule in § 226.9(g)(1)(ii) would apply and the creditor would be required to give an additional 45 days' notice prior to imposition of the penalty rate (but under these

circumstances the consumer would have no ability to cure the over-the-limit balance in order to avoid penalty pricing).

* * * * *

§ 226.12—Special Credit Card Provisions

* * * * *

12(b) Liability of cardholder for unauthorized use.

* * * * *

3. * * *

vi. ►Requiring◄[Requesting] a written, signed statement from the cardholder or authorized user. For example, the creditor may include a signature line on a billing rights form that the cardholder may send in to provide notice of the claim. However, a creditor may not require the cardholder to provide an affidavit or signed statement under penalty of perjury as part of a reasonable investigation.

* * * * *

§ 226.13—Billing Error Resolution

* * * * *

13(f) Procedures if different billing error or no billing error occurred.

* * * * *

3. * * *

i. * * *

F. ►Requiring◄[Requesting] a written, signed statement from the consumer (or authorized user, in the case of a credit card account). For example, the creditor may include a signature line on a billing rights form that the consumer may send in to provide notice of the claim. However, a creditor may not require the consumer to provide an affidavit or signed statement under penalty of perjury as a part of a reasonable investigation.

* * * * *

§ 226.16—Advertising

1. *Clear and conspicuous standard—general.* Section 226.16 is subject to the general ''clear and conspicuous'' standard for subpart B (see § 226.5(a)(1)) but prescribes no specific rules for the format of the necessary disclosures, other than the format requirements related to the disclosure of a promotional rate or payment under § 226.16(d)(6) ►,◄[or] a promotional rate under § 226.16(g) ►or a deferred or waived interest offer under § 226.16(h)◄. Other than the disclosure of certain terms described in §§ 226.16(d)(6)►,◄[or] (g) ►or (h)◄, the credit terms need not be printed in a certain type size nor need they appear in any particular place in the advertisement.

2. *Clear and conspicuous standard—promotional rates or payments►; deferred or waived interest offers◄.*

i. For purposes of § 226.16(d)(6), a clear and conspicuous disclosure means that the required information in § 226.16(d)(6)(ii)(A)–(C) is disclosed with equal prominence and in close proximity to the promotional rate or payment to which it applies. If the information in § 226.16(d)(6)(ii)(A)–(C) is the same type size and is located immediately next to or directly above or below the promotional rate or payment to which it applies, without any intervening text or graphical displays, the disclosures would be deemed to be equally prominent and in close proximity. Notwithstanding the above, for electronic advertisements that disclose promotional rates or payments, compliance with the requirements of § 226.16(c) is deemed to satisfy the clear and conspicuous standard.

ii. For purposes of § 226.16(g)(4) as it applies to written or electronic advertisements only, a clear and conspicuous disclosure means the required information in § 226.16(g)(4)(i) and (g)(4)(ii) must be equally prominent to the promotional rate to which it applies. If the information in § 226.16(g)(4)(i) and (g)(4)(ii) is the same type size as the promotional rate to which it applies, the disclosures would be deemed to be equally prominent. ►For purposes of § 226.16(h)(3) as it applies to written or electronic advertisements only, a clear and conspicuous disclosure means the required information in § 226.16(h)(3) must be equally prominent to each statement of ''no interest,'' ''no payments,'' ''deferred interest,'' ''same as cash,'' or similar term regarding interest or payments during the deferred or waived interest period. If the information required to be disclosed under § 226.16(h)(3) is the same type size as the statement of ''no interest,'' ''no payments,'' ''deferred interest,'' ''same as cash,'' or similar term regarding interest or payments during the deferred or waived interest period, the disclosure would be deemed to be equally prominent.◄

* * * * *

►*16(h) Deferred or waived interest offers.*

1. *Deferred or waived interest clarified.* Deferred or waived interest offers do not include offers that allow a consumer to skip payments during a specified period of time, and under which the consumer is not obligated under any circumstances for any interest or other finance charges that could be attributable to that period. Deferred or waived interest offers also do not include 0% annual percentage rate offers where a consumer is not obligated under any circumstances for interest attributable to the time period the 0% annual percentage rate was in effect, though such offers may be considered promotional rates under § 226.16(e)(2)(i). Deferred or waived interest offers also do not include skip payment programs that have no required minimum payment for one or more billing cycles but where interest continues to accrue and be imposed during that period.

2. *Deferred or waived interest period clarified.* Although the terms of an advertised deferred or waived interest offer may provide that a creditor may charge the accrued interest if a full payment is not received by a certain date, creditors sometimes have an informal policy or practice that delays charging the accrued interest for payment received a brief period of time after the date upon which a creditor has the contractual right to charge the accrued interest. The advertisement need not include the end of an informal ''courtesy period'' in disclosing the deferred or waived interest period under § 226.16(h)(3).

3. *Immediate proximity.* For written or electronic advertisements, including the deferred or waived interest period in the same phrase as the statement of ''no interest,'' ''no payments,'' ''deferred interest,'' or ''same as cash'' or similar term regarding interest or payments during the deferred or waived interest period is deemed to be in immediate proximity of the statement.

4. *Prominent location closely proximate.* For written or electronic advertisements, information required to be disclosed in § 226.16(h)(4)(i) and (ii) that is in the same paragraph as the first statement of ''no interest,'' ''no payments,'' ''deferred interest,'' or ''same as cash'' or similar term regarding interest or payments during the deferred or waived interest period is deemed to be in a prominent location closely proximate to the statement. Information disclosed in a footnote is not considered in a prominent location closely proximate to the statement.

5. *First listing.* For purposes of § 226.16(h)(4) as it applies to written or electronic advertisements, the first statement of ''no interest,'' ''no payments,'' ''deferred interest,'' ''same as cash,'' or similar term regarding interest or payments during the deferred or waived interest period is the most prominent listing of one of these statements on the front side of the first page of the principal promotional document. The principal promotional document is the document designed to be seen first by the consumer in a mailing, such as a cover letter or solicitation letter. If one of the statements does not appear on the front side of the first page of the principal promotional document, then the first listing of one of these statements is the most prominent listing of a statement on the subsequent pages of the principal promotional document. If one of the statements is not listed on the principal promotional document or there is no principal promotional document, the first listing of one of these statements is the most prominent listing of the statement on the front side of the first page of each document containing one of these statements. If one of the statements does not appear on the front side of the first page of a document, then the first listing of one of these statements is the most prominent listing of a statement on the subsequent pages of the document. If the listing of one of these statements with the largest type size on the front side of the first page (or subsequent pages if one of these statements is not listed on the front side of the first page) of the principal promotional document (or each document listing one of these statements if a statement is not listed on the principal promotional document or there is no principal promotional document) is used as the most prominent listing, it will be deemed to be the first listing. Consistent with comment 16(c)–1, a catalog or multiple-page advertisement is considered one document for purposes of § 226.16(h)(4).

6. *Additional information.* Consistent with comment 5(a)–2, the information required under § 226.16(h)(4) need not be segregated from other information regarding the deferred or waived interest offer. Advertisements may also be required to provide additional information pursuant to § 226.16(b) though such information need not be integrated with the information required under § 226.16(h)(4).

7. *Examples.* Examples of disclosures that could be used to comply with the requirements of § 226.16(h)(3) include: ''no interest if paid in full within 6 months'' and ''no interest if paid in full by December 31, 2010.''◄

* * * * *

Appendix G—Open-End Model Forms and Clauses

* * * * *

5. * * *

v. * * *

C. Adequate spacing between paragraphs when several pieces of information were included in the same row of the table, as appropriate. [For example, in the samples in the row of the tables with the heading ''APR for Balance Transfers,'' the forms disclose two components: the applicable balance transfer rate and a cross reference to the balance transfer fee. The samples show these two components on separate lines with adequate space between each component. On the other hand, in the samples, in the disclosure of the late-payment fee, the forms disclose two components: the late-payment fee, and the cross reference to the penalty rate. Because the disclosure of both these components is short, these components are disclosed on the same line in the tables.]

* * * * *

►12. *Sample G–22.* Sample G–22 includes two model clauses for use in complying with § 226.16(h)(4). Model clause (a) is for use by credit card issuers subject to 12 CFR 227.24 or similar law. Model clause (b) is for use in connection with open-end credit plans that are not subject to 12 CFR 227.24 or similar law, such as open-end credit plans with no credit card.◄

* * * * *

By order of the Board of Governors of the Federal Reserve System, April 28, 2009.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. E9–10081 Filed 5–4–09; 8:45 am]

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Federal Register

Tuesday,
May 5, 2009

Part III

Federal Reserve System

Department of the Treasury

Office of Thrift Supervision

National Credit Union Administration

12 CFR Part 227, 535, and 706

Unfair or Deceptive Acts or Practices; Clarifications; Proposed Rule

FEDERAL RESERVE SYSTEM

12 CFR Part 227

[Regulation AA; Docket No. R–1314]

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 535

[Docket ID OTS–2009–0006]

RIN 1550–AC17

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 706

RIN 3133–AD62

Unfair or Deceptive Acts or Practices; Clarifications

AGENCIES: Board of Governors of the Federal Reserve System (Board); Office of Thrift Supervision, Treasury (OTS); and National Credit Union Administration (NCUA).

ACTION: Proposed rule; request for public comment.

SUMMARY: In December 2008, the Board, OTS, and NCUA (collectively, the Agencies) exercised their authority under the Federal Trade Commission Act to issue a final rule prohibiting institutions from engaging in specific acts or practices in connection with consumer credit card accounts. The Agencies understand that clarification is needed regarding certain aspects of the final rule. Accordingly, in order to facilitate compliance, the Agencies propose to amend specific portions of the regulations and official staff commentary.

DATES: Comments must be received on or before June 4, 2009.

ADDRESSES: Because paper mail in the Washington DC area and at the Agencies is subject to delay, we encourage commenters to submit comments by e-mail, if possible. We also encourage commenters to use the title ''Unfair or Deceptive Acts or Practices'' to facilitate our organization and distribution of the comments. Comments submitted to one or more of the Agencies will be made available to all of the Agencies. Interested parties are invited to submit comments as follows:

Board: You may submit comments, identified by Docket No. R–1314, by any of the following methods:

- *Agency Web site: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: regs.comments@federalreserve.gov.* Include the docket number in the subject line of the message.
- *Facsimile:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.), between 9 a.m. and 5 p.m. on weekdays.

OTS: You may submit comments, identified by OTS–2009–0006, by any of the following methods:

- *Federal eRulemaking Portal-''Regulations.gov'':* Go to *http://www.regulations.gov,* under the ''more Search Options'' tab click next to the ''Advanced Docket Search'' option where indicated, select ''Office of Thrift Supervision'' from the agency drop-down menu, then click ''Submit.'' In the ''Docket ID'' column, select ''OTS–2009–0006'' to submit or view public comments and to view supporting and related materials for this proposed rulemaking. The ''How to Use This Site'' link on the Regulations.gov home page provides information on using Regulations.gov, including instructions for submitting or viewing public comments, viewing other supporting and related materials, and viewing the docket after the close of the comment period.
- *Mail:* Regulation Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, *Attention:* OTS–2009–0006.
- *Facsimile:* (202) 906–6518.
- *Hand Delivery/Courier:* Guard's Desk, East Lobby Entrance, 1700 G Street, NW., from 9 a.m. to 4 p.m. on business days, *Attention:* Regulation Comments, Chief Counsel's Office, Attention: OTS–2009–0006.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be entered into the docket and posted on Regulations.gov without change, including any personal information provided. Comments, including attachments and other supporting materials received are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.
- *Viewing Comments Electronically:* Go to *http://www.regulations.gov,* select ''Office of Thrift Supervision'' from the agency drop-down menu, then click ''Submit.'' Select Docket ID ''OTS–2009–0006'' to view public comments for this notice of proposed rulemaking.
- *Viewing Comments On-Site:* You may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment for access, call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov,* or send a facsimile transmission to (202) 906–6518. (Prior notice identifying the materials you will be requesting will assist us in serving you.) We schedule appointments on business days between 10 a.m. and 4 p.m. In most cases, appointments will be available the next business day following the date we receive a request.

NCUA: You may submit comments, identified by number RIN 3133–AD62, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *NCUA Web site: http://www.ncua.gov/news/proposed_regs/proposed_regs.html.* Follow the instructions for submitting comments.
- *E-mail:* Address to *regcomments@ncua.gov.* Include ''[Your name] Comments on Proposed Rule Part 706'' in the e-mail subject line.
- *Facsimile:* (703) 518–6319. Use the subject line described above for e-mail.
- *Mail:* Address to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314–3428.
- *Hand Delivery/Courier:* Same as mail address.
- *Public Inspection:* All public comments are available on the agency's Web site at *http://www.ncua.gov/RegulationsOpinionsLaws/comments* as submitted, except as may not be possible for technical reasons. Public comments will not be edited to remove any identifying or contact information. Paper copies of comments may be inspected in NCUA's law library at 1775 Duke Street, Alexandria, Virginia 22314, by appointment, weekdays between 9 a.m. and 3 p.m. To make an appointment, call (703) 518–6540 or send an e-mail to *OGCMail@ncua.gov.*

FOR FURTHER INFORMATION CONTACT:

Board: Benjamin K. Olson, Attorney, or Ky Tran-Trong, Counsel, Division of Consumer and Community Affairs, at (202) 452–2412 or (202) 452–3667, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551. For users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869.

OTS: April Breslaw, Director, Consumer Regulations, (202) 906–6989; Suzanne McQueen, Consumer Regulations Analyst, Compliance and Consumer Protection Division, (202) 906–6459; or Richard Bennett, Senior Compliance Counsel, Regulations and Legislation Division, (202) 906–7409, at Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

NCUA: Matthew J. Biliouris, Program Officer, Office of Examination and Insurance, (703) 518–6360; or Moisette I. Green, Staff Attorney, Office of General Counsel, (703) 518–6540, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314–3428.

SUPPLEMENTARY INFORMATION:

I. Background

In December 2008, the Federal Reserve Board (Board), the Office of Thrift Supervision (OTS), and the National Credit Union Administration (NCUA) (collectively, the Agencies) adopted a final rule under the Federal Trade Commission Act (FTC Act) to protect consumers from unfair acts or practices with respect to consumer credit card accounts. This rule was published in the **Federal Register** on January 29, 2009. *See* 74 FR 5498 (January 2009 Rule). On that same date, the Board published a final rule amending the provisions regarding open-end credit (not home secured) in Regulation Z, which implements the Truth in Lending Act (TILA). *See* 74 FR 5244 (January 2009 Regulation Z Rule). The effective date for both rules is July 1, 2010. *See* 74 FR 5548; 74 FR 5388–5390.

Since publication of the two rules, the Agencies have become aware that clarification is needed to resolve confusion regarding how institutions will comply with particular aspects of those rules. Accordingly, in order to provide guidance and facilitate compliance with the January 2009 Rule by the effective date, the Agencies propose to amend portions of the rule and the accompanying staff commentary. These proposed amendments are discussed in detail in section III of this **SUPPLEMENTARY INFORMATION**. Similarly, elsewhere in today's **Federal Register**, the Board has proposed to amend certain aspects of the January 2009 Regulation Z Rule.

Although comment is requested on the proposed amendments, the Agencies emphasize that the purpose of these rulemakings is to clarify and facilitate compliance with the final rule, not to reconsider the need for—or the extent of—the protections that the rule affords consumers. Thus, commenters are encouraged to limit their submissions accordingly.

In addition, because the Agencies do not intend to extend the effective date for the January 2009 Rule, any amendments must be adopted in final form with sufficient time for institutions to implement the amended rule on or prior to July 1, 2010. The Agencies emphasize that, because this rulemaking focuses on clarifications to discrete aspects of the January 2009 Rule, institutions should continue their efforts to come into compliance with that rule as soon as practicable and, in any event, prior to July 1, 2010. In order to ensure that final clarifications can be provided as soon as possible, the Agencies are requiring that comments on this proposal be submitted within 30 days from publication in the **Federal Register**.[1]

II. Statutory Authority

Section 18(f)(1) of the FTC Act provides that the Board (with respect to banks), OTS (with respect to savings associations), and the NCUA (with respect to federal credit unions) are responsible for prescribing ''regulations defining with specificity * * * unfair or deceptive acts or practices, and containing requirements prescribed for the purpose of preventing such acts or practices.'' 15 U.S.C. 57a(f)(1). In the **SUPPLEMENTARY INFORMATION** for the January 2009 Rule, the Agencies set forth the standards codified by Congress or adopted by the Federal Trade Commission for determining whether an act or practice is unfair or deceptive and applied those standards to the practices prohibited by the final rule. *See* 74 FR 5501 *et seq.* In addition, the OTS relied on its authority under the Home Owners' Loan Act (HOLA) as a secondary basis for its final rule. *See, e.g.*, 74 FR 5505–5506. For purposes of this rulemaking, the Agencies continue to rely on this legal authority and analysis.

[1] Generally, NCUA gives the public 60 days to comment on proposed rules; however, a shorter comment period is appropriate in this instance to ensure compliance with the January 2009 Rule. *See* IRPS 87–2, 52 FR 35231 (Sept. 18, 1987).

III. Section-by-Section Analysis

The final rules adopted by the Board, OTS, and NCUA under the FTC Act are located in, respectively, parts 227, 535, and 706 of title 12 of the Code of Federal Regulations. For purposes of the discussion in this **SUPPLEMENTARY INFORMATION**, the Agencies use the shared numerical suffix for each provision. For example, § __.21 refers to the Board's 12 CFR 227.21, the OTS's 12 CFR 535.21, and the NCUA's 12 CFR 706.21.

Section __.21—Definitions

Subpart C to the Agencies' rules contains the provisions addressing consumer credit card accounts. Section __.21 defines certain terms used in Subpart C.

Section __.21(a) Annual Percentage Rate

Section __.21(a) defines ''annual percentage rate'' as the product of multiplying each periodic rate for a balance or transaction on a consumer credit card account by the number of periods in a year. In the text of the regulations and in the commentary, the Agencies sometimes use the term ''rate'' in place of ''annual percentage rate'' to conserve space and avoid repetition. To avoid possible confusion, the Agencies propose to add a new comment 21(a)–1, clarifying that, for purposes of Subpart C, ''rate'' has the same meaning as ''annual percentage rate'' unless otherwise specified. Furthermore, for clarity and consistency, the Agencies propose to substitute ''rate'' for ''annual percentage rate'' in the titles to certain comments. *See* comments 23–3, 23–6, 24(b)(2)–5, 24(b)(5)–2, 24(c)(1)(i)–2.

Section __.21(c) Consumer Credit Card Account

The provisions of Subpart C apply to ''consumer credit card accounts,'' which are defined in § __.21(c) as accounts provided to a consumer primarily for personal, family, or household purposes under an open-end credit plan that is accessed by a credit or charge card. Based on questions received following issuance of the January 2009 Rule, the Agencies understand that clarification is needed regarding whether an outstanding balance on a consumer credit card account remains subject to Subpart C when the account is closed, when the account is acquired by another institution, and when the balance is transferred to another credit account. In particular, concerns have been raised that permitting institutions to apply an increased rate to an outstanding balance in these circumstances could lead to

circumvention of the general prohibition in § __.24 on such increases.

To address these concerns, the Agencies propose to add comments 21(c)–1 through 3, which would clarify that, as a general matter, the protections in Subpart C continue to apply to an outstanding balance following the closure or acquisition of the account or the transfer of the balance to another credit account issued by the same institution (or its affiliate or subsidiary). Accordingly, in these circumstances, an institution must, for example, continue to provide consumers a reasonable amount of time to make payment on such balances pursuant to § __.22; allocate payments in excess of the required minimum periodic payment among such balances consistent with § __.23; and increase the annual percentage rates that apply to such balances only to the extent permitted by § __.24.

Because the protections in Subpart C cannot be waived or forfeited, the proposed comments do not distinguish between closures or transfers initiated by the institution and closures or transfers initiated by the consumer. In the January 2009 Rule, the Agencies determined that, because many of the prohibited practices cannot be effectively disclosed, consumers are unable to reasonably avoid the harm caused by those practices. Thus, as discussed below, allowing institutions to engage in the prohibited practices by obtaining the consumer's agreement could undercut the purpose of the rule.

Although there may be circumstances in which individual consumers could make informed choices about the benefits and costs of waiving the protections in Subpart C, an exception for those circumstances would create a significant loophole that could be used to deny the protections to other consumers. For example, if an institution offered to transfer its cardholder's outstanding balance to a credit product that would reduce the rate on the balance for a period of time in exchange for the cardholder accepting a higher rate after that period, the cardholder would have to determine whether the savings created by the temporary reduction would offset the cost of the subsequent increase, which would depend on the amount of the balance, the amount and length of the reduction, the amount of the increase, and the length of time it would take the consumer to pay off the balance at the increased rate. Based on extensive consumer testing conducted during the preparation of the January 2009 Rule (and the Board's January 2009 Regulation Z Rule), the Agencies believe that it would be very difficult to ensure that institutions disclose this information in a manner that will enable most consumers to make informed decisions about whether to accept the increase in rate. Although some approaches to disclosure may be effective, others may not and it would be impossible to distinguish among such approaches in a way that would provide clear guidance for institutions. Furthermore, consumers might be presented with choices that are not meaningful (such as a choice between accepting a higher rate on an outstanding balance or losing credit privileges on the account). Thus, the proposed commentary to § __.21(c) would clarify that, as a general matter, the protections in Subpart C do not depend on whether the consumer agrees to the closure of an account or the transfer of a balance.

Accordingly, proposed comment 21(c)–1 states that, if a consumer credit card account with an outstanding balance is closed by the consumer or the institution, the account continues to be the same consumer credit card account for purposes of Subpart C with respect to that balance. Thus, in these circumstances, the institution could not increase the rate that applies to the outstanding balance (except to the extent permitted by § __.24).

Proposed comment 21(c)–2 addresses circumstances in which an institution acquires a consumer credit card account with an outstanding balance by, for example, merging with or acquiring another institution or by purchasing another institution's credit card portfolio. In some cases, the acquiring institution may elect to close the acquired account and replace it with its own credit card account. *See* 12 CFR 226.12 comment 12(a)(2)–3. The acquisition of an account does not involve any choice on the part of consumers, and the Agencies believe that consumers whose accounts are acquired should receive the same level of protection after acquisition as they did beforehand. Accordingly, the proposed comment states that an institution that acquires a consumer credit card account remains subject to the provisions of Subpart C with respect to any outstanding balances on the account. For example, the institution would generally be prohibited from increasing the annual percentage rate on an outstanding purchase balance to the rate that the institution applies to purchases on its accounts.[2]

Finally, proposed comment 21(c)–3 addresses balance transfers between accounts issued by the same institution (or its affiliate or subsidiary) and balance transfers between accounts issued by different institutions. Balances may be transferred from one consumer credit card account issued by an institution to another consumer credit card account issued by the same institution when, for example, the consumer's account is converted from a retail credit card that may only be used at a single retailer or affiliated group of retailers to a co-branded general purpose credit card which may be used at a wider number of merchants. Because of the concerns discussed above regarding circumvention and informed consumer choice and for consistency with the issuance rules regarding card renewals or substitutions for accepted credit cards under Regulation Z, 12 CFR 226.12(a)(2), the Agencies believe—and proposed comment 21(c)–3 states—that these transfers should be treated as a continuation of the existing account relationship rather than the creation of a new account relationship. *See* 12 CFR 226.12 comment 12(a)(2)–2. Similarly, proposed comment 21(c)–3 would apply to circumstances where a balance is transferred to a line of credit accessed solely by an account number or another type of credit account issued by the same institution or its affiliate or subsidiary (except for an open-end credit plan secured by the consumer's dwelling).[3] Accordingly, under these circumstances, an institution could not, for example, apply an increased rate to an existing balance in a manner prohibited by § __.24.

In contrast, proposed comment 21(c)–3 also states that, when a consumer chooses to transfer a balance to a consumer credit card account issued by a *different* institution, Subpart C does not prohibit the institution to which the balance is transferred from applying its

[2] Thus, the acquiring institution would not be permitted to substitute a new index for the index applicable to an acquired variable rate balance if the change could result in an increase in the applicable annual percentage rate. *See* comment 24(b)(2)–1. An institution that does not utilize the index used to determine the variable rate for an acquired balance may, however, convert that rate to an equal or lower non-variable rate, subject to the notice requirements of 12 CFR 226.9(c). *See* comment 24(b)(2)–5.

[3] Proposed comment 21(c)–3 clarifies that Subpart C would not apply to balances transferred from a consumer credit card account issued by an institution to an open-end credit plan secured by the consumer's dwelling issued by the same institution (or its affiliate or subsidiary) because these plans provide protections that are similar to—and, in some cases, more stringent than—the protections in Subpart C. For example, a creditor may not change the annual percentage rate on a home-equity plan unless the change is based on an index that is not under the creditor's control and is available to the general public. *See* 12 CFR 226.5a(f)(1).

account terms to that balance, provided those terms comply with Subpart C. For example, if a consumer credit card account issued by institution A has a $1,000 purchase balance at an annual percentage rate of 15% and the consumer transfers that balance to a consumer credit card account with a purchase rate of 17% issued by institution B, institution B may apply the 17% rate to the $1,000 balance. However, institution B may not subsequently increase the rate that applies to that balance unless permitted by one of the exceptions in § __.24(b).

Although balance transfers from one institution to another raise some of the same concerns as balance transfers involving the same institution, the Agencies believe that transfers between institutions are not contrary to Subpart C because the institution to which the balance is transferred is not increasing the cost of credit it previously extended to the consumer. For example, assume that institution A has extended a consumer $1,000 of credit at a rate of 15%. Because § __.24 generally prohibits institution A from increasing the rate that applies to that balance, it would be inconsistent with § __.24 to allow institution A to reprice that balance simply by transferring it to another account. In contrast, in order for the $1,000 balance to be transferred to institution B, institution B must provide the consumer with a new $1,000 extension of credit in an arms-length transaction and should be permitted to price that new extension consistent with its evaluation of prevailing market rates, the risk presented by the consumer, and other factors. Thus, the transfer from institution A to institution B does not appear to raise concerns about circumvention of § __.24 because institution B is not increasing the cost of credit it previously extended.

The Agencies understand that drawing this distinction between balance transfers involving the same institution and balance transfers involving different institutions may limit an institution's ability to offer its existing cardholders the same terms that it would offer another institution's cardholders. Currently, however, the Agencies understand that institutions generally do not make promotional balance transfer offers available to their existing cardholders for balances held by the institution because it is not cost-effective to do so. Furthermore, although many institutions do offer existing cardholders the opportunity to upgrade to accounts offering different terms or features (such as upgrading to an account that offers a particular type of rewards), the Agencies understand that these offers generally are not conditioned on a balance transfer, which indicates that it may be cost-effective for institutions to make these offers without repricing an outstanding balance. Nevertheless, the Agencies solicit comment on the extent to which proposed comment 21(c)–3 would affect institutions' ability to make offers to existing cardholders.

Section __.22—Unfair Acts or Practices Regarding Time To Make Payment

Section __.22(a) provides that an institution must not treat a payment on a consumer credit card account as late for any purpose unless the consumer has been provided a reasonable amount of time to make the payment. Section __.22(b)(1) states that an institution must be able to demonstrate that it has complied with this requirement, and § __.22(b)(2) provides a safe harbor for institutions that have adopted reasonable procedures designed to ensure that periodic statements specifying the payment due date are mailed or delivered to consumers at least 21 days before the payment due date.

Comment 22(b)–3 offers an example of an alternative method of complying with § __.22(a). In this example, an institution that only provides periodic statements electronically and only accepts payments electronically for a particular type of consumer credit card account could comply with § __.22(a) even if it does not provide periodic statements 21 days before the payment due date. The Agencies understand that, although the example states that this type of account must also comply with ''applicable law and regulatory guidance,'' an explicit reference to the consumer notice and consent procedures of the Electronic Signatures in Global and National Commerce Act (E-Sign Act), 15 U.S.C. 7001 *et seq.*, may be helpful to avoid confusion. Accordingly, the Agencies propose to add an explicit reference to the E-Sign Act in comment 22(b)–3.

Section __.23—Unfair Acts or Practices Regarding Allocation of Payments

When different annual percentage rates apply to different balances on a consumer credit card account, § __.23 requires institutions to allocate any amount paid by the consumer in excess of the required minimum periodic payment (the excess payment) among the balances using one of two methods. The institution may apply the excess payment first to the balance with the highest annual percentage rate and any remaining portion to the other balances in descending order based on the applicable rate (the high-to-low method). Alternatively, the institution may allocate the excess payment among the balances in the same proportion as each balance bears to the total balance (the pro rata method).

When the Agencies originally proposed to address payment allocation, the proposed rule contained provisions specifically addressing accounts with a balance subject to a deferred interest program.[4] One of these proposed provisions would have permitted (but not required) an existing practice by some institutions of allocating excess payments first to a balance on which interest is deferred during the last two billing cycles of the deferred interest period so that consumers could pay off that balance and avoid assessment of the accrued interest. *See* proposed § __.23(b)(1)(ii), 73 FR 28916, 28942 (May 19, 2008). Some industry commenters supported this aspect of the proposal, while others argued that it would require burdensome changes to their systems. Some consumer group commenters argued that, rather than allowing institutions to choose whether to apply excess payments to deferred interest balances in the last two billing cycles, this allocation method should be mandatory. Due to other concerns about deferred interest plans, however, the January 2009 Rule did not include this provision. *See* 74 FR 5519, 5527–5528.

As discussed in greater detail below with respect to § __.24, the Agencies propose to clarify that—so long as consumers receive sufficient protections—institutions may continue to provide promotional programs under which a consumer will not be obligated to pay interest that accrues on a balance if that balance is paid in full prior to a specified date or expiration of a specified period of time (deferred or waived interest programs).[5] One area in which clarification is needed with respect to such programs is payment allocation. Under the current version of § __.23, if the deferred or waived interest balance is not the only balance on the account, the consumer would generally be required to pay off the entire outstanding balance in order to avoid interest charges on the deferred or

[4] Many creditors offer deferred interest programs under which consumers are not obligated to pay interest on purchases if those purchases are paid in full by the end of a specified period. If the purchases are not paid in full when the period ends, these programs generally require the consumer to pay interest that has accrued on the purchases during the period.

[5] For purposes of this **SUPPLEMENTARY INFORMATION**, a waived interest program includes a promotional program where interest is refunded if a balance is paid in full within a specified period of time.

waived interest balance.[6] If the consumer is unaware of the need to pay off the entire balance, the consumer would be charged interest on the deferred or waived interest balance and thus would not obtain the benefits of the promotional program.

To ensure that consumers are adequately protected, the Agencies propose to amend § __.23 to *require* institutions to allocate excess payments first to deferred or waived interest balances during the last two billing cycles of the promotional period. As noted above, this is consistent with the current practice of many institutions with respect to deferred interest plans and is generally beneficial to consumers insofar as it enables them to avoid interest charges by paying off the accrued interest balance in full prior to expiration without paying off all other balances on the account.[7] Accordingly, the Agencies propose to move the provisions in the current version of § __.23 to § __.23(a), to place the new provision for deferred or waived programs in § __.23(b), and to renumber the existing commentary accordingly. The Agencies also propose to add a new example in comment 23(a)–1 (proposed comment 23(a)(1)–1) illustrating the application of proposed § __.23(b). In addition, elsewhere in today's **Federal Register**, the Board has proposed to amend the disclosure requirements for periodic statements in Regulation Z, 12 CFR 226.7, to ensure that consumers are informed of the amount of interest accrued on the deferred or waived balance and the date by which that balance must be paid in full to avoid those accrued interest charges.[8]

Furthermore, the Agencies propose to amend comment 23–6 to clarify that, for purposes of § __.23, a balance on which interest will not be charged if the balance is paid in full prior to expiration of a specified period should be treated as a balance with an annual percentage rate of zero rather than a balance with the rate at which interest accrues during the promotional period (the accrual rate). As an initial matter, treating the rate as zero is consistent with the nature of the deferred or waived interest program insofar as the consumer will not be obligated to pay any accrued interest if the balance is paid in full prior to expiration. In addition, because § __.23 only applies when different annual percentage rates apply to different balances on the account, using the accrual rate for purposes of § __.23 could significantly narrow the protections of the payment allocation rules. Specifically, when the accrual rate for a deferred or waived interest balance is the same as the rate that applies to purchases (which the Agencies understand is often the case) and there are no other balances on the account, § __.23 would not apply if the accrual rate was used. For example, if an account has a $1,000 purchase balance with an annual percentage rate of 15% and a $2,000 balance on which interest accrues at 15% but will not be charged if that balance is paid in full within a specific period of time, § __.23 would not apply if the accrual rate of 15% was the applicable rate for the $2,000 balance for purposes of payment allocation. The Agencies believe that, in these circumstances, consumers should be afforded the protections in § __.23 (and, in particular, the protections in proposed § __.23(b)).

In addition, for purposes of the high-to-low allocation method in § __.23(a)(1), treating the rate on this type of promotional balance as zero during the accrued interest period ensures that excess payments will be applied first to balances on which interest is being charged, which will generally result in lower interest charges if the consumer pays the deferred or waived interest balance in full prior to expiration of the promotional period. Thus, using the above example, the amendments to comment 23–6 would clarify that an institution using the high-to-low method would allocate excess payments to the $1,000 purchase balance before the $2,000 balance until the last two billing cycles of the accrued interest period (when proposed § __.24(b) would require that excess payments be applied first to any remaining portion of the $2,000 balance). Although treating the rate on the deferred or waived interest balance as zero could prevent consumers who wish to pay off that balance in installments over the course of the promotional period from doing so, the Agencies believe that, on balance, this treatment produces the best overall outcome for consumers when the high-to-low allocation method is used.[9]

Finally, proposed comment 23(b)–1 would clarify that § __.23(b) applies to promotional programs under which the consumer is not obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time, not to grace periods offered by the institution.

Requests for Comment

The Agencies request comment on:

- Whether the provision in proposed § __.23(b) regarding balances on which interest will not be charged if the balance is paid in full by a specified date should apply during the last two billing cycles of the deferred or waived interest period or during a longer or shorter time period.
- Whether proposed § __.23(b) should apply to a grace period offered by the institution. In particular, the Agencies request comment on whether institutions offer grace periods that only require consumers to pay certain balances in full each billing cycle (rather than the entire balance) and, if so, whether proposed § __.23(b) should

[6] For example, assume that a consumer credit card account has a $2,000 purchase balance with a 20% annual percentage rate and a $1,000 balance on which interest accrues at a 15% annual percentage rate, but the consumer will not be obligated to pay that interest if that balance is paid in full by a specified date. Regardless of whether the institution uses the high-to-low allocation method or the pro rata allocation method, the consumer would be required to pay $3,000 in order to avoid interest charges on the $1,000 balance. Indeed, under the current version of § __.23, the only circumstance in which the consumer could pay off the $1,000 balance without also paying off the $2,000 purchase balance would be if the $1,000 balance had a higher annual percentage rate than the $2,000 purchase balance and the institution chose to use the high-to-low method.

[7] As discussed above, for purposes of this proposal, the Agencies continue to rely on the legal authority and analysis contained in the January 2009 Rule. In particular, with respect to the proposed amendment to § __.23, the Agencies rely on the legal analysis regarding unfair payment allocation practices at 74 FR 5514–5517. In addition, the Agencies note that failing to allocate excess payments first to deferred or waived interest balances during the last two billing cycles of the promotional period appears to cause substantial consumer injury insofar as a different allocation method would result in the assessment of accrued interest (unless the consumer pays off all balances on the account). Because one of the intended purposes of a credit card account is to finance purchases over multiple billing cycles, it would be unreasonable to expect consumers to avoid accrued interest charges on a deferred or waived interest balance by paying off all balances on the account. Finally, failing to comply with the proposed amendment does not appear to create any benefits for consumers that would outweigh the injury. Indeed, the Agencies understand that the payment allocation practices of many institutions offering deferred or waived interest programs already comply with the proposed amendment.

[8] Specifically, the Board is proposing to amend 12 CFR 226.7 comment 7(b)–1 to require creditors offering deferred or waived interest programs to disclose on the periodic statement the balance subject to the program and the amount of interest that has accrued on that balance. In addition, the Board is proposing to add a new 12 CFR 226.7(b)(14) that would require creditors to state on the front of the periodic statement for the two billing cycles immediately preceding expiration of the promotional period the date on which the period expires and that the deferred or waived interest balance must be paid in full by a specific date in order to avoid accrued interest charges.

[9] The Agencies note that, if the institution uses the pro rata allocation method, a proportionate amount of the excess payment will be applied to the deferred or waived interest balance each month during the promotional period.

permit institutions to apply excess payments to those balances first.

Section __.24—Unfair Acts or Practices Regarding Increases in Annual Percentage Rates

Section __.24(a) requires institutions to disclose, at account opening, the annual percentage rates that will apply to each category of transactions on a consumer credit card account. In addition, § __.24(a) prohibits institutions from increasing those rates unless specifically permitted by one of the exceptions in § __.24(b).

As an initial matter, the Agencies understand that clarification is needed regarding the meaning of ''category of transactions'' for purposes of § __.24. Accordingly, the Agencies propose to add a new comment 24–3 to clarify that, for purposes of § __.24, a ''category of transactions'' is a type or group of transactions to which an annual percentage rate applies that is different than the annual percentage rate that applies to other transactions. For example, purchase transactions, cash advance transactions, and balance transfer transactions are separate categories of transactions for purposes of § __.24 if an institution applies different annual percentage rates to each. Furthermore, if, for example, the institution applies different annual percentage rates to different types of purchase transactions (such as one rate for purchases of gasoline and a different rate for all other purchases), each type constitutes a separate category of transactions for purposes of § __.24.[10]

In addition, the Agencies understand there is some confusion regarding whether certain changes to a consumer credit card account constitute an ''account opening'' for purposes of § __.24 generally and, in particular, the general prohibition on increasing rates during the first year after account opening. Accordingly, the Agencies propose to add a new comment 24–4 clarifying that, when a consumer has a credit card account with an institution and the consumer opens a new credit card account with the same institution (or its affiliate or subsidiary), the opening of the new account constitutes an ''account opening'' for purposes of § __.24 if the consumer retains the ability to obtain additional extensions of credit on both accounts. Thus, for example, if a consumer opens a credit card account with an institution on January 1 of year one and opens a second credit card account with that institution on July 1 of year one, the opening of the second account constitutes an account opening for purposes of § __.24 so long as the consumer can engage in transactions using either account. This is the case even if the consumer transfers a balance from the first account to the second. Thus, because the institution has two separate account relationships with the consumer, the general prohibition in § __.24 on increasing rates during the first year after account opening would apply to the opening of the second account.

In contrast, the comment would clarify that an account has not been opened for purposes of § __.24 when an institution replaces one consumer credit card account with another consumer credit card account (such as when a retail credit card is replaced with a cobranded general purpose card that can be used at a wider number of merchants) or when an institution consolidates or combines a credit card account with one or more other credit card accounts into a single credit card account. As discussed above, the Agencies believe that these transfers should be treated as a continuation of the existing account relationship rather than the creation of a new account relationship. Similarly, the comment would also clarify that the replacement of an acquired credit card account does not constitute an ''account opening'' for purposes of § __.24. Thus, in these circumstances, the general prohibition in § __.24 on increasing rates during the first year after account opening would not apply. However, when a replacement or consolidation occurs during the first year after account opening, proposed comment 24–4 would clarify that the institution may not increase an annual percentage rate in a manner otherwise prohibited by § __.24.[11] Similarly, the other protections in § __.24 (such as the limitations on repayment of protected balances in § __.24(c)) would still apply following the replacement or consolidation.

Finally, the Agencies understand that the replacement of one consumer credit card account with another generally is not instantaneous. If, for example, a consumer requests that a credit card account with a $1,000 balance be upgraded to a credit card account that offers rewards on purchases, the second account may be opened immediately or within a few days but, for operational reasons, there may be a delay before the $1,000 balance can be transferred and the first account can be closed.[12] Accordingly, the Agencies solicit comment on whether the appropriate amount of time for the replacement of one consumer credit card account with another is 15 days, 30 days, or a different period.[13]

Section __.24(a) General Rule

The Agencies also understand that there is some confusion regarding the relationship between comment 24(a)–1 and Regulation Z, 12 CFR 226.6(b)(2)(i)(D) with respect to the disclosure of penalty rates. Specifically, comment 24(a)–1 states that institutions cannot satisfy the disclosure requirements in § __.24(a) by disclosing a range of annual percentage rates or that a rate will be ''up to'' a particular amount. In contrast, when more than one penalty rate may apply, 12 CFR 226.6(b)(2)(i)(D) permits creditors to disclose ''the highest rate that could apply, instead of disclosing the specific rates or the range of rates that could apply.'' Because the disclosure requirements in § __.24(a) are intended to ensure that consumers receive notice at account opening of the specific annual percentage rates that *will* apply to the categories of transactions on the account, those requirements do not apply to rates that may or may not apply depending on a particular event or occurrence (such as penalty rates) or rates that may be applied at the institution's discretion. Therefore, the Agencies propose to amend comment 24(a)–1 accordingly. The Agencies note, however, that this clarification is limited to the *disclosure* requirements in § __.24(a) and does not alter § __.24(a)'s general prohibition on applying penalty rates or other contingent rates unless specifically permitted by § __.24(b).

The Agencies also propose the following clarifications and technical corrections to the commentary to § __.24(a):

- Amend the example in comment 24(a)–2.i to clarify that the institution

[10] As noted below, the Agencies request comment on whether institutions establish separate categories of transactions based on factors other than annual percentage rates and, if so, for what reasons.

[11] For example, assume that, on January 1 of year one, a consumer opens a consumer credit card account with a purchase rate of 15%. On July 1 of year one, the account is replaced with a consumer credit card account issued by the same institution, which offers different features (such as rewards on purchases). Under these circumstances, the institution could not increase the annual percentage rate for purchases to a rate that is higher than 15% pursuant to § __.24(b)(3) until January 1 of year two (which is one year after the first account was opened).

[12] As discussed above, the proposed commentary to § __.21 would clarify that, in these circumstances, the institution could not increase the annual percentage rate that applies to the $1,000 balance unless otherwise permitted by § __.24.

[13] Proposed comment 24–4 provides 15 days and 30 days as alternatives.

disclosed a penalty rate at account opening.

- Amend the example in comment 24(a)–2.iii to clarify that the 12 CFR 226.9(g) notice states that, if the consumer becomes more than 30 days late on the account, the penalty rate will apply to all balances on the account.
- Amend the example in comment 24(a)–2.iii.C to correct a typographical error.

Section __.24(b)(1) Account Opening Disclosure Exception

Section __.24(b)(1) provides that an annual percentage rate for a category of transactions may be increased to a rate disclosed at account opening upon expiration of a period of time disclosed at account opening. Under this exception, if, for example, an institution discloses at account opening that a 5% rate will apply to purchases for six months and that a 15% rate will apply thereafter, the institution can increase the rate on the existing purchase balance and on new purchases to 15% after six months. These plans are sometimes referred to as ''stepped rates.''

Comment 24(b)(1)–1 states that, because § __.24(b)(1) is limited to increased rates that *will* apply after a specified period of time, the exception does not permit application of increased rates that are disclosed at account opening but are contingent on a particular event or occurrence or may be applied at the institution's discretion. For example, as illustrated in comment 24(b)(1)–1.i, § __.24(b)(1) does not permit an institution to apply an increased penalty rate when a consumer makes a late payment even if the institution disclosed that rate at account opening. For clarity, the Agencies propose to move this language into the text of § __.24(b)(1). The Agencies also propose to amend comment 24(b)(1)–1 to clarify that the examples illustrate the application of § __.24, rather than just § __.24(a).

Comment 24(b)(1)–2 clarifies that nothing in § __.24 prohibits an institution from assessing interest due to the loss of a grace period to the extent consistent with the prohibition on two-cycle billing in § __.25. Because the Agencies understand that there is some confusion regarding the relationship between § __.24 and the provision of a grace period, the Agencies propose to add language to this comment clarifying that an institution has not reduced an annual percentage rate on a consumer credit card account for purposes of § __.24 if the institution does not charge interest on a balance when the consumer pays that balance in full prior to the expiration of a grace period. In addition, for organizational purposes, the Agencies propose to redesignate this comment as 24–2 and renumber comment 24(b)(1)–3 accordingly.

Finally, the Agencies understand that there is some confusion as to whether an institution waives the right to impose an increased rate pursuant to § __.24(b)(1) if it does not do so immediately upon expiration of the specified time period. As a general matter, because § __.24 is intended to increase predictability and transparency for consumers, the exceptions in § __.24(b) do not permit institutions to retain the right to increase a rate indefinitely and at their discretion. For example, if at account opening an institution discloses a stepped rate of 15% on purchases for one year and 20% thereafter, the institution can apply a lower rate of 17% at the end of the year but, if it wants to retain its right under § __.24(b)(1) to apply the 20% rate to purchases made during the first year, it must disclose to the consumer (pursuant to 12 CFR 226.9(c)) how long the 17% rate will apply and that the 20% rate will apply thereafter so that the consumer can make informed decisions when using the card. *See* comment 24(b)(1)–3 (proposed comment 24(b)(1)–2)).

The Agencies understand, however, that applying an increased rate on a specific date can present operational difficulties when that date falls in the middle of a billing cycle. Accordingly, to address this concern, the Agencies propose to add a new comment 24(b)–1 clarifying that, if § __.24(b) permits an institution to apply an increased annual percentage rate on a date that is not the first day of a billing cycle, the institution may delay application of the increased rate until the first day of the following billing cycle without relinquishing the ability to apply that rate.[14]

Section __.24(b)(3) Advance Notice Exception

Section __.24(b)(3) provides that an annual percentage rate for a category of transactions may be increased pursuant to a notice under 12 CFR 226.9(c) or (g) for transactions that occur more than seven days after provision of the notice. The Agencies understand that there has been some confusion regarding the interaction between this seven-day period in § __.24(b)(3) and the requirement in 12 CFR 226.9(c) and (g) that notice of an increased rate be provided at least 45 days prior to imposition of the increased rate. As illustrated in the examples in comment 24(b)(3)–3, the distinction is that the institution may apply the increased rate to any transaction that occurs after the seventh day following provision of the notice, but it must wait 45 days to begin accruing interest at that rate. The reason for this distinction is that the two time periods serve different purposes. The seven-day period is intended to ensure that the consumer receives the notice and is aware of the increased rate before engaging in transactions to which that increased rate will eventually apply (unless the consumer transfers or pays off the balance). *See* 74 FR 5531. In contrast, the 45-day period is intended to give the consumer sufficient time to evaluate whether to continue using the credit card account at the increased rate or whether better terms can be obtained elsewhere. *See* 74 FR 5344–5356. For additional clarity, the Agencies propose to amend comment 24(b)(3)–2 to state that, when calculating interest charges, § __.24(b)(3) does not permit an institution to reach back to days before the effective date of the rate increase under 12 CFR 226.9(c) or (g)—in other words, the date 45 days after provision of the notice.

The Agencies also propose to amend comment 24(b)(3)–2 to clarify when a transaction is deemed to have occurred for purposes of § __.24(b)(3). Specifically, the current version of comment 24(b)(3)–2 states that an institution may apply a rate increased pursuant to § __.24(b)(3) to transactions that are authorized within seven days—but are settled more than seven days—after provision of the notice. The Agencies understand, however, that this distinction has created some confusion because, for example, authorization may not be obtained for all transactions and because the term ''settled'' could refer to different points in the payment process, including settlement between the acquirer and the merchant or settlement between the consumer and the card issuer. Accordingly, for consistency and clarity, the Agencies propose to amend comment 24(b)(3)–2 to clarify that when a transaction occurred for purposes of § __.24(b)(3) is determined by the date of the transaction (without regard to when the transaction is authorized, settled, or posted to the consumer's account). In addition, the Agencies would clarify that, when a merchant places a ''hold''

[14] For example, assume that, at account opening on January 1, an institution discloses that a 10% rate will apply to purchases for six months and a 15% rate will apply thereafter. The first day of the billing cycle for the account is the fifteenth of the month. If the six-month period expires on July 1, the institution may delay application of the 15% rate until July 15 without relinquishing its ability to apply that rate under § __.24(b)(1).

on the available credit on an account for an estimated transaction amount when the actual transaction amount will not be known until a later date, the date of the transaction for purposes of § __.24(b)(3) is the date on which the merchant determines the actual transaction amount. The Agencies also propose to amend the examples in comment 24(b)(3)–3 for consistency with these proposed changes.

In addition, the Agencies propose to amend § __.24(b)(3) and its commentary to reflect that notice of an increased rate may be provided under 12 CFR 226.9(b), which applies to supplemental access devices (such as convenience checks) and additional features added to the account after account opening. 12 CFR 226.9(b) requires creditors to disclose the rates and other key terms applicable to the device or feature before the consumer uses the device or feature for the first time. For example, 12 CFR 226.9(b)(3)(A) requires that creditors providing convenience checks to which a temporary promotional rate applies disclose key terms on the front of the page containing the checks, including the promotional rate, the period during which the promotional rate will be in effect, and the rate that will apply after the promotional rate expires. Thus, unlike rates increased pursuant to a 12 CFR 226.9(c) and (g) notice, the seven-day period is not necessary for rate increases disclosed pursuant to 12 CFR 226.9(b) because the device or feature will not be used before the consumer has received notice of the applicable rates and terms. Accordingly, the Agencies propose to amend § __.24(b)(3) to provide that increased rates disclosed pursuant to 12 CFR 226.9(b) must not be applied to transactions that occurred prior to provision of the notice. Section __.24(b)(3) would continue to provide that increased rates disclosed pursuant to 12 CFR 226.9(c) or (g) must not be applied to transactions that occurred within seven days after provision of the notice. The Agencies would also clarify in comment 24(b)(3)–2 that, if a rate increase is disclosed pursuant to both 12 CFR 226.9(b) and 12 CFR 226.9(c), that rate may only be applied to transactions that occur more than seven days after provision of the 12 CFR 226.9(c) notice. In addition, the Agencies would add an illustrative example in new comment 24(b)(3)–4.iv.

Finally, the Agencies understand that clarification is needed regarding the application of discounted promotional rates to existing accounts. As discussed above, § __.24(b)(1) permits stepped rates disclosed at account opening. In addition, comment 24(b)(3)–3 provides some examples of how a stepped rate could be provided pursuant to a 12 CFR 226.9(c) notice. The Agencies did not, however, specifically address circumstances in which a discounted promotional stepped rate is offered after account opening. Consistent with comment 24(b)(3)–3, the Agencies believe that, if the consumer receives advance notice of the term of the discounted rate and the rate that will apply after that term expires, a promotional stepped rate offer on an existing account can provide the same benefits to consumers as a promotional stepped rate offer at account opening so long as the offer cannot be used to increase the rate that applies to pre-existing balances.

Accordingly, to clarify that such offers are permitted, the Agencies propose to add a new comment 24(b)(3)–4 stating that nothing in § __.24 prohibits an institution from lowering the annual percentage rate that applies to an existing balance or to new transactions. The comment would further state, however, that, if a lower rate is applied to an existing balance, the institution cannot subsequently increase the rate on that balance unless it has provided the consumer with advance notice of the increase pursuant to 12 CFR 226.9(b) or (c). This notice must state the period of time during which the lower rate will apply (or the date until which that rate will apply) and the rate that will apply after expiration of that period. Furthermore, to ensure that the consumer receives notice of the offer before engaging in transactions that are subject to that offer (and will therefore eventually be taken to a higher rate), the comment would clarify that, when an institution applies a decreased rate to transactions that occurred prior to provision of the notice (or, in the case of a 12 CFR 226.9(c) or (g) notice, transactions that occurred within seven days after provision of the notice), the institution may not subsequently increase the rate that applies to those transactions to a rate that is higher than the rate that applied prior to the decrease.[15] Finally, the comment would provide illustrative examples of stepped rate offers that would comply with these requirements.[16]

Section __.24(b)(5) Workout Arrangement Exception

Section __.24(b)(5) provides that an annual percentage rate may be increased due to the consumer's failure to comply with the terms of a workout arrangement between the institution and the consumer, provided that the annual percentage rate applicable to a category of transactions following any such increase does not exceed the rate that applied to that category of transactions prior to commencement of the workout arrangement. This exception is intended to encourage institutions to continue offering workout arrangements that reduce rates for consumers in serious default, while also ensuring that a consumer who enters into such an arrangement but is unable to comply with its terms is not charged a rate that exceeds the rate that applied prior to the arrangement. *See* 74 FR 5532.

Because the term ''workout'' has been used by the Agencies in other contexts,[17] the Agencies understand that there is some confusion as to whether this exception also applies to temporary hardship arrangements that assist consumers in overcoming financial difficulties by lowering the annual percentage rate for a period of time. For example, if an account becomes seriously delinquent because of a loss of employment, the institution may reduce the rate that applies to the outstanding balance from the penalty rate to a rate of zero on the condition that the consumer make payments that will cure the delinquency within a specified period of time. If the arrangement is successful, the institution may choose to return the annual percentage rate to the rate that applied prior to commencement of the temporary hardship arrangement. Because such arrangements can provide important benefits to consumers, the Agencies propose to amend § __.24(b)(5) and its commentary to clarify that this exception also applies to temporary hardship arrangements and when the consumer completes a workout or temporary hardship arrangement.

[15] For example, assume that the annual percentage rate for purchases on an account is 15% and that, pursuant to 12 CFR 226.9(c), the institution provides notice on July 1 that a rate of 5% will apply to purchases until December 31, after which a rate of 17% will apply. If the institution applies the 5% rate to purchases made on or before July 8, the institution may only increase the rate on those purchases to a maximum of 15% on December 31.

[16] For the same reasons, the Agencies propose to amend comment 24(b)(1)–3 (proposed comment 24(b)(1)–2) to clarify that institutions may offer discounted stepped rates during the first year after account opening so long as the rate that applies after expiration of the discounted rate does not exceed the rate disclosed at account opening for that category of transactions.

[17] *See, e.g.,* Board Supervisory Letter SR 03–1 on Account Management and Loss Allowance Methodology for Credit Card Lending (Jan. 8, 2003) (available at *http://www.federalreserve.gov/boarddocs/srletters/2003/sr0301.htm*); OTS Regulatory Bulletin RB 37–16 on Examination Handbook, Asset Quality Section 218, Credit Card Lending (May 8, 2006) (available at *http://files.ots.treas.gov/74827.pdf*).

Proposed § __.24(b)(6) Servicemembers Civil Relief Act Exception

The Agencies understand that clarification is required regarding the relationship between § __.24 and certain provisions of the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. app. 501 *et seq.* Specifically, 50 U.S.C. app. 527(a)(1) provides that ''[a]n obligation or liability bearing interest at a rate in excess of 6 percent per year that is incurred by a servicemember, or the servicemember and the servicemember's spouse jointly, before the servicemember enters military service shall not bear interest at a rate in excess of 6 percent. * * *'' With respect to consumer credit card accounts, this restriction applies during the period of military service. *See* 50 U.S.C. app. 527(a)(1)(B).[18]

Under the current version of § __.24, an institution that complies with the SCRA by lowering the rate that applies to an existing balance on a consumer credit card account when the consumer enters military service would not be permitted to increase the rate for that balance once the period of military service ends and the protections of the SCRA no longer apply. The Agencies did not intend this result, which appears to be inconsistent with the plain language of the SCRA. Accordingly, the Agencies propose to add a new exception in § __.24(b)(6) stating that an annual percentage rate that has been decreased pursuant to 50 U.S.C. app. 527 may be increased once that provision no longer applies, provided that the increased rate does not exceed the rate that applied prior to the period of military service.

Treatment of Deferred Interest and Similar Promotional Programs

In the final rule, the Agencies concluded that deferred interest programs, as currently designed and marketed, are inconsistent with the general prohibition in § __.24 on the application of increased rates to existing balances. *See* 74 FR 5527–5528. The Agencies noted that, although such programs provide substantial benefits to consumers who pay the balance in full prior to expiration of the program (thereby avoiding the assessment of interest charges), consumers who do not do so may be unfairly surprised, particularly because these programs are typically marketed as ''interest free.'' Accordingly, the Agencies determined that the assessment of deferred interest is effectively a repricing of past transactions subject to § __.24 and that prohibiting this practice would improve transparency and enable consumers to make more informed decisions regarding the cost of using credit. *See id.*

The Agencies specifically stated, however, that § __.24 does not prohibit institutions from offering promotional programs that provide similar benefits to consumers but do not raise concerns about unfair surprise. In particular, the Agencies noted that an institution could offer a program where interest is assessed on purchases at a disclosed rate for a period of time but the interest charged is waived if the principal is paid in full by the end of that period.

The Agencies understand that the distinction in the January 2009 Rule between deferred interest and waived interest has caused confusion with respect to the manner in which institutions should structure promotional programs under which the consumer will not be obligated to pay interest that accrues on a balance if that balance is paid in full by a specified date or within a specified period of time. In light of this confusion, the Agencies believe that the January 2009 Rule focused too heavily on the form or technical aspects of these programs.[19] Deferred interest programs should not be categorically prohibited while waived interest programs are categorically exempt from the requirements of the final rule. Instead, the Agencies believe the better approach is to focus on applying consistent standards to ensure that consumers are not unfairly surprised by the cost of using these types of promotional programs. Accordingly, the Agencies propose the following amendments.

As an initial matter, the Agencies understand that the distinction in the January 2009 Rule between ''deferred interest'' programs and ''waived interest'' programs could be read to suggest that some programs were covered by the final rule and others were not. Because the protections consumers receive should not depend on this technical distinction, the Agencies propose to amend the commentary to § __.24 to clarify that, although institutions may continue to provide promotional programs under which the consumer will not be obligated to pay interest that accrues on a balance if that balance is paid in full within a specified period of time, those programs are subject to all of the protections in § __.24, including the general prohibition on so-called ''hair trigger'' or ''universal default'' repricings of existing balances. *See* proposed comments 24(a)–2.iv and 24(b)(3)–4.iii. Thus, for example, if a consumer relies on this type of promotional program when making a purchase, the institution cannot deny the consumer the opportunity to avoid interest charges on that purchase by paying the purchase in full prior to expiration of the promotional period unless the consumer is more than 30 days' delinquent on the account.[20]

Furthermore, as discussed above, the Agencies propose to amend the payment allocation rules in § __.23 to ensure that consumers are not required to pay off all balances on the account in order to receive the benefits of these types of promotional programs. In addition, elsewhere in today's **Federal Register**, the Board has proposed to amend the advertising requirements in Regulation Z, 12 CFR 226.16, to address concerns that the use of terms such as ''no interest'' to describe deferred or waived interest programs may confuse consumers. Specifically, whenever ''no interest'' or a similar term is used in an advertisement for a deferred or waived interest program, proposed 12 CFR 226.16(h) would require the creditor to disclose that any balance subject to the program must be paid in full by the end of the promotional period to avoid interest charges (for example, ''no interest if paid in full within six months''). In addition, the creditor would be required to state that, if the balance subject to the program is not paid in full within the promotional period, interest will be charged from the date the consumer became obligated for each transaction subject to the program.[21] The Agencies believe that

[18] 50 U.S.C. app. 527(a)(1)(B) applies to obligations or liabilities that do not consist of a mortgage, trust deed, or other security in the nature of a mortgage.

[19] In particular, the Agencies understand that the references in the January 2009 Rule to ''assessing'' or ''charging'' interest have caused uncertainty about whether, during the promotional period, an institution must treat accrued interest for which the consumer may or may not ultimately be responsible (depending on whether the balance is paid in full prior to expiration) as part of the consumer's debt. The Agencies did not intend to regulate the accounting treatment of this accrued interest. Instead, the Agencies intended to ensure that consumers understand the amount of interest for which they will be responsible if the balance is not paid in full before expiration. As discussed elsewhere in this **SUPPLEMENTARY INFORMATION**, the Board is proposing amendments to Regulation Z in today's **Federal Register** to accomplish this purpose.

[20] If, however, the waived or deferred interest balance is not paid in full on or before the date the program expires, the institution is not required to wait an additional 30 days before charging accrued interest. *See* proposed comment 24(a)–2.iv.

[21] As discussed above, the Board has also proposed to amend the periodic statement disclosures in Regulation Z, 12 CFR 226.7, to ensure that consumers who utilize these types of promotional programs are informed of the date on which the program expires and the amount of

these amendments will ensure that institutions can continue to offer programs that provide substantial benefits to consumers while protecting consumers from unexpected increases in the cost of completed transactions.

Finally, the Agencies understand that there is some confusion regarding implementation of the final rule with respect to existing deferred interest programs. As noted above, the effective date of the January 2009 Rule is July 1, 2010. In the **SUPPLEMENTARY INFORMATION** to that rule, the Agencies provided guidance regarding the implementation of § __.24. *See* 74 FR 5534. The Agencies did not, however, address the effect of the rule on deferred interest programs established prior to the effective date that expire after that date. The Agencies did not intend to convert these programs into interest-free loans by prohibiting an institution from charging interest if the deferred interest balance is not paid in full prior to expiration of the deferred interest period. However, the Agencies will not permit institutions to continue practices prohibited by the January 2009 Rule after the effective date. Accordingly, if a deferred interest program established prior to the effective date permits a consumer to avoid deferred interest charges by paying the deferred interest balance in full by a date that falls on or after July 1, 2010, the institution may charge deferred interest to the account consistent with the terms of the program, provided that: (1) Any periodic statement mailed or delivered on or after July 1, 2010 complies with the disclosure requirements in 12 CFR 226.7 (as amended); and (2) as of July 1, 2010, the institution fully complies with the protections in the January 2009 Rule (as amended), including the payment allocation requirements in proposed § __.23(b) and the prohibitions on ''hair trigger'' and ''universal default'' repricings in § __.24.

24(c) Treatment of Protected Balances

The Agencies propose to amend comment 24(c)(2)–1 to clarify that § __.24(c)(2) does not prohibit an institution from continuing to assess a periodic fee that was assessed before the account had a protected balance or from assessing fees such as late payment fees if the only balance on the account is a protected balance.

Requests for Comment

The Agencies request comment on:

• Whether institutions establish separate categories of transactions based on factors other than annual percentage rates and, if so, for what reasons and whether proposed comment 24–3 should be revised accordingly.

• Whether the proposed implementation guidance regarding deferred interest plans provides sufficient protections for consumers and flexibility for institutions.

Section __.25—Unfair Balance Computation Method

Section __.25(a) prohibits institutions from imposing finance charges on balances on a consumer credit card account based on balances for days in billing cycles that precede the most recent billing cycle as a result of the loss of any time period provided by the institution within which the consumer may repay any portion of the credit extended without incurring finance charges. The prohibited practice is sometimes referred to as ''two-cycle'' or ''double-cycle'' billing.

As discussed above, the Agencies are proposing amendments to § __.23, § __.24, and Regulation Z that would clarify the substantive and disclosure requirements for promotional programs under which a consumer will not be obligated to pay interest that accrues on a balance if that balance is paid in full prior to a specified date or the expiration of a specified period of time. Consistent with these proposed amendments, the Agencies also propose to add a new comment 25(a)–3, clarifying that § __.25 does not prohibit the institution from charging accrued interest under this type of program if the balance is not paid in full prior to the specified date.

IV. Regulatory Analysis

Section VIII of the **SUPPLEMENTARY INFORMATION** to the January 2009 Rule sets forth the Agencies' respective analyses under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) and the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR part 1320 Appendix A.1). *See* 74 FR 5548–5551. This section also sets forth the OTS's determinations with respect to Executive Orders 12866 and 13132 and the Unfunded Mandates Reform Act of 1995 as well as the NCUA's determinations with respect to Executive Order 13132 and the Treasury and General Government Appropriations Act, 1999. *See* 74 FR 5551–5558. Because the proposed amendments are clarifications and would not, if adopted, alter the substance of the analyses and determinations accompanying the January 2009 Rule, the Agencies continue to rely on those analyses and determinations for purposes of this rulemaking.

V. Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act requires the Board and OTS to use plain language in all proposed and final rules published after January 1, 2000. Additionally, NCUA's goal is to promulgate clear and understandable regulations that impose minimal regulatory burdens. Therefore, the Agencies specifically invite your comments on how to make this proposal easier to understand.

List of Subjects

12 CFR Part 227

Banks, Banking, Credit, Intergovernmental relations, Trade practices.

12 CFR Part 535

Consumer credit, Consumer protection, Credit, Credit cards, Deception, Intergovernmental relations, Savings associations, Trade practices, Unfairness.

12 CFR Part 706

Credit, Credit unions, Deception, Intergovernmental relations, Trade practices, Unfairness.

Board of Governors of the Federal Reserve System

12 CFR Chapter II

Text of Proposed Revisions

Certain conventions have been used to highlight the proposed revisions. New language is shown inside ►bold-type arrows◄ while language that would be deleted is set off with ❚bold-type brackets❚.

Authority and Issuance

For the reasons discussed in the joint preamble, the Board proposes to further amend 12 CFR part 227, as amended at 74 FR 5559, January 29, 2009, as set forth below:

PART 227—UNFAIR OR DECEPTIVE ACTS OR PRACTICES (REGULATION AA)

1. Section 227.23 is revised to read as follows:

§ 227.23 Unfair acts or practices regarding allocation of payments.

When different annual percentage rates apply to different balances on a consumer credit card account►:

(a) *General rule.* Except as provided in paragraph (b) of this section◄, the bank must allocate any amount paid by the consumer in excess of the required

interest for which they will be responsible if the promotional balance is not paid in full by that date.

minimum periodic payment among the balances using one of the following methods:

►(1)◄ ⟦(a)⟧ *High-to-low method.* The amount paid by the consumer in excess of the required minimum periodic payment is allocated first to the balance with the highest annual percentage rate and any remaining portion to the other balances in descending order based on the applicable annual percentage rate.

►(2)◄ ⟦(b)⟧ *Pro rata method.* The amount paid by the consumer in excess of the required minimum periodic payment is allocated among the balances in the same proportion as each balance bears to the total balance.

►(b) *Special rule for accounts subject to certain promotional programs.* When a promotional program provides that a consumer will not be obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time, the bank must allocate amounts paid by the consumer in excess of the required minimum periodic payment first to that balance during the two billing cycles immediately preceding expiration of the specified period and any remaining portion to the other balances consistent with paragraph (a) of this section.◄

2. Section 227.24 is amended by revising paragraph (b) to read as follows:

§ 227.24 Unfair acts or practices regarding increases in annual percentage rates.

* * * * *

(b) *Exceptions.* The prohibition in paragraph (a) of this section on increasing annual percentage rates does not apply where an annual percentage rate may be increased pursuant to one of the exceptions in this paragraph.

(1) *Account opening disclosure exception.* An annual percentage rate for a category of transactions may be increased to ►an annual percentage rate◄ ⟦a rate⟧ disclosed at account opening upon expiration of a period of time disclosed at account opening. ►This exception does not permit application of an increased annual percentage rate disclosed at account opening that is contingent on a particular event or occurrence or that may be applied at the bank's discretion.◄

(2) *Variable rate exception.* An annual percentage rate for a category of transactions that varies according to an index that is not under the bank's control and is available to the general public may be increased due to an increase in the index.

(3) *Advance notice exception.* An annual percentage rate for a category of transactions may be increased pursuant to a notice under 12 CFR 226.9►(b), (c), or (g)◄ ⟦(c) or (g)⟧►, provided that:

(i) If the bank discloses the increased rate pursuant to 12 CFR 226.9(b), that rate must not be applied to transactions that occurred prior to provision of the notice;

(ii) If the bank discloses the increased rate pursuant to 12 CFR 226.9(c) or (g), that rate must not be applied to transactions that occurred within seven days after provision of the notice; and

(iii) This exception does not permit an increase in any annual percentage rate during the first year after the account is opened.◄ ⟦for transactions that occur more than seven days after provision of the notice. This exception does not permit an increase in any annual percentage rate during the first year after the account is opened.⟧

(4) *Delinquency exception.* An annual percentage rate may be increased due to the bank not receiving the consumer's required minimum periodic payment within 30 days after the due date for that payment.

(5) *Workout* ►*and temporary hardship*◄ *arrangement exception.* An annual percentage rate may be increased due to the consumer's ►completion of◄ ⟦failure to comply with the terms of⟧ a workout ►or temporary hardship◄ arrangement between the bank and the consumer ►or the consumer's failure to comply with the terms of such an arrangement◄, provided that the annual percentage rate applicable to a category of transactions following any such increase does not exceed the rate that applied to that category of transactions prior to commencement of the ⟦workout⟧ arrangement.

►(6) *Servicemembers Civil Relief Act exception.* An annual percentage rate that has been decreased pursuant to 50 U.S.C. app. 527 may be increased once that provision no longer applies, provided that the annual percentage rate applicable to a category of transactions following any such increase does not exceed the rate that applied to that category of transactions prior to the decrease.◄

* * * * *

3. In Supplement I to Part 227:

A. Add *Section 227.21—Definitions.*

B. Under *Section 227.22—Unfair Acts or Practices Regarding Time to Make Payment,* under *22(b) Compliance with General Rule,* paragraph 3. is revised.

C. Under *Section 227.23—Unfair Acts or Practices Regarding Allocation of Payments:*

(i) Paragraph 2., the heading of paragraph 3., and paragraphs 4. and 6. are revised;

(ii) Redesignate *23(a) High-to-Low Method as 23(a)(1) High-to-Low Method*;

(iii) Under *23(a)(1) High-to-Low Method,* paragraph 1.v is added;

(iv) Redesignate *23(b) Pro Rata Method as 23(a)(2) Pro Rata Method;*

(v) Under *23(a)(2) Pro Rata Method,* paragraph 1. is revised; and

(vi) Add *23(b) Special Rule for Accounts Subject to Certain Promotional Programs.*

D. Under *Section 227.24—Unfair Acts or Practices Regarding Increases in Annual Percentage Rates:*

(i) Paragraph 1. is revised;

(ii) Add paragraphs 2., 3., 4.;

(iii) Under *24(a) General Rule,* paragraphs 1., 2.i. introductory text, 2.iii. introductory text, and 2.iii.C. are revised, and paragraph 2.iv is added;

(iv) Under *24(b) Exceptions,* add paragraph 1.;

(v) Under *24(b)(1) Account Opening Disclosure Exception,* paragraph 1. introductory text is revised, paragraph 1.iii. and paragraph 2. are removed, paragraph 3. is redesignated as paragraph 2., the introductory text of newly designated paragraph 2. is revised, and paragraph 2.ii. is added;

(vi) Under *24(b)(2) Variable Rate Exception,* the heading of paragraph 5. is revised;

(vii) Under *24(b)(3) Advance Notice Exception,* paragraphs 2. and 3. are revised and paragraph 4. is added;

(viii) Revise *24(b)(5) Workout Arrangement Exception;*

(ix) Under *24(c) Treatment of Protected Balances,* under *24(c)(1) Repayment,* under *Paragraph 24(c)(1)(i),* the heading of paragraph 2. is revised; and

(x) Under *24(c) Treatment of Protected Balances,* under *24(c)(2) Fees and Charges,* paragraph 1. is revised.

E. Under *Section 227.25—Unfair Balance Computation Method,* under *25(a) General Rule,* paragraph 3. is added.

* * * * *

Subpart C—Consumer Credit Card Account Practices Rule

►*§ 227.21—Definitions*

21(a) Annual Percentage Rate

1. *Use of ''rate.''* For purposes of Subpart C, ''rate'' has the same meaning as ''annual percentage rate'' unless otherwise specified.

21(c) Consumer Credit Card Account

1. *Closed accounts.* If a consumer credit card account with an outstanding balance is closed, the account continues to be the same consumer credit card account for purposes of Subpart C with

respect to that balance. For example, if a bank or a consumer closes a consumer credit card account with an outstanding balance, the bank would still be prohibited from increasing the annual percentage rate that applies to that balance unless permitted by one of the exceptions in § 227.24(b).

2. *Acquired accounts.* If, through merger or acquisition (for example), a bank acquires a consumer credit card account with an outstanding balance, the account continues to be the same consumer credit card account for purposes of Subpart C with respect to that balance. For example, if a consumer credit card account has a $1,000 purchase balance with an annual percentage rate of 15% and the bank that acquires that account applies an 18% rate to purchases, the bank would be prohibited from applying the 18% rate to the $1,000 balance unless permitted by one of the exceptions in § 227.24(b).

3. *Balance transfers.*

i. *Between accounts issued by the same bank.* If a balance is transferred from a consumer credit card account issued by a bank to another credit account issued by the same bank or its affiliate or subsidiary, the account continues to be the same consumer credit card account for purposes of Subpart C with respect to that balance unless the account to which the balance is transferred is an open-end credit plan secured by the consumer's dwelling. For example, if a consumer credit card account has a $2,000 purchase balance with an annual percentage rate of 15% and that balance is transferred to another consumer credit card account issued by the same bank that applies an 18% rate to purchases, the bank would be prohibited from applying the 18% rate to the $2,000 balance unless permitted by one of the exceptions in § 227.24(b). Additional circumstances in which a balance is considered transferred for purposes of this comment include when:

A. A retail credit card with an outstanding balance is replaced or substituted with a cobranded general purpose card that can be used with a broader merchant base;

B. A credit card account with an outstanding balance is replaced or substituted with another credit card account offering different features;

C. A credit card account with an outstanding balance is consolidated or combined with one or more other credit card accounts into a single credit card account; and

D. A credit card account is replaced or substituted with a line of credit that can be accessed solely by an account number.

ii. *Between accounts issued by different institutions.* If a balance is transferred to a consumer credit card account issued by a bank from a credit account issued by a different bank or an institution that is not an affiliate or subsidiary of the bank that issued the consumer credit card account, the account is not the same consumer credit card account for purposes of Subpart C with respect to that balance. Thus, the provisions of Subpart C do not prohibit the bank to which the balance is transferred from applying its account terms to that balance, provided that those terms comply with Subpart C. For example, if a consumer credit card account issued by bank A has a $1,000 purchase balance at an annual percentage rate of 15% and the consumer transfers that balance to a consumer credit card account with a purchase rate of 17% issued by bank B, bank B may apply the 17% rate to the $1,000 balance. However, bank B may not subsequently increase the rate on that balance unless permitted by one of the exceptions in § 227.24(b).◀

§ 227.22—Unfair Acts or Practices Regarding Time To Make Payment

* * * * *

22(b) Compliance With General Rule

* * * * *

3. *Example of alternative method of compliance.* Assume that, for a particular type of consumer credit card account, a bank only provides periodic statements electronically and only accepts payments electronically (consistent with applicable law and regulatory guidance▶, including the consumer notice and consent procedures of the Electronic Signatures in Global and National Commerce Act (E-Sign Act), 15 U.S.C. 7001 *et seq.*◀). Under these circumstances, the bank could comply with § 227.22(a) even if it does not provide periodic statements 21 days before the payment due date consistent with § 227.22(b)(2).

§ 227.23—Unfair Acts or Practices Regarding Allocation of Payments

* * * * *

2. *Adjustments of one dollar or less permitted.* When allocating payments, the bank may adjust amounts by one dollar or less. For example, if a bank is allocating $100 pursuant to § 227.23▶(a)(2)◀[(b)] among balances of $1,000, $2,000, and $4,000, the bank may apply $14 to the $1,000 balance, $29 to the $2,000 balance, and $57 to the $4,000 balance.

3. *Applicable balances and [annual percentage] rates.* * * *

4. *Use of permissible allocation methods.* A bank is not prohibited from changing the allocation method for a consumer credit card account or from using different allocation methods for different consumer credit card accounts, so long as the methods used are consistent with § 227.23. For example, a bank may change from allocating to the highest rate balance first pursuant to § 227.23(a)▶(1)◀ to allocating pro rata pursuant to § 227.23▶(a)(2)◀[(b)] or vice versa. Similarly, a bank may allocate to the highest rate balance first pursuant to § 227.23(a)▶(1)◀ on some of its accounts and allocate pro rata pursuant to § 227.23▶(a)(2)◀[(b)] on other accounts.

* * * * *

6. *Balances with the same [annual percentage] rate.* When the same annual percentage rate applies to more than one balance on an account and a different annual percentage rate applies to at least one other balance on that account, § 227.23 ▶generally◀ does not require that any particular method be used when allocating among the balances with the same annual percentage rate. Under these circumstances, a bank may treat the balances with the same rate as a single balance or separate balances. *See* comments 23(a)▶(1)◀–1.iv and 23▶(a)(2)◀[(b)]–2.iv. ▶However, when a consumer will not be obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time, that balance must be treated as a balance with an annual percentage rate of zero for purposes of § 227.23 during that period of time. For example, if an account has a $1,000 purchase balance and a $2,000 balance on which the consumer will not be obligated to pay interest if that balance is paid in full prior to July 1 and a 15% annual percentage rate applies to both, the balances must be treated as balances with different rates for purposes of § 227.23 until July 1. In addition, for purposes of allocating pursuant to § 227.23(a)(1), any amount paid by the consumer in excess of the required minimum periodic payment must be applied first to the $1,000 purchase balance except during the last two billing cycles of the promotional period (when it must be applied first to any remaining portion of the $2,000 balance). *See* comment 23(a)(1)–1.v.◀

23(a)▶(1)◀ High-to-Low Method

1. * * *

▶v. Assume that on January 1 a consumer uses a credit card account to make a $1,200 purchase subject to a

promotional offer under which interest accrues at an annual percentage rate of 15% but the consumer will not be obligated to pay that interest if the balance is paid in full on or before June 30. The billing cycles for this account begin on the first day of the month and end on the last day of the month. Each month from January through June, the consumer uses the account to make $200 in purchases that are not subject to the promotional offer but are subject to the 15% rate. Each month from February through June, the consumer pays $400 in excess of the required minimum periodic payment on the payment due date, which is the twenty-fifth of the month. Any interest that accrues on the non-promotional purchases is paid by the required minimum periodic payment. A bank using this method would allocate the $400 excess payments received on February 25, March 25, and April 25 as follows: $200 to pay off the non-promotional balance (that is subject to the 15% rate) and the remaining $200 to the promotional balance (that is treated as a balance with a rate of zero). Section 227.23(b), however, requires the bank to allocate the entire $400 excess payment received on May 25 to the promotional balance. Similarly, § 227.23(b) requires the bank to allocate the $400 excess payment received on June 25 as follows: $200 to the promotional balance (which pays that purchase in full) and the remaining $200 to the non-promotional balance.◄

23►(a)(2)◄[(b)] Pro Rata Method

1. *Total balance.* A bank may, but is not required to, deduct amounts paid by the consumer's required minimum periodic payment when calculating the total balance for purposes of § 227.23►(a)(2)◄[(b)(3)]. *See* comment 23►(a)(2)◄[(b)]–2.iii.

* * * * *

►23(b) Special Rule for Accounts Subject to Certain Promotional Programs

1. *Grace periods.* Section 227.23(b) applies to promotional programs under which the consumer is not obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time. A grace period during which a consumer may repay one or more balances on a consumer credit card account is not a ''promotional program'' for purposes of § 227.23(b).◄

§ 227.24—Unfair Acts or Practices Regarding Increases in Annual Percentage Rates

1. *Relationship to Regulation Z, 12 CFR part 226.* A bank that complies with the applicable disclosure requirements in Regulation Z, 12 CFR part 226, has complied with the disclosure requirements in § 227.24. *See* 12 CFR 226.5a, 226.6, 226.9. For example, a bank may comply with the requirement in § 227.24(a) to disclose at account opening the annual percentage rates that will apply to each category of transactions by complying with the disclosure requirements in 12 CFR 226.5a regarding applications and solicitations and the requirements in 12 CFR 226.6 regarding account-opening disclosures. Similarly, in order to increase an annual percentage rate on new transactions pursuant to § 227.24(b)(3), a bank must comply with the disclosure requirements in 12 CFR 226.9►(b), (c), or (g)◄ [(c) or (g)]. However, nothing in § 227.24 alters the requirements in 12 CFR 226.9(c) and (g) that creditors provide consumers with written notice at least 45 days prior to the effective date of certain increases in the annual percentage rates on open-end (not home-secured) credit plans.

►2. *Relationship to grace period.* Nothing in § 227.24 prohibits a bank from assessing interest due to the loss of a grace period to the extent consistent with § 227.25. In addition, a bank has not reduced an annual percentage rate on a consumer credit account for purposes of § 227.24 if the bank does not charge interest on a balance when the consumer pays that balance in full prior to the expiration of a grace period.

3. *Category of transactions.* For purposes of § 227.24, a ''category of transactions'' is a type or group of transactions to which an annual percentage rate applies that is different than the annual percentage rate that applies to other transactions. For example, purchase transactions, cash advance transactions, and balance transfer transactions are separate categories of transactions for purposes of § 227.24 if a bank applies different annual percentage rates to each. Furthermore, if, for example, the bank applies different annual percentage rates to different types of purchase transactions (such as one rate for purchases of gasoline and a different rate for all other purchases), each type constitutes a separate category of transactions for purposes of § 227.24.

4. *Account opening.*

i. *Multiple accounts with same bank.* When a consumer has a credit card account with a bank and the consumer opens a new credit card account with the same bank (or its affiliate or subsidiary), the opening of the new account constitutes an ''account opening'' for purposes of § 227.24 if, more than 15/30 days after the new account is opened, the consumer has the ability to obtain additional extensions of credit on each account. For example, assume that, on January 1 of year one, a consumer opens a credit card account with a bank. On July 1 of year one, the consumer opens a second credit card account with that bank. On July 15, a $1,000 balance is transferred from the first account to the second account. The opening of the second account constitutes the opening of an account for purposes of § 227.24 so long as, on July 17/August 1, the consumer can engage in transactions using either account. Under these circumstances, the bank could not increase an annual percentage rate on the second account pursuant to § 227.24(b)(3) until July 1 of year two (which is one year after the second account was opened).

ii. *Replacement or consolidation.*

A. *Generally.* A consumer credit card account has not been opened for purposes of § 227.24 when a consumer credit card account issued by a bank is replaced or consolidated with another consumer credit card account issued by the same bank (or its affiliate or subsidiary). Circumstances in which a consumer credit card account has not been opened for purposes of § 227.24 include when:

(1) A retail credit card is replaced with a cobranded general purpose card that can be used at a wider number of merchants;

(2) A credit card account is replaced with another consumer credit card account offering different features;

(3) A credit card account is consolidated or combined with one or more other credit card accounts into a single credit card account; or

(4) A credit card account acquired through merger or acquisition is replaced with a credit card account issued by the acquiring bank.

B. *Limitation.* A bank that replaces or consolidates a consumer credit card account with another consumer credit card account issued by the bank (or its affiliate or subsidiary) may not increase an annual percentage rate in a manner otherwise prohibited by § 227.24. For example, assume that, on January 1 of year one, a consumer opens a consumer credit card account with an annual percentage rate for purchases of 15%. On July 1 of year one, the account is replaced with a consumer credit card account that offers different features (such as rewards on purchases). Under

these circumstances, the bank cannot increase the annual percentage rate for purchases to a rate that is higher than 15% pursuant to § 227.24(b)(3) until January 1 of year two (which is one year after the first account was opened).◄

24(a) General Rule

1. *Rates that will apply to each category of transactions.* Section 227.24(a) requires banks to disclose, at account opening, the annual percentage rates that will apply to each category of transactions on the account. A bank cannot satisfy this requirement by disclosing at account opening only a range of rates or that a rate will be ''up to'' a particular amount. ►The disclosure requirements in § 227.24(a) do not apply to annual percentage rates that are contingent on a particular event or occurrence or may be applied at the bank's discretion (such as penalty rates) insofar as those rates may be applied consistent with § 227.24.◄

2. * * *

i. Assume that, at account opening on January 1 of year one, a bank discloses that the annual percentage rate for purchases is a non-variable rate of 15% and will apply for six months. The bank also discloses that, after six months, the annual percentage rate for purchases will be a variable rate that is currently 18% and will be adjusted quarterly by adding a margin of 8 percentage points to a publicly available index not under the bank's control. ►Furthermore,◄ ⟦Finally,⟧ the bank discloses that the annual percentage rate for cash advances is the same variable rate that will apply to purchases after six months. ►Finally, the bank discloses that, to the extent consistent with § 227.24 and other applicable law, a non-variable penalty rate of 30% may apply if the consumer makes a late payment.◄ The payment due date for the account is the twenty-fifth day of the month and the required minimum periodic payments are applied to accrued interest and fees but do not reduce the purchase and cash advance balances.

* * * * *

iii. Assume that, at account opening on January 1 of year one, a bank discloses that the annual percentage rate for purchases is a variable rate determined by adding a margin of 6 percentage points to a publicly-available index outside of the bank's control. The bank also discloses that, to the extent consistent with § 227.24 and other applicable law, a non-variable penalty rate of 28% may apply if the consumer makes a late payment. The due date for the account is the fifteenth of the month. On May 30 of year two, the account has a purchase balance of $1,000. On May 31, the creditor provides a notice pursuant to 12 CFR 226.9(c) informing the consumer of a new variable rate that will apply on July 16 for all purchases made on or after June 8 (calculated by using the same index and an increased margin of 8 percentage points). On June 7, the consumer makes a $500 purchase. On June 8, the consumer makes a $200 purchase. On June 25, the bank has not received the payment due on June 15 and provides the consumer with a notice pursuant to 12 CFR 226.9(g) stating that the penalty rate of 28% will apply as of August 9 to all transactions made on or after July 3 ►and that, if the consumer becomes more than 30 days late, the penalty rate will apply to all balances on the account◄. On July 4, the consumer makes a $300 purchase.

* * * * *

C. Same facts as paragraph A. above except the payment due on June 15 of year two is received on July 20. Section 227.24(b)(4) permits the bank to apply the 28% penalty rate to all balances on the account and to future transactions because it has not received payment within 30 days after the due date. Because the bank provided a 12 CFR 226.9(g) notice on June ►25◄⟦24⟧ stating the 28% penalty rate, the bank may apply the 28% penalty rate to all balances on the account as well as any future transactions on August 9 without providing an additional notice pursuant to 12 CFR 226.9(g).

►iv. Assume that, at account opening on January 1 of year one, the bank discloses a promotional program under which interest on purchases made during January will accrue at a non-variable rate of 20%, but the consumer will not be obligated to pay that interest if those purchases are paid in full by December 31 of year one. On January 15, the consumer makes a purchase of $2,000. No other transactions are made on the account. The payment due on April 1 is not received until April 10. Section 227.24 does not permit the bank to deny the consumer the opportunity to avoid interest charges on the $2,000 purchase by paying that purchase in full on or before December 31 of year one. If, however, the $2,000 purchase remains unpaid on January 1 of year two, § 227.24 does not prohibit the bank from charging the interest accrued on that purchase during year one.◄

24(b) Exceptions

►1. *Delayed implementation of rate increase.* If § 227.24(b) permits a bank to apply an increased annual percentage rate on a date that is not the first day of a billing cycle, the bank may delay application of the increased rate until the first day of the following billing cycle without relinquishing the ability to apply that rate. For example, assume that, at account opening on January 1, a bank discloses that a non-variable annual percentage rate of 10% will apply to purchases for six months and a non-variable rate of 15% will apply thereafter. The first day of the billing cycle for the account is the fifteenth of the month. If the six-month period expires on July 1, the bank may delay application of the 15% rate until July 15 without relinquishing its ability to apply that rate under § 227.24(b)(1).◄

24(b)(1) Account Opening Disclosure Exception

1. *Prohibited increases in rate.* Section § 227.24(b)(1) permits an increase in the annual percentage rate for a category of transactions to a rate disclosed at account opening upon expiration of a period of time that was also disclosed at account opening. Section 227.24(b)(1) does not permit application of ►an increased annual percentage rate◄ ⟦increased rates that are⟧ disclosed at account opening ►that is◄ ⟦but are⟧ contingent on a particular event or occurrence or ►that◄ may be applied at the bank's discretion. The following examples illustrate rate increases that are not permitted by § 227.24⟦(a)⟧:

* * * * *

⟦iii. Assume that a bank discloses at account opening on January 1 of year one that interest on purchases will be deferred for one year, although interest will accrue on purchases during that year at a non-variable rate of 20%. The bank further discloses that, if all purchases made during year one are not paid in full by the end of that year, the bank will begin charging interest on the purchase balance and new purchases at 20% and will retroactively charge interest on the purchase balance at a rate of 20% starting on the date of each purchase made during year one. On January 1 of year one, the consumer makes a purchase of $1,500. No other transactions are made on the account. On January 1 of year two, $500 of the $1,500 purchase remains unpaid. Section 227.24 does not permit the bank to reach back to charge interest on the $1,500 purchase from January 1 through December 31 of year one. However, the bank may apply the previously-disclosed 20% rate to the $500 purchase balance beginning on January 1 of year two (pursuant to § 227.24(b)(1)).⟧

⟦2. *Loss of grace period.* Nothing in § 227.24 prohibits a bank from assessing interest due to the loss of a grace period to the extent consistent with § 227.25.⟧

►2.◄ [3.] *Application of rate that is lower than disclosed rate.* Section § 227.24(b)(1) permits an increase in the annual percentage rate for a category of transactions to a rate disclosed at account opening upon expiration of a period of time that was also disclosed at account opening. Nothing in § 227.24 prohibits a bank from applying a rate that is lower than ►a◄ [the] disclosed rate ►either during or◄ upon expiration of the period. However, ►once the◄ [if a] lower rate is applied to an existing balance, the bank cannot subsequently increase the rate on that balance unless it [has] provided the consumer with advance notice of the increase pursuant to 12 CFR 226.9►(b)◄ or (c). ►This notice must state the period of time during which the lower rate will apply and the rate that will apply after expiration of that period.◄ Furthermore, ►a bank that applies a lower rate to transactions that occurred during the first year after account opening may not subsequently increase the rate that applies to those transactions to a rate that is higher than the increased rate disclosed at account opening◄ [the bank cannot increase the rate on that existing balance to a rate that is higher than the increased rate disclosed at account opening]. The following ►examples illustrate◄ [example illustrates] the application of ►the◄ [this] rule:

* * * * *

►ii. Assume that a bank discloses at account opening on January 1 of year one that a non-variable annual percentage rate of 15% will apply to purchases for one year, after which that rate will increase to a non-variable rate of 18%. The bank also discloses that, to the extent consistent with § 227.24 and other applicable law, a non-variable penalty rate of 30% may apply if the consumer's required minimum periodic payment is received after the payment due date, which is the tenth of the month. The required minimum periodic payments are applied to accrued interest and fees but do not reduce the purchase balance.

A. On September 30 of year one, the account has a purchase balance of $1,400 at the 15% rate. On October 1, the bank provides a notice pursuant to 12 CFR 226.9(c) informing the consumer that the rate for new purchases will decrease to a non-variable rate of 10% for six months (from October 1 through March 31 of year two) and that, beginning on April 1 of year two, the rate for purchases will increase to a non-variable rate of 20%. The bank does not apply the 10% rate to the $1,400 purchase balance. On October 15 of year one, the consumer makes a $300 purchase at the 10% rate. On January 1 of year two, the bank may begin accruing interest on the $1,400 purchase balance at 18% (as disclosed at account opening). On January 15 of year two, the consumer makes a $150 purchase at the 10% rate. On April 1 of year two, the 10% rate that applies to the $300 purchase and the $150 purchase expires. The bank may begin accruing interest on the $150 purchase at 20% (as disclosed in the 12 CFR 226.9(c) notice). Because, however, the $300 purchase occurred during the first year after account opening, the bank cannot increase the rate that applies to that purchase to a rate that is higher than the 18% rate disclosed at account opening.

B. Same facts as above except that the required minimum periodic payment due on November 10 of year one is not received until November 15. Section 227.24(b)(1) does not permit the bank to increase any annual percentage rate on the account at this time. The bank may, however, apply the 30% penalty rate to new transactions beginning on January 1 of year two pursuant to § 227.24(b)(3) by providing a 12 CFR 226.9(g) notice informing the consumer of this increase no later than November 16 of year one. On January 1 of year two, § 227.24(b)(1) permits the bank to begin accruing interest on the $1,400 purchase balance at 18% (as disclosed at account opening). If the consumer makes the $150 purchase on January 15 of year two, § 227.24(b)(3) would permit the bank to apply the 30% rate to that purchase. On April 1 of year two, the 10% rate that applies to the $300 purchase expires. Because this purchase occurred during the first year after account opening, the bank cannot increase the rate that applies to that purchase to a rate that is higher than the 18% rate disclosed at account opening.◄

24(b)(2) Variable Rate Exception

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5. *Changing a variable* [*annual percentage*] *rate to a non-variable* [*annual percentage*] *rate.* * * *

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24(b)(3) Advance Notice Exception

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2. *Transactions that* ►*occurred prior to provision of notice or within seven days after provision of notice*◄ [*occur more than seven days after notice provided*]. ►Section 227.24(b)(3) generally permits a bank to apply an increased rate to transactions that occur after provision of a 12 CFR 226.9(b) notice or more than seven days after provision of a 12 CFR 226.9(c) or (g) notice. If a rate increase is disclosed pursuant to both 12 CFR 226.9(b) and 12 CFR 226.9(c), that rate may only be applied to transactions that occur more than seven days after provision of the 12 CFR 226.9(c) notice. Section 227.24(b)(3) does not permit a bank to reach back to days before the effective date of the rate increase under 12 CFR 226.9(c) or (g) when calculating interest charges. *See* comment 24(b)(3)–3.◄ [Section 227.24(b)(3) generally prohibits a bank from applying an increased rate to transactions that occur within seven days after provision of the 12 CFR 226.9 (c) or (g) notice.] ►Whether a transaction occurred prior to provision of a notice or within seven days after provision of a notice is determined by the date of the transaction. In some cases, however, a merchant may place a ''hold'' on the available credit on an account for an estimated transaction amount when the actual transaction amount will not be known until a later date. In these circumstances, the date of the transaction for purposes of § 227.24(b)(3) is the date on which the merchant determines the actual transaction amount. For example, assume that, when a consumer uses a credit card account to check into a hotel on July 1, the hotel obtains authorization for a $750 hold on the account to ensure there is adequate available credit to cover the anticipated cost of the stay. When the consumer checks out on July 4, the actual cost of the stay is $850 because of additional incidental costs, and the hotel charges this amount to the account. For purposes of § 227.24(b)(3), the transaction occurred on July 4.◄ [This prohibition does not, however, apply to transactions that are authorized within seven days after provision of the 12 CFR 226.9 (c) or (g) notice but are settled more than seven days after the notice was provided.]

3. *Examples.*

i. Assume that a consumer credit card account is opened on January 1 of year one. On March 14 of year two, the account has a purchase balance of $2,000 at a non-variable annual percentage rate of 15%. On March 15, the bank provides a notice pursuant to 12 CFR 226.9(c) informing the consumer that the rate for new purchases will increase to a non-variable rate of 18% on May 1. The notice further states that the 18% rate will apply for six months (until November 1) and states that thereafter the bank will apply a variable rate that is currently 22% and is determined by adding a margin of 12 percentage points to a publicly-available index that is not under the bank's

control. The seventh day after provision of the notice is March 22 and, on that date, the consumer makes a $200 purchase. On March 24, the consumer makes a $1,000 purchase. On May 1, § 227.24(b)(3) permits the bank to begin accruing interest at 18% on the $1,000 purchase made on March 24. The bank is not permitted to apply the 18% rate to the $2,200 purchase balance as of March 22. After six months (November 2), the bank may begin accruing interest on any remaining portion of the $1,000 purchase at the previously-disclosed variable rate determined using the 12-point margin.

[ii. Same facts as above except that the $200 purchase is authorized by the bank on March 22 but is not settled until March 23. On May 1, § 227.24(b)(3) permits the bank to start charging interest at 18% on both the $200 purchase and the $1,000 purchase. The bank is not permitted to apply the 18% rate to the $2,000 purchase balance as of March 22.]

►ii.◄ [iii.] Same facts as [in paragraph i.] above except that on September 17 of year two (which is 45 days before expiration of the 18% non-variable rate), the bank provides a notice pursuant to 12 CFR 226.9(c) informing the consumer that, on November 2, a new variable rate will apply to new purchases and any remaining portion of the $1,000 balance (calculated by using the same index and a reduced margin of 10 percentage points). The notice further states that, on May 1 of year three, the margin will increase to the margin disclosed ►in the March 15 notice◄ [at account opening] (12 percentage points). On May 1 of year three, § 227.24(b)(3) permits the bank to increase the margin used to determine the variable rate that applies to new purchases to 12 percentage points and to apply that rate to any remaining portion of the $1,000 purchase as well as to new purchases. [*See* comment 24(b)(1)–3.] The bank is not permitted to apply this rate to any remaining portion of the $2,200 purchase balance as of March 22.

►4. *Application of a lower rate.* Nothing in § 227.24 prohibits a bank from lowering the annual percentage rate that applies to an existing balance or to new transactions. However, once the lower rate is applied to an existing balance, the bank cannot subsequently increase the rate on that balance unless it provided the consumer with advance notice of the increase pursuant to 12 CFR 226.9(b) or (c). This notice must state the period of time during which the lower rate will apply and the rate that will apply after expiration of that period. Furthermore, a bank that applies a decreased rate to transactions that occurred prior to provision of the notice—or, in the case of a 12 CFR 226.9(c) or (g) notice, transactions that occurred within seven days after provision of the notice—may not subsequently increase the rate that applies to those transactions to a rate that is higher than the rate that applied prior to the decrease. The following examples illustrate the application of the rule:

i. Assume that a bank discloses at account opening on January 1 of year one that a non-variable annual percentage rate of 10% will apply to purchases for one year, after which that rate will increase to a non-variable rate of 15%. The bank also discloses that, to the extent consistent with § 227.24 and other applicable law, a non-variable penalty rate of 30% may apply if the consumer's required minimum periodic payment is received after the payment due date, which is the tenth of the month. The required minimum periodic payments are applied to accrued interest and fees but do not reduce the purchase balance. On June 30 of year two, the account has a purchase balance of $1,000 at the 15% rate. On July 1, the bank provides a notice pursuant to 12 CFR 226.9(c) informing the consumer that the rate for new purchases will decrease to a non-variable rate of 5% for six months (from July 1 through December 31 of year two) and that, beginning on January 1 of year three, the rate for purchases will increase to a non-variable rate of 17%. On July 8 of year two, the consumer makes a $200 purchase. On July 9, the consumer makes a $100 purchase. On January 1 of year three, § 227.24(b)(3) permits the bank to begin accruing interest on the $100 purchase at 17%. The bank may not apply the 17% rate to the $200 purchase because that transaction occurred within seven days after provision of the 12 CFR 226.9(c) notice. If the bank applied the 5% rate to the $1,000 purchase balance and the $200 purchase, the bank may not increase the rate that applies to those amounts to a rate that is higher than 15% on January 1 of year three.

ii. Same facts as above except that the required minimum periodic payment due on September 10 of year two is not received until September 15 of year two. On September 15 of year two, the bank provides a notice pursuant to 12 CFR 226.9(g) informing the consumer that the rate for new purchases will increase to the 30% penalty rate on October 31. On October 31, § 227.23(b)(3) permits the bank to begin accruing interest at 30% on any purchase made on or after September 23. The bank may not, however, apply the 30% rate to the $1,300 in purchases. Instead, the bank must continue to apply the 5% rate to the $100 purchase until at least January 1 of year three when § 227.24(b)(3) permits the bank to begin accruing interest on that purchase at 17%. Similarly, if the bank applied the 5% rate to the $1,000 purchase balance and the $200 purchase, the bank may begin accruing interest on those amounts at 15% on January 1 of year three.

iii. Assume that a bank discloses at account opening on January 1 of year one that the rate that applies to purchases is a variable annual percentage rate that is currently 18% and will be adjusted quarterly by adding a margin of 8 percentage points to a publicly available index not under the bank's control. The bank also discloses that, to the extent consistent with § 227.24 and other applicable law, a non-variable penalty rate of 30% may apply if the consumer's required minimum periodic payment is received after the payment due date, which is the first of the month. On July 30 of year two, the consumer uses the account for a $1,000 purchase in response to a promotional offer. Under the terms of this offer, interest on purchases made during the months of July through September will accrue at the variable rate for purchases but the consumer will not be obligated to pay that interest if all purchases made during that three-month period are paid in full by December 31 of year two. The payment due on September 1 of year two is not received until September 6. Section 227.24 does not permit the bank to deny the consumer the opportunity to avoid interest charges on the $1,000 purchase by paying that purchase in full on or before December 31 of year two. The bank may, however, provide a notice pursuant to 12 CFR 226.9(g) on September 2 of year two informing the consumer that the promotional offer does not apply to purchases made on or after September 10 and that the rate for such purchases will increase to the 30% penalty rate on October 18. On December 31 of year two, the $1,000 purchase has been paid in full. Under these circumstances, the bank may not charge any interest accrued on the $1,000 purchase.

iv. Assume that a bank discloses at account opening on January 1 of year one that the rate that applies to cash advances is a variable annual percentage rate that is currently 24% and will be adjusted quarterly by adding a margin of 14 percentage points to a publicly available index not under the bank's control. On July 1 of year two, the bank provides checks that access the account

and, pursuant to 12 CFR 226.9(b)(3)(A), discloses that a promotional rate of 15% will apply to credit extended by use of the checks until January 1 of year three, after which the cash advance rate determined using the 14-point margin will apply. On July 15 of year two, the consumer uses one of the checks to pay for a $500 transaction. On January 1 of year three, § 227.24(b)(3) permits the bank to apply the cash advance rate determined using the 14-point margin to the $500 transaction.◄

24(b)(5) Workout ►and Temporary Hardship◄ Arrangement Exception

1. *Scope of exception.* Nothing in § 227.24(b)(5) permits a bank to alter the requirements of § 227.24 pursuant to a workout ►or temporary hardship◄ arrangement between a consumer and the bank. For example, a bank cannot increase an annual percentage rate pursuant to a workout ►or temporary hardship◄ arrangement unless otherwise permitted by § 227.24. In addition, a bank cannot require the consumer to make payments with respect to a protected balance that exceed the payments permitted under § 227.24(c).

2. *Variable* ⟦*annual percentage*⟧ *rates.* If the annual percentage rate that applied to a category of transactions prior to commencement of the workout ►or temporary hardship◄ arrangement varied with an index consistent with § 227.24(b)(2), the rate applied to that category of transactions following an increase pursuant to § 227.24(b)(5) must be determined using the same formula (index and margin).

3. *Example►s◄.*

►i.◄ Assume that, consistent with § 227.24(b)(4), the margin used to determine a variable annual percentage rate that applies to a $5,000 balance is increased from 5 percentage points to 15 percentage points. Assume also that the bank and the consumer subsequently agree to a workout arrangement that reduces the margin back to 5 points on the condition that the consumer pay a specified amount by the payment due date each month. If the consumer does not pay the agreed-upon amount by the payment due date, the bank may increase the margin for the variable rate that applies to the $5,000 balance up to 15 percentage points. 12 CFR 226.9 does not require advance notice of this type of increase.

►ii. Assume that a consumer fails to make four consecutive minimum payments totaling $480 on a consumer credit card account with a balance of $6,000 and that, consistent with § 227.24(b)(4), the annual percentage rate that applies to that balance is increased from a non-variable rate of 15% to a non-variable penalty rate of 30%. Assume also that the bank and the consumer subsequently agree to a temporary hardship arrangement that reduces all rates on the account to 0% on the condition that the consumer pay an amount by the payment due date each month that is sufficient to cure the $480 delinquency within six months. If the consumer pays the agreed-upon amount by the payment due date during the six-month period and cures the delinquency, the bank may increase the rate that applies to any remaining portion of the $6,000 balance to 15% or any other rate up to the 30% penalty rate.◄

24(c) Treatment of Protected Balances

* * * * *

24(c)(1) Repayment

* * * * *

Paragraph 24(c)(1)(i)

* * * * *

2. *Amortization when applicable* ⟦*annual percentage*⟧ *rate is variable.*

* * *

* * * * *

24(c)(2) Fees and Charges

1. *Fee or charge based solely on the protected balance.* A bank is prohibited from assessing a fee or charge based solely on balances to which § 227.24(c) applies. For example, a bank is prohibited from assessing a monthly maintenance fee that would not be charged if the account did not have a protected balance. A bank is not, however, prohibited from ►continuing to assess a periodic fee that was assessed before the account had a protected balance.◄ ►Similarly, a bank is not prohibited from◄ assessing fees such as late payment fees or fees for exceeding the credit limit even if such fees are based in part on the protected balance ►or if the only balance on the account is a protected balance◄.

§ 227.25—Unfair Balance Computation Method

25(a) General Rule

* * * * *

►3. *Charging accrued interest at expiration of certain promotional programs.* When a bank offers a promotional program under which a consumer will not be obligated to pay interest that accrues on a balance if that balance is paid in full prior to a specified date or expiration of a specified period of time, § 227.25 does not prohibit the bank from charging that accrued interest to the account if the balance is not paid in full prior to the specified date (consistent with applicable law and regulatory guidance).◄

* * * * *

Department of the Treasury

Office of Thrift Supervision

12 CFR Chapter V

Text of Proposed Revisions

Certain conventions have been used to highlight the proposed revisions. New language is shown inside ►bold-type arrows◄ while language that would be deleted is set off with ⟦bold-type brackets⟧.

Authority and Issuance

For the reasons discussed in the joint preamble, OTS proposes to further amend 12 CFR part 535, as amended at 74 FR 5567, January 29, 2009, as set forth below:

PART 535—UNFAIR OR DECEPTIVE ACTS OR PRACTICES

1. Section 535.23 is revised to read as follows:

§ 535.23 Unfair allocation of payments.

When different annual percentage rates apply to different balances on a consumer credit card account►:

(a) *General rule.* Except as provided in paragraph (b) of this section◄, you must allocate any amount paid by the consumer in excess of the required minimum periodic payment among the balances using one of the following methods:

►(1)◄ ⟦(a)⟧ *High-to-low method.* The amount paid by the consumer in excess of the required minimum periodic payment is allocated first to the balance with the highest annual percentage rate and any remaining portion to the other balances in descending order based on the applicable annual percentage rate.

►(2)◄ ⟦(b)⟧ *Pro rata method.* The amount paid by the consumer in excess of the required minimum periodic payment is allocated among the balances in the same proportion as each balance bears to the total balance.

►(b) *Special rule for accounts subject to certain promotional programs.* When a promotional program provides that a consumer will not be obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time, you must allocate amounts paid by the consumer in excess of the required minimum periodic payment first to that balance during the two billing cycles immediately preceding expiration of the specified period and any remaining

portion to the other balances consistent with paragraph (a) of this section.◄

2. Section 535.24 is amended by revising paragraph (b) to read as follows:

§ 535.24 Unfair increases in annual percentage rates.

* * * * *

(b) *Exceptions.* The prohibition in paragraph (a) of this section on increasing annual percentage rates does not apply where an annual percentage rate may be increased pursuant to one of the exceptions in this paragraph.

(1) *Account opening disclosure exception.* An annual percentage rate for a category of transactions may be increased to ►an annual percentage rate◄ [a rate] disclosed at account opening upon expiration of a period of time disclosed at account opening. ►This exception does not permit application of an increased annual percentage rate disclosed at account opening that is contingent on a particular event or occurrence or that may be applied at your discretion.◄

(2) *Variable rate exception.* An annual percentage rate for a category of transactions that varies according to an index that is not under your control and is available to the general public may be increased due to an increase in the index.

(3) *Advance notice exception.* An annual percentage rate for a category of transactions may be increased pursuant to a notice under 12 CFR 226.9►(b), (c), or (g)◄ [(c) or (g)]►, provided that:

(i) If you disclose the increased rate pursuant to 12 CFR 226.9(b), that rate must not be applied to transactions that occurred prior to provision of the notice;

(ii) If you disclose the increased rate pursuant to 12 CFR 226.9(c) or (g), that rate must not be applied to transactions that occurred within seven days after provision of the notice; and

(iii) This exception does not permit an increase in any annual percentage rate during the first year after the account is opened.◄ [for transactions that occur more than seven days after provision of the notice. This exception does not permit an increase in any annual percentage rate during the first year after the account is opened.]

(4) *Delinquency exception.* An annual percentage rate may be increased due to your not receiving the consumer's required minimum periodic payment within 30 days after the due date for that payment.

(5) *Workout ►and temporary hardship◄ arrangement exception.* An annual percentage rate may be increased due to the consumer's ►completion of◄ [failure to comply with the terms of] a workout ►or temporary hardship◄ arrangement between you and the consumer ►or the consumer's failure to comply with the terms of such an arrangement◄, provided that the annual percentage rate applicable to a category of transactions following any such increase does not exceed the rate that applied to that category of transactions prior to commencement of the [workout] arrangement.

►(6) *Servicemembers Civil Relief Act exception.* An annual percentage rate that has been decreased pursuant to 50 U.S.C. app. 527 may be increased once that provision no longer applies, provided that the annual percentage rate applicable to a category of transactions following any such increase does not exceed the rate that applied to that category of transactions prior to the decrease.◄

* * * * *

3. In Appendix A to Part 535:

A. Add *Section 535.21—Definitions.*

B. Under *Section 535.22—Unfair Acts or Practices Regarding Time to Make Payment*, under *22(b) Compliance with General Rule,* paragraph 3. is revised.

C. Under *Section 535.23—Unfair Acts or Practices Regarding Allocation of Payments:*

(i) Paragraph 2., the heading of paragraph 3., and paragraphs 4. and 6. are revised;

(ii) Redesignate *23(a) High-to-Low Method as 23(a)(1) High-to-Low Method;*

(iii) Under *23(a)(1) High-to-Low Method,* paragraph 1.v. is added;

(iv) Redesignate *23(b) Pro Rata Method as 23(a)(2) Pro Rata Method;*

(v) Under *23(a)(2) Pro Rata Method,* paragraph 1. is revised; and

(vi) Add *23(b) Special Rule for Accounts Subject to Certain Promotional Programs.*

D. Under *Section 535.24—Unfair Acts or Practices Regarding Increases in Annual Percentage Rates:*

(i) Paragraph 1. is revised;

(ii) Add paragraphs 2., 3., 4.;

(iii) Under *24(a) General Rule,* paragraphs 1., 2.i. introductory text, 2.iii. introductory text, and 2.iii.C. are revised, and paragraph 2.iv. is added;

(iv) Under *24(b) Exceptions,* add paragraph 1.;

(v) Under *24(b)(1) Account Opening Disclosure Exception,* paragraph 1. introductory text is revised, paragraph 1.iii. and paragraph 2. are removed, paragraph 3. is redesignated as paragraph 2., the introductory text of newly designated paragraph 2. is revised, and paragraph 2.ii. is added;

(vi) Under *24(b)(2) Variable Rate Exception,* the heading of paragraph 5. is revised;

(vii) Under *24(b)(3) Advance Notice Exception,* paragraphs 2. and 3. are revised and paragraph 4. is added;

(viii) Revise *24(b)(5) Workout Arrangement Exception;*

(ix) Under *24(c) Treatment of Protected Balances,* under *24(c)(1) Repayment,* under *Paragraph 24(c)(1)(i),* the heading of paragraph 2. is revised; and

(x) Under *24(c) Treatment of Protected Balances,* under *24(c)(2) Fees and Charges,* paragraph 1. is revised.

E. Under *Section 535.25—Unfair Balance Computation Method,* under *25(a) General Rule,* paragraph 3. is revised.

Appendix A to Part 535—Official Staff Commentary

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Subpart C—Consumer Credit Card Account Practices

►*§ 535.21—Definitions*

21(a) Annual Percentage Rate

1. *Use of ''rate.''* For purposes of Subpart C, ''rate'' has the same meaning as ''annual percentage rate'' unless otherwise specified.

21(c) Consumer Credit Card Account

1. *Closed accounts.* If a consumer credit card account with an outstanding balance is closed, the account continues to be the same consumer credit card account for purposes of Subpart C with respect to that balance. For example, if a savings association or a consumer closes a consumer credit card account with an outstanding balance, the savings association would still be prohibited from increasing the annual percentage rate that applies to that balance unless permitted by one of the exceptions in § 535.24(b).

2. *Acquired accounts.* If, through merger or acquisition (for example), a savings association acquires a consumer credit card account with an outstanding balance, the account continues to be the same consumer credit card account for purposes of Subpart C with respect to that balance. For example, if a consumer credit card account has a $1,000 purchase balance with an annual percentage rate of 15% and the savings association that acquires that account applies an 18% rate to purchases, the savings association would be prohibited from applying the 18% rate to the $1,000 balance unless permitted by one of the exceptions in § 535.24(b).

3. *Balance transfers.*

i. *Between accounts issued by the same savings association.* If a balance is transferred from a consumer credit card account issued by a savings association to another credit account issued by the same savings association or its affiliate or subsidiary, the account continues to be the same consumer credit card account for purposes of Subpart C with respect to that balance unless the account to which the balance is transferred is an open-end credit plan secured by the consumer's dwelling. For example, if a

consumer credit card account has a $2,000 purchase balance with an annual percentage rate of 15% and that balance is transferred to another consumer credit card account issued by the same savings association that applies an 18% rate to purchases, the savings association would be prohibited from applying the 18% rate to the $2,000 balance unless permitted by one of the exceptions in § 535.24(b). Additional circumstances in which a balance is considered transferred for purposes of this comment include when:

A. A retail credit card with an outstanding balance is replaced or substituted with a cobranded general purpose card that can be used with a broader merchant base;

B. A credit card account with an outstanding balance is replaced or substituted with another credit card account offering different features;

C. A credit card account with an outstanding balance is consolidated or combined with one or more other credit card accounts into a single credit card account; and

D. A credit card account is replaced or substituted with a line of credit that can be accessed solely by an account number.

ii. *Between accounts issued by different institutions.* If a balance is transferred to a consumer credit card account issued by a savings association from a credit account issued by a different savings association or an institution that is not an affiliate or subsidiary of the savings association that issued the consumer credit card account, the provisions of Subpart C do not prohibit the savings association to which the balance is transferred from applying its account terms to that balance, provided that those terms comply with Subpart C. For example, if a consumer credit card account issued by savings association A has a $1,000 purchase balance at an annual percentage rate of 15% and the consumer transfers that balance to a consumer credit card account with a purchase rate of 17% issued by savings association B, savings association B may apply the 17% rate to the $1,000 balance. However, savings association B may not subsequently increase the rate on that balance unless permitted by one of the exceptions in § 535.24(b).◀

§ 535.22—Unfair Time To Make Payment

* * * * *

22(b) Compliance With General Rule

* * * * *

3. *Example of alternative method of compliance.* Assume that, for a particular type of consumer credit card account, a savings association only provides periodic statements electronically and only accepts payments electronically (consistent with applicable law and regulatory guidance▶, including the consumer notice and consent procedures of the Electronic Signatures in Global and National Commerce Act (E-Sign Act), 15 U.S.C. 7001 *et seq.*◀). Under these circumstances, the savings association could comply with § 535.22(a) even if it does not provide periodic statements 21 days before the payment due date consistent with § 535.22(b)(2).

§ 535.23—Unfair Allocation of Payments

* * * * *

2. *Adjustments of one dollar or less permitted.* When allocating payments, the savings association may adjust amounts by one dollar or less. For example, if a savings association is allocating $100 pursuant to § 535.23▶(a)(2)◀**[**(b)**]** among balances of $1,000, $2,000, and $4,000, the savings association may apply $14 to the $1,000 balance, $29 to the $2,000 balance, and $57 to the $4,000 balance.

3. *Applicable balances and [annual percentage] rates.* * * *

4. *Use of permissible allocation methods.* A savings association is not prohibited from changing the allocation method for a consumer credit card account or from using different allocation methods for different consumer credit card accounts, so long as the methods used are consistent with § 535.23. For example, a savings association may change from allocating to the highest rate balance first pursuant to § 535.23(a)▶(1)◀ to allocating pro rata pursuant to § 535.23▶(a)(2)◀**[**(b)**]** or vice versa. Similarly, a savings association may allocate to the highest rate balance first pursuant to § 535.23(a)▶(1)◀ on some of its accounts and allocate pro rata pursuant to § 535.23▶(a)(2)◀**[**(b)**]** on other accounts.

* * * * *

6. *Balances with the same [annual percentage] rate.* When the same annual percentage rate applies to more than one balance on an account and a different annual percentage rate applies to at least one other balance on that account, § 535.23 ▶generally◀ does not require that any particular method be used when allocating among the balances with the same annual percentage rate. Under these circumstances, a savings association may treat the balances with the same rate as a single balance or separate balances. *See* comments 23(a)▶(1)◀–1.iv and 23▶(a)(2)◀**[**(b)**]**–2.iv. ▶However, when a consumer will not be obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time, that balance must be treated as a balance with an annual percentage rate of zero for purposes of § 535.23 during that period of time. For example, if an account has a $1,000 purchase balance and a $2,000 balance on which the consumer will not be obligated to pay interest if that balance is paid in full prior to July 1 and a 15% annual percentage rate applies to both, the balances must be treated as balances with different rates for purposes of § 535.23 until July 1. In addition, for purposes of allocating pursuant to § 535.23(a)(1), any amount paid by the consumer in excess of the required minimum periodic payment must be applied first to the $1,000 purchase balance except during the last two billing cycles of the promotional period (when it must be applied first to any remaining portion of the $2,000 balance). *See* comment 23(a)(1)–1.v.◀

23(a)▶(1)◀ High-to-Low Method

1. * * *

▶v. Assume that on January 1 a consumer uses a credit card account to make a $1,200 purchase subject to a promotional offer under which interest accrues at an annual percentage rate of 15% but the consumer will not be obligated to pay that interest if the balance is paid in full on or before June 30. The billing cycles for this account begin on the first day of the month and end on the last day of the month. Each month from January through June, the consumer uses the account to make $200 in purchases that are not subject to the promotional offer but are subject to the 15% rate. Each month from February through June, the consumer pays $400 in excess of the required minimum periodic payment on the payment due date, which is the twenty-fifth of the month. Any interest that accrues on the non-promotional purchases is paid by the required minimum periodic payment. A savings association using this method would allocate the $400 excess payments received on February 25, March 25, and April 25 as follows: $200 to pay off the non-promotional balance (that is subject to the 15% rate) and the remaining $200 to the promotional balance (that is treated as a balance with a rate of zero). Section 535.23(b), however, requires the savings association to allocate the entire $400 excess payment received on May 25 to the promotional balance. Similarly, § 535.23(b) requires the savings association to allocate the $400 excess payment received on June 25 as follows: $200 to the promotional balance (which pays that purchase in full) and the remaining $200 to the non-promotional balance.◀

*23▶(a)(2)◀**[**(b)**]** Pro Rata Method*

1. Total balance. A savings association may, but is not required to, deduct amounts paid by the consumer's required minimum periodic payment when calculating the total balance for purposes of § 535.23▶(a)(2)◀**[**(b)(3)**]**. *See* comment 23▶(a)(2)◀**[**(b)**]**–2.iii.

* * * * *

▶23(b) Special Rule for Accounts Subject to Certain Promotional Programs

1. *Grace periods.* Section 535.23(b) applies to promotional programs under which the consumer is not obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time. A grace period during which a consumer may repay one or more balances on a consumer credit card account is not a ''promotional program'' for purposes of § 535.23(b).◀

§ 535.24—Unfair Increases in Annual Percentage Rates

1. *Relationship to Regulation Z, 12 CFR part 226.* A savings association that complies with the applicable disclosure requirements in Regulation Z, 12 CFR part 226, has complied with the disclosure requirements in § 535.24. *See* 12 CFR 226.5a, 226.6, 226.9. For example, a savings association may comply with the requirement in § 535.24(a) to disclose at account opening the annual percentage rates that will apply to each category of transactions by complying with the disclosure requirements in 12 CFR 226.5a regarding applications and solicitations and the requirements in 12 CFR 226.6 regarding account-opening disclosures. Similarly, in

order to increase an annual percentage rate on new transactions pursuant to § 535.24(b)(3), a savings association must comply with the disclosure requirements in 12 CFR 226.9►(b), (c), or (g)◄[(c) or (g)]. However, nothing in § 535.24 alters the requirements in 12 CFR 226.9(c) and (g) that creditors provide consumers with written notice at least 45 days prior to the effective date of certain increases in the annual percentage rates on open-end (not home-secured) credit plans.

►2. *Relationship to grace period.* Nothing in § 535.24 prohibits a savings association from assessing interest due to the loss of a grace period to the extent consistent with § 535.25. In addition, a savings association has not reduced an annual percentage rate on a consumer credit account for purposes of § 535.24 if the savings association does not charge interest on a balance when the consumer pays that balance in full prior to the expiration of a grace period.

3. *Category of transactions.* For purposes of § 535.24, a ''category of transactions'' is a type or group of transactions to which an annual percentage rate applies that is different than the annual percentage rate that applies to other transactions. For example, purchase transactions, cash advance transactions, and balance transfer transactions are separate categories of transactions for purposes of § 535.24 if a savings association applies different annual percentage rates to each. Furthermore, if, for example, the savings association applies different annual percentage rates to different types of purchase transactions (such as one rate for purchases of gasoline and a different rate for all other purchases), each type constitutes a separate category of transactions for purposes of § 535.24.

4. *Account opening.*

i. *Multiple accounts with same savings association.* When a consumer has a credit card account with a savings association and the consumer opens a new credit card account with the same savings association (or its affiliate or subsidiary), the opening of the new account constitutes an ''account opening'' for purposes of § 535.24 if, more than 15/30 days after the new account is opened, the consumer has the ability to obtain additional extensions of credit on each account. For example, assume that, on January 1 of year one, a consumer opens a credit card account with a savings association. On July 1 of year one, the consumer opens a second credit card account with that savings association. On July 15, a $1,000 balance is transferred from the first account to the second account. The opening of the second account constitutes the opening of an account for purposes of § 535.24 so long as, on July 17/August 1, the consumer can engage in transactions using either account. Under these circumstances, the savings association could not increase an annual percentage rate on the second account pursuant to § 535.24(b)(3) until July 1 of year two (which is one year after the second account was opened).

ii. *Replacement or consolidation.*

A. *Generally.* A consumer credit card account has not been opened for purposes of § 535.24 when a consumer credit card account issued by a savings association is replaced or consolidated with another consumer credit card account issued by the same savings association (or its affiliate or subsidiary). Circumstances in which a consumer credit card account has not been opened for purposes of § 535.24 include when:

(1) A retail credit card is replaced with a cobranded general purpose card that can be used at a wider number of merchants;

(2) A credit card account is replaced with another consumer credit card account offering different features;

(3) A credit card account is consolidated or combined with one or more other credit card accounts into a single credit card account; or

(4) A credit card account acquired through merger or acquisition is replaced with a credit card account issued by the acquiring institution.

B. *Limitation.* A savings association that replaces or consolidates a consumer credit card account with another consumer credit card account issued by the savings association (or its affiliate or subsidiary) may not increase an annual percentage rate in a manner otherwise prohibited by § 535.24. For example, assume that, on January 1 of year one, a consumer opens a consumer credit card account with an annual percentage rate for purchases of 15%. On July 1 of year one, the account is replaced with a consumer credit card account that offers different features (such as rewards on purchases). Under these circumstances, the savings association cannot increase the annual percentage rate for purchases to a rate that is higher than 15% pursuant to § 535.24(b)(3) until January 1 of year two (which is one year after the first account was opened).◄

24(a) General Rule

1. *Rates that will apply to each category of transactions.* Section 535.24(a) requires savings associations to disclose, at account opening, the annual percentage rates that will apply to each category of transactions on the account. A savings association cannot satisfy this requirement by disclosing at account opening only a range of rates or that a rate will be ''up to'' a particular amount. ►The disclosure requirements in § 535.24(a) do not apply to annual percentage rates that are contingent on a particular event or occurrence or may be applied at the savings association's discretion (such as penalty rates) insofar as those rates may be applied consistent with § 535.24.◄

2. * * *

i. Assume that, at account opening on January 1 of year one, a savings association discloses that the annual percentage rate for purchases is a non-variable rate of 15% and will apply for six months. The savings association also discloses that, after six months, the annual percentage rate for purchases will be a variable rate that is currently 18% and will be adjusted quarterly by adding a margin of 8 percentage points to a publicly available index not under the savings association's control. ►Furthermore,◄ [Finally,] the savings association discloses that the annual percentage rate for cash advances is the same variable rate that will apply to purchases after six months. ►Finally, the savings association discloses that, to the extent consistent with § 535.24 and other applicable law, a non-variable penalty rate of 30% may apply if the consumer makes a late payment.◄ The payment due date for the account is the twenty-fifth day of the month and the required minimum periodic payments are applied to accrued interest and fees but do not reduce the purchase and cash advance balances.

* * * * *

iii. Assume that, at account opening on January 1 of year one, a savings association discloses that the annual percentage rate for purchases is a variable rate determined by adding a margin of 6 percentage points to a publicly-available index outside of the savings association's control. The savings association also discloses that, to the extent consistent with § 535.24 and other applicable law, a non-variable penalty rate of 28% may apply if the consumer makes a late payment. The due date for the account is the fifteenth of the month. On May 30 of year two, the account has a purchase balance of $1,000. On May 31, the creditor provides a notice pursuant to 12 CFR 226.9(c) informing the consumer of a new variable rate that will apply on July 16 for all purchases made on or after June 8 (calculated by using the same index and an increased margin of 8 percentage points). On June 7, the consumer makes a $500 purchase. On June 8, the consumer makes a $200 purchase. On June 25, the savings association has not received the payment due on June 15 and provides the consumer with a notice pursuant to 12 CFR 226.9(g) stating that the penalty rate of 28% will apply as of August 9 to all transactions made on or after July 3 ►and that, if the consumer becomes more than 30 days late, the penalty rate will apply to all balances on the account◄. On July 4, the consumer makes a $300 purchase.

* * * * *

C. Same facts as paragraph A. above except the payment due on June 15 of year two is received on July 20. Section 535.24(b)(4) permits the savings association to apply the 28% penalty rate to all balances on the account and to future transactions because it has not received payment within 30 days after the due date. Because the savings association provided a 12 CFR 226.9(g) notice on June ►25◄[24] stating the 28% penalty rate, the savings association may apply the 28% penalty rate to all balances on the account as well as any future transactions on August 9 without providing an additional notice pursuant to 12 CFR 226.9(g).

►iv. Assume that, at account opening on January 1 of year one, the savings association discloses a promotional program under which interest on purchases made during January will accrue at a non-variable rate of 20%, but the consumer will not be obligated to pay that interest if those purchases are paid in full by December 31 of year one. On January 15, the consumer makes a purchase of $2,000. No other transactions are made on the account. The payment due on April 1 is not received until April 10. Section 535.24 does not permit the savings association to deny the consumer the opportunity to avoid interest charges on the $2,000 purchase by

paying that purchase in full on or before December 31 of year one. If, however, the $2,000 purchase remains unpaid on January 1 of year two, § 535.24 does not prohibit the savings association from charging the interest accrued on that purchase during year one.◄

24(b) Exceptions

►1. *Delayed implementation of rate increase.* If § 535.24(b) permits a savings association to apply an increased annual percentage rate on a date that is not the first day of a billing cycle, the savings association may delay application of the increased rate until the first day of the following billing cycle without relinquishing the ability to apply that rate. For example, assume that, at account opening on January 1, a savings association discloses that a non-variable annual percentage rate of 10% will apply to purchases for six months and a non-variable rate of 15% will apply thereafter. The first day of the billing cycle for the account is the fifteenth of the month. If the six-month period expires on July 1, the savings association may delay application of the 15% rate until July 15 without relinquishing its ability to apply that rate under § 535.24(b)(1).◄

24(b)(1) Account Opening Disclosure Exception

1. *Prohibited increases in rate.* Section § 535.24(b)(1) permits an increase in the annual percentage rate for a category of transactions to a rate disclosed at account opening upon expiration of a period of time that was also disclosed at account opening. Section 535.24(b)(1) does not permit application of ►an increased annual percentage rate◄ [increased rates that are] disclosed at account opening ►that is◄ [but are] contingent on a particular event or occurrence or ►that◄ may be applied at the savings association's discretion. The following examples illustrate rate increases that are not permitted by § 535.24[(a)]:

* * * * *

[iii. Assume that a savings association discloses at account opening on January 1 of year one that interest on purchases will be deferred for one year, although interest will accrue on purchases during that year at a non-variable rate of 20%. The savings association further discloses that, if all purchases made during year one are not paid in full by the end of that year, the savings association will begin charging interest on the purchase balance and new purchases at 20% and will retroactively charge interest on the purchase balance at a rate of 20% starting on the date of each purchase made during year one. On January 1 of year one, the consumer makes a purchase of $1,500. No other transactions are made on the account. On January 1 of year two, $500 of the $1,500 purchase remains unpaid. Section 535.24 does not permit the savings association to reach back to charge interest on the $1,500 purchase from January 1 through December 31 of year one. However, the savings association may apply the previously-disclosed 20% rate to the $500 purchase balance beginning on January 1 of year two (pursuant to § 535.24(b)(1)).]

[2. *Loss of grace period.* Nothing in § 535.24 prohibits a savings association from assessing interest due to the loss of a grace period to the extent consistent with § 535.25.]

►2.◄ [3.] *Application of rate that is lower than disclosed rate.* Section § 535.24(b)(1) permits an increase in the annual percentage rate for a category of transactions to a rate disclosed at account opening upon expiration of a period of time that was also disclosed at account opening. Nothing in § 535.24 prohibits a savings association from applying a rate that is lower than ►a◄ [the] disclosed rate ►either during or◄ upon expiration of the period. However, ►once the◄ [if a] lower rate is applied to an existing balance, the savings association cannot subsequently increase the rate on that balance unless it [has] provided the consumer with advance notice of the increase pursuant to 12 CFR 226.9►(b)◄ or (c). ►This notice must state the period of time during which the lower rate will apply and the rate that will apply after expiration of that period.◄ Furthermore, ►a savings association that applies a lower rate to transactions that occurred during the first year after account opening may not subsequently increase the rate that applies to those transactions to a rate that is higher than the increased rate disclosed at account opening◄ [the savings association cannot increase the rate on that existing balance to a rate that is higher than the increased rate disclosed at account opening]. The following ►examples illustrate◄ [example illustrates] the application of ►the◄ [this] rule:

* * * * *

►ii. Assume that a savings association discloses at account opening on January 1 of year one that a non-variable annual percentage rate of 15% will apply to purchases for one year, after which that rate will increase to a non-variable rate of 18%. The savings association also discloses that, to the extent consistent with § 535.24 and other applicable law, a non-variable penalty rate of 30% may apply if the consumer's required minimum periodic payment is received after the payment due date, which is the tenth of the month. The required minimum periodic payments are applied to accrued interest and fees but do not reduce the purchase balance.

A. On September 30 of year one, the account has a purchase balance of $1,400 at the 15% rate. On October 1, the savings association provides a notice pursuant to 12 CFR 226.9(c) informing the consumer that the rate for new purchases will decrease to a non-variable rate of 10% for six months (from October 1 through March 31 of year two) and that, beginning on April 1 of year two, the rate for purchases will increase to a non-variable rate of 20%. The savings association does not apply the 10% rate to the $1,400 purchase balance. On October 15 of year one, the consumer makes a $300 purchase at the 10% rate. On January 1 of year two, the savings association may begin accruing interest on the $1,400 purchase balance at 18% (as disclosed at account opening). On January 15 of year two, the consumer makes a $150 purchase at the 10% rate. On April 1 of year two, the 10% rate that applies to the $300 purchase and the $150 purchase expires. The savings association may begin accruing interest on the $150 purchase at 20% (as disclosed in the 12 CFR 226.9(c) notice). Because, however, the $300 purchase occurred during the first year after account opening, the savings association cannot increase the rate that applies to that purchase to a rate that is higher than the 18% rate disclosed at account opening.

B. Same facts as above except that the required minimum periodic payment due on November 10 of year one is not received until November 15. Section 535.24(b)(1) does not permit the savings association to increase any annual percentage rate on the account at this time. The savings association may, however, apply the 30% penalty rate to new transactions beginning on January 1 of year two pursuant to § 535.24(b)(3) by providing a 12 CFR 226.9(g) notice informing the consumer of this increase no later than November 16 of year one. On January 1 of year two, § 535.24(b)(1) permits the savings association to begin accruing interest on the $1,400 purchase balance at 18% (as disclosed at account opening). If the consumer makes the $150 purchase on January 15 of year two, § 535.24(b)(3) would permit the savings association to apply the 30% rate to that purchase. On April 1 of year two, the 10% rate that applies to the $300 purchase expires. Because this purchase occurred during the first year after account opening, the savings association cannot increase the rate that applies to that purchase to a rate that is higher than the 18% rate disclosed at account opening.◄

24(b)(2) Variable Rate Exception

* * * * *

5. *Changing a variable [annual percentage] rate to a non-variable [annual percentage] rate.* * * *

* * * * *

24(b)(3) Advance Notice Exception

* * * * *

2. *Transactions that ►occurred prior to provision of notice or within seven days after provision of notice◄ [occur more than seven days after notice provided].* ►Section 535.24(b)(3) generally permits a savings association to apply an increased rate to transactions that occur after provision of a 12 CFR 226.9(b) notice or more than seven days after provision of a 12 CFR 226.9(c) or (g) notice. If a rate increase is disclosed pursuant to both 12 CFR 226.9(b) and 12 CFR 226.9(c), that rate may only be applied to transactions that occur more than seven days after provision of the 12 CFR 226.9(c) notice. Section 535.24(b)(3) does not permit a savings association to reach back to days before the effective date of the rate increase under 12 CFR 226.9(c) or (g) when calculating interest charges. *See* comment 24(b)(3)–3.◄ [Section 535.24(b)(3) generally prohibits a savings association from applying an increased rate to transactions that occur within seven days after provision of the 12 CFR 226.9 (c) or (g) notice.] ►Whether a transaction occurred prior to provision of a notice or within seven days after provision of a notice is determined by the date of the transaction. In some cases, however, a merchant may place a ''hold'' on the available credit on an account for an

estimated transaction amount when the actual transaction amount will not be known until a later date. In these circumstances, the date of the transaction for purposes of § 535.24(b)(3) is the date on which the merchant determines the actual transaction amount. For example, assume that, when a consumer uses a credit card account to check into a hotel on July 1, the hotel obtains authorization for a $750 hold on the account to ensure there is adequate available credit to cover the anticipated cost of the stay. When the consumer checks out on July 4, the actual cost of the stay is $850 because of additional incidental costs, and the hotel charges this amount to the account. For purposes of § 535.24(b)(3), the transaction occurred on July 4.◄ [This prohibition does not, however, apply to transactions that are authorized within seven days after provision of the 12 CFR 226.9 (c) or (g) notice but are settled more than seven days after the notice was provided.]

3. Examples.

i. Assume that a consumer credit card account is opened on January 1 of year one. On March 14 of year two, the account has a purchase balance of $2,000 at a non-variable annual percentage rate of 15%. On March 15, the savings association provides a notice pursuant to 12 CFR 226.9(c) informing the consumer that the rate for new purchases will increase to a non-variable rate of 18% on May 1. The notice further states that the 18% rate will apply for six months (until November 1) and states that thereafter the savings association will apply a variable rate that is currently 22% and is determined by adding a margin of 12 percentage points to a publicly-available index that is not under the savings association's control. The seventh day after provision of the notice is March 22 and, on that date, the consumer makes a $200 purchase. On March 24, the consumer makes a $1,000 purchase. On May 1, § 535.24(b)(3) permits the savings association to begin accruing interest at 18% on the $1,000 purchase made on March 24. The savings association is not permitted to apply the 18% rate to the $2,200 purchase balance as of March 22. After six months (November 2), the savings association may begin accruing interest on any remaining portion of the $1,000 purchase at the previously-disclosed variable rate determined using the 12-point margin.

[ii. Same facts as above except that the $200 purchase is authorized by the savings association on March 22 but is not settled until March 23. On May 1, § 535.24(b)(3) permits the savings association to start charging interest at 18% on both the $200 purchase and the $1,000 purchase. The savings association is not permitted to apply the 18% rate to the $2,000 purchase balance as of March 22.]

►ii.◄ [iii.] Same facts as [in paragraph i.] above except that on September 17 of year two (which is 45 days before expiration of the 18% non-variable rate), the savings association provides a notice pursuant to 12 CFR 226.9(c) informing the consumer that, on November 2, a new variable rate will apply to new purchases and any remaining portion of the $1,000 balance (calculated by using the same index and a reduced margin of 10 percentage points). The notice further states that, on May 1 of year three, the margin will increase to the margin disclosed ►in the March 15 notice◄ [at account opening] (12 percentage points). On May 1 of year three, § 535.24(b)(3) permits the savings association to increase the margin used to determine the variable rate that applies to new purchases to 12 percentage points and to apply that rate to any remaining portion of the $1,000 purchase as well as to new purchases. [*See* comment 24(b)(1)–3.] The savings association is not permitted to apply this rate to any remaining portion of the $2,200 purchase balance as of March 22.

►4. *Application of a lower rate*. Nothing in § 535.24 prohibits a savings association from lowering the annual percentage rate that applies to an existing balance or to new transactions. However, once the lower rate is applied to an existing balance, the savings association cannot subsequently increase the rate on that balance unless it provided the consumer with advance notice of the increase pursuant to 12 CFR 226.9(b) or (c). This notice must state the period of time during which the lower rate will apply and the rate that will apply after expiration of that period. Furthermore, a savings association that applies a decreased rate to transactions that occurred prior to provision of the notice—or, in the case of a 12 CFR 226.9(c) or (g) notice, transactions that occurred within seven days after provision of the notice—may not subsequently increase the rate that applies to those transactions to a rate that is higher than the rate that applied prior to the decrease. The following examples illustrate the application of the rule:

i. Assume that a savings association discloses at account opening on January 1 of year one that a non-variable annual percentage rate of 10% will apply to purchases for one year, after which that rate will increase to a non-variable rate of 15%. The savings association also discloses that, to the extent consistent with § 535.24 and other applicable law, a non-variable penalty rate of 30% may apply if the consumer's required minimum periodic payment is received after the payment due date, which is the tenth of the month. The required minimum periodic payments are applied to accrued interest and fees but do not reduce the purchase balance. On June 30 of year two, the account has a purchase balance of $1,000 at the 15% rate. On July 1, the savings association provides a notice pursuant to 12 CFR 226.9(c) informing the consumer that the rate for new purchases will decrease to a non-variable rate of 5% for six months (from July 1 through December 31 of year two) and that, beginning on January 1 of year three, the rate for purchases will increase to a non-variable rate of 17%. On July 8 of year two, the consumer makes a $200 purchase. On July 9, the consumer makes a $100 purchase. On January 1 of year three, § 535.24(b)(3) permits the savings association to begin accruing interest on the $100 purchase at 17%. The savings association may not apply the 17% rate to the $200 purchase because that transaction occurred within seven days after provision of the 12 CFR 226.9(c) notice. If the savings association applied the 5% rate to the $1,000 purchase balance and the $200 purchase, the savings association may not increase the rate that applies to those amounts to a rate that is higher than 15% on January 1 of year three.

ii. Same facts as above except that the required minimum periodic payment due on September 10 of year two is not received until September 15 of year two. On September 15 of year two, the savings association provides a notice pursuant to 12 CFR 226.9(g) informing the consumer that the rate for new purchases will increase to the 30% penalty rate on October 31. On October 31, § 535.23(b)(3) permits the savings association to begin accruing interest at 30% on any purchase made on or after September 23. The savings association may not, however, apply the 30% rate to the $1,300 in purchases. Instead, the savings association must continue to apply the 5% rate to the $100 purchase until at least January 1 of year three when § 535.24(b)(3) permits the savings association to begin accruing interest on that purchase at 17%. Similarly, if the savings association applied the 5% rate to the $1,000 purchase balance and the $200 purchase, the savings association may begin accruing interest on those amounts at 15% on January 1 of year three.

iii. Assume that a savings association discloses at account opening on January 1 of year one that the rate that applies to purchases is a variable annual percentage rate that is currently 18% and will be adjusted quarterly by adding a margin of 8 percentage points to a publicly available index not under the savings association's control. The savings association also discloses that, to the extent consistent with § 535.24 and other applicable law, a non-variable penalty rate of 30% may apply if the consumer's required minimum periodic payment is received after the payment due date, which is the first of the month. On July 30 of year two, the consumer uses the account for a $1,000 purchase in response to a promotional offer. Under the terms of this offer, interest on purchases made during the months of July through September will accrue at the variable rate for purchases but the consumer will not be obligated to pay that interest if all purchases made during that three-month period are paid in full by December 31 of year two. The payment due on September 1 of year two is not received until September 6. Section 535.24 does not permit the savings association to deny the consumer the opportunity to avoid interest charges on the $1,000 purchase by paying that purchase in full on or before December 31 of year two. The savings association may, however, provide a notice pursuant to 12 CFR 226.9(g) on September 2 of year two informing the consumer that the promotional offer does not apply to purchases made on or after September 10 and that the rate for such purchases will increase to the 30% penalty rate on October 18. On December 31 of year two, the $1,000 purchase has been paid in full. Under these circumstances, the savings association may not charge any interest accrued on the $1,000 purchase.

iv. Assume that a savings association discloses at account opening on January 1 of year one that the rate that applies to cash advances is a variable annual percentage rate

that is currently 24% and will be adjusted quarterly by adding a margin of 14 percentage points to a publicly available index not under the savings association's control. On July 1 of year two, the savings association provides checks that access the account and, pursuant to 12 CFR 226.9(b)(3)(A), discloses that a promotional rate of 15% will apply to credit extended by use of the checks until January 1 of year three, after which the cash advance rate determined using the 14-point margin will apply. On July 15 of year two, the consumer uses one of the checks to pay for a $500 transaction. On January 1 of year three, § 535.24(b)(3) permits the savings association to apply the cash advance rate determined using the 14-point margin to the $500 transaction.◄

24(b)(5) Workout ►and Temporary Hardship◄ Arrangement Exception

1. *Scope of exception.* Nothing in § 535.24(b)(5) permits a savings association to alter the requirements of § 535.24 pursuant to a workout ►or temporary hardship◄ arrangement between a consumer and the savings association. For example, a savings association cannot increase an annual percentage rate pursuant to a workout ►or temporary hardship◄ arrangement unless otherwise permitted by § 535.24. In addition, a savings association cannot require the consumer to make payments with respect to a protected balance that exceed the payments permitted under § 535.24(c).

2. *Variable* ⟦*annual percentage*⟧ *rates.* If the annual percentage rate that applied to a category of transactions prior to commencement of the workout ►or temporary hardship◄ arrangement varied with an index consistent with § 535.24(b)(2), the rate applied to that category of transactions following an increase pursuant to § 535.24(b)(5) must be determined using the same formula (index and margin).

3. *Example* ►*s*◄.

►i.◄ Assume that, consistent with § 535.24(b)(4), the margin used to determine a variable annual percentage rate that applies to a $5,000 balance is increased from 5 percentage points to 15 percentage points. Assume also that the savings association and the consumer subsequently agree to a workout arrangement that reduces the margin back to 5 points on the condition that the consumer pay a specified amount by the payment due date each month. If the consumer does not pay the agreed-upon amount by the payment due date, the savings association may increase the margin for the variable rate that applies to the $5,000 balance up to 15 percentage points. 12 CFR 226.9 does not require advance notice of this type of increase.

►ii. Assume that a consumer fails to make four consecutive minimum payments totaling $480 on a consumer credit card account with a balance of $6,000 and that, consistent with § 535.24(b)(4), the annual percentage rate that applies to that balance is increased from a non-variable rate of 15% to a non-variable penalty rate of 30%. Assume also that the savings association and the consumer subsequently agree to a temporary hardship arrangement that reduces all rates on the account to 0% on the condition that the consumer pay an amount by the payment due date each month that is sufficient to cure the $480 delinquency within six months. If the consumer pays the agreed-upon amount by the payment due date during the six-month period and cures the delinquency, the savings association may increase the rate that applies to any remaining portion of the $6,000 balance to 15% or any other rate up to the 30% penalty rate.◄

24(c) Treatment of Protected Balances

* * * * *

24(c)(1) Repayment

* * * * *

Paragraph 24(c)(1)(i)

* * * * *

2. *Amortization when applicable* ⟦*annual percentage*⟧ *rate is variable.* * * *

* * * * *

24(c)(2) Fees and Charges

1. *Fee or charge based solely on the protected balance.* A savings association is prohibited from assessing a fee or charge based solely on balances to which § 535.24(c) applies. For example, a savings association is prohibited from assessing a monthly maintenance fee that would not be charged if the account did not have a protected balance. A savings association is not, however, prohibited from ►continuing to assess a periodic fee that was assessed before the account had a protected balance.◄ ►Similarly, a savings association is not prohibited from◄ assessing fees such as late payment fees or fees for exceeding the credit limit even if such fees are based in part on the protected balance ►or if the only balance on the account is a protected balance◄.

§ 535.25—Unfair Balance Computation Method

25(a) General Rule

* * * * *

►3. *Charging accrued interest at expiration of certain promotional programs.* When a savings association offers a promotional program under which a consumer will not be obligated to pay interest that accrues on a balance if that balance is paid in full prior to a specified date or expiration of a specified period of time, § 535.25 does not prohibit the savings association from charging that accrued interest to the account if the balance is not paid in full prior to the specified date (consistent with applicable law and regulatory guidance).◄

* * * * *

National Credit Union Administration

For the reasons discussed in the joint preamble, the NCUA Board proposes to further amend 12 CFR Part 706, as amended at 74 FR 5575, January 29, 2009, as set forth below:

PART 706—UNFAIR OR DECEPTIVE ACTS OR PRACTICES

1. The authority citation for part 706 continues to read as follows:

Authority: 15 U.S.C. 57a.

2. Revise § 706.23 as follows:

§ 706.23 Unfair allocation of payments.

When different annual percentage rates apply to different balances on a consumer credit card account:

(a) *General rule.* Except as provided in paragraph (b) of this section, a federal credit union must allocate any amount paid by a member in excess of the required minimum periodic payment among the balances using one of the following methods:

(1) *High-to-low method.* The amount paid by a member in excess of the required minimum periodic payment is allocated first to the balance with the highest annual percentage rate and any remaining portion to the other balances in descending order based on the applicable annual percentage rate.

(2) *Pro rata method.* The amount paid by a member in excess of the required minimum periodic payment is allocated among the balances in the same proportion as each balance bears to the total balance.

(b) *Special rule for accounts subject to certain promotional programs.* When a promotional program provides that a member will not be obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time, a federal credit union must allocate amounts paid by a member in excess of the required minimum periodic payment first to that balance during the two billing cycles immediately preceding expiration of the specified period and any remaining portion to the other balances consistent with paragraph (a) of this section.

3. Amend § 706.24 by revising paragraphs (b)(1) through (b)(5) and adding paragraph (b)(6) to read as follows:

§ 706.24 Unfair increases in annual percentage rates.

* * * * *

(b) * * *

(1) *Account opening disclosure exception.* An annual percentage rate for a category of transactions may be increased to an annual percentage rate disclosed at account opening upon expiration of a period of time disclosed at account opening. This exception does not permit application of an increased annual percentage rate disclosed at account opening that is contingent on a particular event or occurrence or that may be applied at the federal credit union's discretion.

(2) *Variable rate exception.* An annual percentage rate for a category of transactions that varies according to an

index that is not under the federal credit union's control and is available to the general public may be increased due to an increase in the index.

(3) *Advance notice exception.* An annual percentage rate for a category of transactions may be increased pursuant to a notice under 12 CFR 226.9(b), (c), or (g), provided that:

(i) If the federal credit union discloses the increased rate pursuant to 12 CFR 226.9(b), that rate must not be applied to transactions that occurred prior to provision of the notice;

(ii) If the federal credit union discloses the increased rate pursuant to 12 CFR 226.9(c) or (g), that rate must not be applied to transactions that occurred within seven days after provision of the notice; and

(iii) This exception does not permit an increase in any annual percentage rate during the first year after an account is opened.

(4) *Delinquency exception.* An annual percentage rate may be increased due to the federal credit union not receiving a member's required minimum periodic payment within 30 days after the due date for that payment.

(5) *Workout and temporary hardship arrangement exception.* An annual percentage rate may be increased due to a member's completion of a workout or temporary hardship arrangement between a federal credit union and the member or a member's failure to comply with the terms of such an arrangement, provided that the annual percentage rate applicable to a category of transactions following any such increase does not exceed the rate that applied to that category of transactions prior to commencement of the arrangement.

(6) *Servicemembers Civil Relief Act exception.* An annual percentage rate that has been decreased pursuant to 50 U.S.C. app. 527 may be increased once that provision no longer applies, provided that the annual percentage rate applicable to a category of transactions following any such increase does not exceed the rate that applied to that category of transactions prior to the decrease.

* * * * *

4. In Appendix A to Part 706:

A. Add *Section 706.21—Definitions.*

B. Under *Section 706.22—Unfair Acts or Practices Regarding Time To Make Payment*, under *22(b) Compliance with General Rule*, paragraph 3. is revised.

C. Under *Section 706.23—Unfair Acts or Practices Regarding Allocation of Payments:*

(i) Paragraph 2., the heading of paragraph 3., and paragraphs 4. and 6. are revised;

(ii) Redesignate *23(a) High-to-Low Method* as *23(a)(1) High-to-Low Method*;

(iii) Under *23(a)(1) High-to-Low Method*, paragraph 1.v. is added;

(iv) Redesignate *23(b) Pro Rata Method* as *23(a)(2) Pro Rata Method*;

(v) Under *23(a)(2) Pro Rata Method*, paragraph 1. is revised; and

(vi) Add *23(b) Special Rule for Accounts Subject to Certain Promotional Programs.*

D. Under *Section 706.24—Unfair Acts or Practices Regarding Increases in Annual Percentage Rates:*

(i) Paragraph 1. is revised;

(ii) Add paragraphs 2., 3., 4.;

(iii) Under *24(a) General Rule*, paragraphs 1., 2.i. introductory text, 2.iii. introductory text, and 2.iii.C. are revised, and paragraph 2.iv. is added;

(iv) Under *24(b) Exceptions*, add paragraph 1.;

(v) Under *24(b)(1) Account Opening Disclosure Exception*, paragraph 1. introductory text is revised, paragraph 1.iii. and paragraph 2. are removed, paragraph 3. is redesignated as paragraph 2., the introductory text of newly designated paragraph 2. is revised, and paragraph 2.ii. is added;

(vi) Under *24(b)(2) Variable Rate Exception*, the heading of paragraph 5. is revised;

(vii) Under *24(b)(3) Advance Notice Exception*, paragraphs 2. and 3. are revised and paragraph 4. is added;

(viii) Revise *24(b)(5) Workout Arrangement Exception*;

(ix) Under *24(c) Treatment of Protected Balances*, under *24(c)(1) Repayment*, under *Paragraph 24(c)(1)(i)*, the heading of paragraph 2. is revised; and

(x) Under *24(c) Treatment of Protected Balances*, under *24(c)(2) Fees and Charges*, paragraph 1. is revised.

E. Under *Section 706.25—Unfair Balance Computation Method*, under *25(a) General Rule*, paragraph 3. is revised.

Appendix A to Part 706—Official Staff Commentary

* * * * *

Subpart C—Consumer Credit Card Account Practices Rule

§ 706.21—Definitions

21(a) Annual Percentage Rate

1. *Use of ''rate.''* For purposes of Subpart C, ''rate'' has the same meaning as ''annual percentage rate'' unless otherwise specified.

21(c) Consumer Credit Card Account

1. *Closed accounts.* If a consumer credit card account with an outstanding balance is closed, the account continues to be the same consumer credit card account for purposes of Subpart C with respect to that balance. For example, if a federal credit union or a member closes a consumer credit card account with an outstanding balance, the federal credit union would still be prohibited from increasing the annual percentage rate that applies to that balance unless permitted by one of the exceptions in § 706.24(b).

2. *Acquired accounts.* If, through merger or acquisition, for example, a federal credit union acquires a consumer credit card account with an outstanding balance, the account continues to be the same consumer credit card account for purposes of Subpart C with respect to that balance. For example, if a consumer credit card account has a $1,000 purchase balance with an annual percentage rate of 12% and the federal credit union that acquires that account applies a 15% rate to purchases, the federal credit union would be prohibited from applying the 15% rate to the $1,000 balance unless permitted by one of the exceptions in § 706.24(b).

3. *Balance transfers.*

i. *Between accounts issued by the same federal credit union.* If a balance is transferred from a consumer credit card account issued by a federal credit union to another credit account issued by the same federal credit union, the account continues to be the same consumer credit card account for purposes of Subpart C with respect to that balance unless the account to which the balance is transferred is an open-end credit plan secured by a member's dwelling. For example, if a consumer credit card account has a $2,000 purchase balance with an annual percentage rate of 12% and that balance is transferred to another consumer credit card account issued by the same federal credit union that applies a 15% rate to purchases, the federal credit union would be prohibited from applying the 15% rate to the $2,000 balance unless permitted by one of the exceptions in § 706.24(b). Additional circumstances in which a balance is considered transferred for purposes of this comment include when:

A. A retail credit card with an outstanding balance is replaced or substituted with a cobranded general purpose card that can be used with a broader merchant base;

B. A credit card account with an outstanding balance is replaced or substituted with another credit card account offering different features;

C. A credit card account with an outstanding balance is consolidated or combined with one or more other credit card accounts into a single credit card account; and

D. A credit card account is replaced or substituted with a line of credit that can be accessed solely by an account number.

ii. *Between accounts issued by different federal credit unions.* If a balance is transferred to a consumer credit card account issued by a federal credit union from a consumer credit card account issued by a different financial institution that is not an affiliate or subsidiary of the federal credit union that issued the consumer credit card account, the account is not the same consumer credit card account for purposes of Subpart C with respect to that balance. Thus,

the provisions of Subpart C do not prohibit the federal credit union to which the balance is transferred from applying its account terms to that balance, provided that those terms comply with Subpart C. For example, if a consumer credit card account issued by federal credit union A has a $1,000 purchase balance at an annual percentage rate of 13% and a member transfers that balance to a consumer credit card account with a purchase rate of 15% issued by federal credit union B, federal credit union B may apply the 15% rate to the $1,000 balance. However, federal credit union B may not subsequently increase the rate on that balance unless permitted by one of the exceptions in § 706.24(b).

706.22—Unfair Time To Make Payment

* * * * *

22(b) Compliance With General Rule

* * * * *

3. *Example of alternative method of compliance.* Assume that, for a particular type of consumer credit card account, a federal credit union only provides periodic statements electronically and only accepts payments electronically (consistent with applicable law and regulatory guidance, including the consumer notice and consent procedures of the Electronic Signatures in Global and National Commerce Act (E-Sign Act), 15 U.S.C. 7001 *et seq.*). Under these circumstances, the federal credit union could comply with § 706.22(a) even if it does not provide periodic statements 21 days before the payment due date consistent with § 706.22(b)(2).

* * * * *

§ 706.23—Unfair Acts or Practices Regarding Allocation of Payments

* * * * *

2. *Adjustments of one dollar or less permitted.* When allocating payments, the federal credit union may adjust amounts by one dollar or less. For example, if a federal credit union is allocating $100 pursuant to § 706.23(a)(2) among balances of $1,000, $2,000, and $4,000, the federal credit union may apply $14 to the $1,000 balance, $29 to the $2,000 balance, and $57 to the $4,000 balance.

3. *Applicable balances and rates.* * * *

4. *Use of permissible allocation methods.* A federal credit union is not prohibited from changing the allocation method for a consumer credit card account or from using different allocation methods for different consumer credit card accounts, so long as the methods used are consistent with § 706.23. For example, a federal credit union may change from allocating to the highest rate balance first pursuant to § 706.23(a)(1) to allocating pro rata pursuant to § 706.23(a)(2) or vice versa. Similarly, a federal credit union may allocate to the highest rate balance first pursuant to § 706.23(a)(1) on some of its accounts and allocate pro rata pursuant to § 706.23(a)(2) on other accounts.

* * * * *

6. *Balances with the same rate.* When the same annual percentage rate applies to more than one balance on an account and a different annual percentage rate applies to at least one other balance on that account, § 706.23 generally does not require that any particular method be used when allocating among the balances with the same annual percentage rate. Under these circumstances, a federal credit union may treat the balances with the same rate as a single balance or separate balances. *See* comments 23(a)(1)–1.iv and 23(a)(2)–2.iv. However, when a member will not be obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time, that balance must be treated as a balance with an annual percentage rate of zero for purposes of § 706.23 during that period of time. For example, if an account has a $1,000 purchase balance and a $2,000 balance on which the member will not be obligated to pay interest if that balance is paid in full prior to July 1 and a 15% annual percentage rate applies to both, the balances must be treated as balances with different rates for purposes of § 706.23 until July 1. In addition, for purposes of allocating pursuant to § 706.23(a)(1), any amount paid by the member in excess of the required minimum periodic payment must be applied first to the $1,000 purchase balance except during the last two billing cycles of the promotional period (when it must be applied first to any remaining portion of the $2,000 balance). *See* comment 23(a)(1)–1.v.

23(a)(1) High-to-Low Method

1. * * *

v. Assume that on January 1 a member uses a credit card account to make a $1,200 purchase subject to a promotional offer under which interest accrues at an annual percentage rate of 15% but the member will not be obligated to pay that interest if the balance is paid in full on or before June 30. The billing cycles for this account begin on the first day of the month and end on the last day of the month. Each month from January through June, the member uses the account to make $200 in purchases that are not subject to the promotional offer but are subject to the 15% rate. Each month from February through June, the member pays $400 in excess of the required minimum periodic payment on the payment due date, which is the twenty-fifth of the month. Any interest that accrues on the non-promotional purchases is paid by the required minimum periodic payment. A federal credit union using this method would allocate the $400 excess payments received on February 25, March 25, and April 25 as follows: $200 to pay off the non-promotional balance (that is subject to the 15% rate) and the remaining $200 to the promotional balance (that is treated as a balance with a rate of zero). Section 706.23(b), however, requires the federal credit union to allocate the entire $400 excess payment received on May 25 to the promotional balance. Similarly, § 706.23(b) requires the federal credit union to allocate the $400 excess payment received on June 25 as follows: $200 to the promotional balance (which pays that purchase in full) and the remaining $200 to the non-promotional balance.

23(a)(2) Pro Rata Method

1. *Total balance.* A federal credit union may, but is not required to, deduct amounts paid by the member's required minimum periodic payment when calculating the total balance for purposes of § 706.23(a)(2). *See* comment 23(a)(2)–2.iii.

* * * * *

23(b) Special Rule for Accounts Subject to Certain Promotional Programs

1. *Grace periods.* Section 706.23(b) applies to promotional programs under which the member is not obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time. A grace period during which a member may repay one or more balances on a consumer credit card account is not a ''promotional program'' for purposes of § 706.23(b).

* * * * *

§ 706.24—Unfair Increases in Annual Percentage Rates

1. *Relationship to Regulation Z, 12 CFR part 226.* A federal credit union that complies with the applicable disclosure requirements in Regulation Z, 12 CFR part 226, has complied with the disclosure requirements in § 706.24. *See* 12 CFR 226.5a, 226.6, 226.9. For example, a federal credit union may comply with the requirement in § 706.24(a) to disclose at account opening the annual percentage rates that will apply to each category of transactions by complying with the disclosure requirements in 12 CFR 226.5a regarding applications and solicitations and the requirements in 12 CFR 226.6 regarding account-opening disclosures. Similarly, in order to increase an annual percentage rate on new transactions pursuant to § 706.24(b)(3), a federal credit union must comply with the disclosure requirements in 12 CFR 226.9(b), (c), or (g). However, nothing in § 706.24 alters the requirements in 12 CFR 226.9(c) and (g) that creditors provide consumers with written notice at least 45 days prior to the effective date of certain increases in the annual percentage rates on open-end (not home-secured) credit plans.

2. *Relationship to grace period.* Nothing in § 706.24 prohibits a federal credit union from assessing interest due to the loss of a grace period to the extent consistent with § 706.25. Additionally, a federal credit union has not reduced an annual percentage rate on a consumer credit account for purposes of § 706.24 if the federal credit union does not charge interest on a balance when the member pays that balance in full prior to the expiration of a grace period.

3. *Category of transactions.* For purposes of § 706.24, a ''category of transactions'' is a type or group of transactions to which an annual percentage rate applies that is different than the annual percentage rate that applies to other transactions. For example, purchase transactions, cash advance transactions, and balance transfer transactions are separate categories of transactions for purposes of § 706.24 if a federal credit union applies different annual percentage rates to each. Furthermore, if, for example, the federal credit union applies

different annual percentage rates to different types of purchase transactions (such as one rate for purchases of gasoline and a different rate for all other purchases), each type constitutes a separate category of transactions for purposes of § 706.24.

4. *Account opening.*

i. *Multiple accounts with same federal credit union.* When a member has a credit card account with a federal credit union and the member opens a new credit card account with the same federal credit union (or its affiliate or subsidiary), the opening of the new account constitutes an ''account opening'' for purposes of § 706.24 if, more than 15/30 days after the new account is opened, the member has the ability to obtain additional extensions of credit on each account. For example, assume that, on January 1 of year one, a member opens a credit card account with a federal credit union. On July 1 of year one, the member opens a second credit card account with that federal credit union. On July 15, a $1,000 balance is transferred from the first account to the second account. The opening of the second account constitutes the opening of an account for purposes of § 706.24 so long as, on July 17/August 1, the member can engage in transactions using either account. Under these circumstances, the bank could not increase an annual percentage rate on the second account pursuant to § 706.24(b)(3) until July 1 of year two (which is one year after the second account was opened).

ii. *Replacement or consolidation.*

A. *Generally.* A consumer credit card account has not been opened for purposes of § 227.24 when a consumer credit card account issued by a bank is replaced or consolidated with another consumer credit card account issued by the same bank (or its affiliate or subsidiary). Circumstances in which a consumer credit card account has not been opened for purposes of § 227.24 include when:

(1) A retail credit card is replaced with a cobranded general purpose card that can be used at a wider number of merchants;

(2) A credit card account is replaced with another consumer credit card account offering different features;

(3) A credit card account is consolidated or combined with one or more other credit card accounts into a single credit card account; or

(4) A credit card account acquired through merger or acquisition is replaced with a credit card account issued by the acquiring federal credit union.

B. *Limitation.* A bank that replaces or consolidates a consumer credit card account with another consumer credit card account issued by the bank (or its affiliate or subsidiary) may not increase an annual percentage rate in a manner otherwise prohibited by § 227.24. For example, assume that, on January 1 of year one, a consumer opens a consumer credit card account with an annual percentage rate for purchases of 15%. On July 1 of year one, the account is replaced with a consumer credit card account that offers different features (such as rewards on purchases). Under these circumstances, the bank cannot increase the annual percentage rate for purchases to a rate that is higher than 15% pursuant to § 227.24(b)(3) until January 1 of year two (which is one year after the first account was opened).

24(a) General Rule

1. *Rates that will apply to each category of transactions.* Section 706.24(a) requires federal credit unions to disclose, at account opening, the annual percentage rates that will apply to each category of transactions on the account. A federal credit union cannot satisfy this requirement by disclosing at account opening only a range of rates or that a rate will be ''up to'' a particular amount. The disclosure requirements in § 706.24(a) do not apply to annual percentage rates that are contingent on a particular event or occurrence or may be applied at the federal credit union's discretion (such as penalty rates) insofar as those rates may be applied consistent with § 706.24.

2. * * *

i. Assume that, at account opening on January 1 of year one, a federal credit union discloses that the annual percentage rate for purchases is a non-variable rate of 5% and will apply for six months. The federal credit union also discloses that, after six months, the annual percentage rate for purchases will be a variable rate that is currently 9% and will be adjusted quarterly by adding a margin of 3 percentage points to a publicly available index not under the federal credit union's control. Furthermore, the federal credit union discloses that the annual percentage rate for cash advances is the same variable rate that will apply to purchases after six months. Finally, the federal credit union discloses that, to the extent consistent with § 706.24 and other applicable law, a non-variable penalty rate of 15% may apply if a member makes a late payment. The payment due date for the account is the twenty-fifth day of the month and the required minimum periodic payments are applied to accrued interest and fees but do not reduce the purchase and cash advance balances.

* * * * *

iii. Assume that, at account opening on January 1 of year one, a federal credit union discloses that the annual percentage rate for purchases is a variable rate determined by adding a margin of 2 percentage points to a publicly-available index outside of the federal credit union's control. The federal credit union also discloses that, to the extent consistent with § 706.24 and other applicable law, a non-variable penalty rate of 15% may apply if a member makes a late payment. The due date for the account is the fifteenth of the month. On May 30 of year two, the account has a purchase balance of $1,000. On May 31, the federal credit union provides a notice pursuant to 12 CFR 226.9(c) informing the member of a new variable rate that will apply on July 16 for all purchases made on or after June 8 (calculated by using the same index and an increased margin of 8 percentage points). On June 7, the member makes a $500 purchase. On June 8, the member makes a $200 purchase. On June 25, the federal credit union has not received the payment due on June 15 and provides the member with a notice pursuant to 12 CFR 226.9(g) stating that the penalty rate of 15% will apply as of August 9 to all transactions made on or after July 3 and that, if the member becomes more than 30 days late, the penalty rate will apply to all balances on the account. On July 4, the member makes a $300 purchase.

* * * * *

C. Same facts as paragraph A. above except the payment due on June 15 of year two is received on July 20. Section 706.24(b)(4) permits the federal credit union to apply the 15% penalty rate to all balances on the account and to future transactions because it has not received payment within 30 days after the due date. Because the federal credit union provided a 12 CFR 226.9(g) notice on June 25 stating the 15% penalty rate, the federal credit union may apply the 15% penalty rate to all balances on the account as well as any future transactions on August 9 without providing an additional notice pursuant to 12 CFR 226.9(g).

iv. Assume that, at account opening on January 1 of year one, the federal credit union discloses a promotional program under which interest on purchases made during January will accrue at a non-variable rate of 10%, but the member will not be obligated to pay that interest if those purchases are paid in full by December 31 of year one. On January 15, the member makes a purchase of $2,000. No other transactions are made on the account. The payment due on April 1 is not received until April 10. Section 706.24 does not permit the federal credit union to deny the member the opportunity to avoid interest charges on the $2,000 purchase by paying that purchase in full on or before December 31 of year one. If, however, the $2,000 purchase remains unpaid on January 1 of year two, § 706.24 does not prohibit the federal credit union from charging the interest accrued on that purchase during year one.

24(b) Exceptions

1. *Delayed implementation of rate increase.* If § 706.24(b) permits a federal credit union to apply an increased annual percentage rate on a date that is not the first day of a billing cycle, the federal credit union may delay application of the increased rate until the first day of the following billing cycle without relinquishing the ability to apply that rate. For example, assume that, at account opening on January 1, a federal credit union discloses that a non-variable annual percentage rate of 10% will apply to purchases for six months and a non-variable rate of 15% will apply thereafter. The first day of the billing cycle for the account is the fifteenth of the month. If the six-month period expires on July 1, the federal credit union may delay application of the 15% rate until July 15 without relinquishing its ability to apply that rate under § 706.24(b)(1).

24(b)(1) Account Opening Disclosure Exception

1. *Prohibited increases in rate.* Section § 706.24(b)(1) permits an increase in the annual percentage rate for a category of transactions to a rate disclosed at account opening upon expiration of a period of time that was also disclosed at account opening. Section 706.24(b)(1) does not permit application of an increased annual percentage rate disclosed at account opening that is contingent on a particular event or

occurrence or may be applied at the federal credit union's discretion. The following examples illustrate rate increases that are not permitted by § 706.24:

* * * * *

2. *Application of rate that is lower than disclosed rate.* Section § 706.24(b)(1) permits an increase in the annual percentage rate for a category of transactions to a rate disclosed at account opening upon expiration of a period of time that was also disclosed at account opening. Nothing in § 706.24 prohibits a federal credit union from applying a rate that is lower than a disclosed rate either during or upon expiration of the period. However, once the lower rate is applied to an existing balance, the federal credit union cannot subsequently increase the rate on that balance unless it provided the member with advance notice of the increase pursuant to 12 CFR 226.9(b) or (c). This notice must state the period of time during which the lower rate will apply and the rate that will apply after expiration of that period. Furthermore, a federal credit union that applies a lower rate to transactions that occurred during the first year after account opening may not subsequently increase the rate that applies to those transactions to a rate that is higher than the increased rate disclosed at account opening. The following examples illustrate the application of the rule:

* * * * *

ii. Assume that a federal credit union discloses at account opening on January 1 of year one that a non-variable annual percentage rate of 10% will apply to purchases for one year, after which that rate will increase to a non-variable rate of 12%. The federal credit union also discloses that, to the extent consistent with § 706.24 and other applicable law, a non-variable penalty rate of 15% may apply if the member's required minimum periodic payment is received after the payment due date, which is the tenth of the month. The required minimum periodic payments are applied to accrued interest and fees but do not reduce the purchase balance.

A. On September 30 of year one, the account has a purchase balance of $1,400 at the 10% rate. On October 1, the federal credit union provides a notice pursuant to 12 CFR 226.9(c) informing the member that the rate for new purchases will decrease to a non-variable rate of 7% for six months (from October 1 through March 31 of year two) and that, beginning on April 1 of year two, the rate for purchases will increase to a non-variable rate of 13%. The federal credit union does not apply the 7% rate to the $1,400 purchase balance. On October 15 of year one, the member makes a $300 purchase at the 7% rate. On January 1 of year two, the federal credit union may begin accruing interest on the $1,400 purchase balance at 12% (as disclosed at account opening). On January 15 of year two, the member makes a $150 purchase at the 7% rate. On April 1 of year two, the 7% rate that applies to the $300 purchase and the $150 purchase expires. The federal credit union may begin accruing interest on the $150 purchase at 13% (as disclosed in the 12 CFR 226.9(c) notice). Because, however, the $300 purchase occurred during the first year after account opening, the federal credit union cannot increase the rate that applies to that purchase to a rate that is higher than the 12% rate disclosed at account opening.

B. Same facts as above except that the required minimum periodic payment due on November 10 of year one is not received until November 15. Section 706.24(b)(1) does not permit the federal credit union to increase any annual percentage rate on the account at this time. The federal credit union may, however, apply the 15% penalty rate to new transactions beginning on January 1 of year two pursuant to § 706.24(b)(3) by providing a 12 CFR 226.9(g) notice informing the member of this increase no later than November 16 of year one. On January 1 of year two, § 706.24(b)(1) permits the federal credit union to begin accruing interest on the $1,400 purchase balance at 12% (as disclosed at account opening). If the member makes the $150 purchase on January 15 of year two, § 706.24(b)(3) would permit the federal credit union to apply the 15% rate to that purchase. On April 1 of year two, the 7% rate that applies to the $300 purchase expires. Because this purchase occurred during the first year after account opening, the federal credit union cannot increase the rate that applies to that purchase to a rate that is higher than the 12% rate disclosed at account opening.

24(b)(2) Variable Rate Exception

* * * * *

5. *Changing a variable rate to a non-variable rate.* * * *

* * * * *

24(b)(3) Advance Notice Exception

* * * * *

2. *Transactions that occurred prior to provision of notice or within seven days after provision of notice.* Section 706.24(b)(3) generally permits a federal credit union to apply an increased rate to transactions that occur after provision of a 12 CFR 226.9(b) notice or more than seven days after provision of a 12 CFR 226.9(c) or (g) notice. If a rate increase is disclosed pursuant to both 12 CFR 226.9(b) and 12 CFR 226.9(c), that rate may only be applied to transactions that occur more than seven days after provision of the 12 CFR 226.9(c) notice. Section 706.24(b)(3) does not permit a federal credit union to reach back to days before the effective date of the rate increase under 12 CFR 226.9(c) or (g) when calculating interest charges. *See* comment 24(b)(3)–3. Whether a transaction occurred prior to provision of a notice or within seven days after provision of a notice is determined by the date of the transaction. In some cases, however, a merchant may place a ''hold'' on the available credit on an account for an estimated transaction amount when the actual transaction amount will not be known until a later date. In these circumstances, the date of the transaction for purposes of § 706.24(b)(3) is the date on which the merchant determines the actual transaction amount. For example, assume that, when a member uses a credit card account to check into a hotel on July 1, the hotel obtains authorization for a $750 hold on the account to ensure there is adequate available credit to cover the anticipated cost of the stay. When the member checks out on July 4, the actual cost of the stay is $850 because of additional incidental costs, and the hotel charges this amount to the account. For purposes of § 706.24(b)(3), the transaction occurred on July 4.

3. *Examples.*

i. Assume that a consumer credit card account is opened on January 1 of year one. On March 14 of year two, the account has a purchase balance of $2,000 at a non-variable annual percentage rate of 5%. On March 15, the federal credit union provides a notice pursuant to 12 CFR 226.9(c) informing a member that the rate for new purchases will increase to a non-variable rate of 8% on May 1. The notice further states that the 8% rate will apply for six months (until November 1) and states that thereafter the federal credit union will apply a variable rate that is currently 9% and is determined by adding a margin of 5 percentage points to a publicly-available index that is not under the federal credit union's control. The seventh day after provision of the notice is March 22 and, on that date, the member makes a $200 purchase. On March 24, the member makes a $1,000 purchase. On May 1, § 706.24(b)(3) permits the federal credit union to begin accruing interest at 8% on the $1,000 purchase made on March 24. The federal credit union is not permitted to apply the 8% rate to the $2,200 purchase balance as of March 22. After six months (November 2), the federal credit union may begin accruing interest on any remaining portion of the $1,000 purchase at the previously-disclosed variable rate determined using the 3-point margin.

ii. Same facts as above except that on September 17 of year two (which is 45 days before expiration of the 8% non-variable rate), the federal credit union provides a notice pursuant to 12 CFR 226.9(c) informing the member that, on November 2, a new variable rate will apply to new purchases and any remaining portion of the $1,000 balance (calculated by using the same index and a reduced margin of 3 percentage points). The notice further states that, on May 1 of year three, the margin will increase to the margin disclosed in the March 15 notice (6 percentage points). On May 1 of year three, § 706.24(b)(3) permits the federal credit union to increase the margin used to determine the variable rate that applies to new purchases to 5 percentage points and to apply that rate to any remaining portion of the $1,000 purchase as well as to new purchases. The federal credit union is not permitted to apply this rate to any remaining portion of the $2,200 purchase balance as of March 22.

4. *Application of a lower rate.* Nothing in § 706.24 prohibits a federal credit union from lowering the annual percentage rate that applies to an existing balance or to new transactions. However, once the lower rate is applied to an existing balance, the federal credit union cannot subsequently increase the rate on that balance unless it provided a member with advance notice of the increase pursuant to 12 CFR 226.9(b) or (c). This notice must state the period of time during

which the lower rate will apply and the rate that will apply after expiration of that period. Furthermore, a federal credit union that applies a decreased rate to transactions that occurred prior to provision of the notice—or, in the case of a 12 CFR 226.9(c) or (g) notice, transactions that occurred within seven days after provision of the notice—may not subsequently increase the rate that applies to those transactions to a rate that is higher than the rate that applied prior to the decrease. The following examples illustrate the application of the rule:

i. Assume that a federal credit union discloses at account opening on January 1 of year one that a non-variable annual percentage rate of 7% will apply to purchases for one year, after which that rate will increase to a non-variable rate of 9%. The federal credit union also discloses that, to the extent consistent with § 706.24 and other applicable law, a non-variable penalty rate of 15% may apply if the member's required minimum periodic payment is received after the payment due date, which is the tenth of the month. The required minimum periodic payments are applied to accrued interest and fees but do not reduce the purchase balance. On June 30 of year two, the account has a purchase balance of $1,000 at the 9% rate. On July 1, the federal credit union provides a notice pursuant to 12 CFR 226.9(c) informing the consumer that the rate for new purchases will decrease to a non-variable rate of 5% for six months (from July 1 through December 31 of year two) and that, beginning on January 1 of year three, the rate for purchases will increase to a non-variable rate of 10%. On July 8 of year two, the member makes a $200 purchase. On July 9, the member makes a $100 purchase. On January 1 of year three, § 706.24(b)(3) permits the federal credit union to begin accruing interest on the $100 purchase at 10%. The federal credit union may not apply the 10% rate to the $200 purchase because that transaction occurred within seven days after provision of the 12 CFR 226.9(c) notice. If the federal credit union applied the 5% rate to the $1,000 purchase balance and the $200 purchase, the federal credit union may not increase the rate that applies to those amounts to a rate that is higher than 9% on January 1 of year three.

ii. Same facts as above except that the required minimum periodic payment due on September 10 of year two is not received until September 15 of year two. On September 15 of year two, the federal credit union provides a notice pursuant to 12 CFR 226.9(g) informing the member that the rate for new purchases will increase to the 15% penalty rate on October 31. On October 31, § 706.23(b)(3) permits the federal credit union to begin accruing interest at 15% on any purchase made on or after September 23. The federal credit union may not, however, apply the 15% rate to the $1,300 in purchases. Instead, the federal credit union must continue to apply the 5% rate to the $100 purchase until at least January 1 of year three when § 706.24(b)(3) permits the federal credit union to begin accruing interest on that purchase at 10%. Similarly, if the federal credit union applied the 5% rate to the $1,000 purchase balance and the $200 purchase, the federal credit union may begin accruing interest on those amounts at 9% on January 1 of year three.

iii. Assume that a federal credit union discloses at account opening on January 1 of year one that the rate that applies to purchases is a variable annual percentage rate that is currently 7% and will be adjusted quarterly by adding a margin of 3 percentage points to a publicly available index not under the federal credit union's control. The federal credit union also discloses that, to the extent consistent with § 706.24 and other applicable law, a non-variable penalty rate of 15% may apply if the member's required minimum periodic payment is received after the payment due date, which is the first of the month. On July 30 of year two, the member uses the account for a $1,000 purchase in response to a promotional offer. Under the terms of this offer, interest on purchases made during the months of July through September will accrue at the variable rate for purchases but the member will not be obligated to pay that interest if all purchases made during that three-month period are paid in full by December 31 of year two. The payment due on September 1 of year two is not received until September 6. Section 706.24 does not permit the federal credit union to deny the member the opportunity to avoid interest charges on the $1,000 purchase by paying that purchase in full on or before December 31 of year two. The federal credit union may, however, provide a notice pursuant to 12 CFR 226.9(g) on September 2 of year two informing the member that the promotional offer does not apply to purchases made on or after September 10 and that the rate for such purchases will increase to the 15% penalty rate on October 18. On December 31 of year two, the $1,000 purchase has been paid in full. Under these circumstances, the federal credit union may not charge any interest accrued on the $1,000 purchase.

iv. Assume that a federal credit union discloses at account opening on January 1 of year one that the rate that applies to cash advances is a variable annual percentage rate that is currently 9% and will be adjusted quarterly by adding a margin of 3 percentage points to a publicly available index not under the federal credit union's control. On July 1 of year two, the federal credit union provides checks that access the account and, pursuant to 12 CFR 226.9(b)(3)(A), discloses that a promotional rate of 5% will apply to credit extended by use of the checks until January 1 of year three, after which the cash advance rate determined using the 3-point margin will apply. On July 15 of year two, the member uses one of the checks to pay for a $500 transaction. On January 1 of year three, § 706.24(b)(3) permits the federal credit union to apply the cash advance rate determined using the 3-point margin to the $500 transaction.

24(b)(5) Workout and Temporary Hardship Arrangement Exception

1. *Scope of exception.* Nothing in § 706.24(b)(5) permits a federal credit union to alter the requirements of § 706.24 pursuant to a workout or temporary hardship arrangement between a member and the federal credit union. For example, a federal credit union cannot increase an annual percentage rate pursuant to a workout or temporary hardship arrangement unless otherwise permitted by § 706.24. In addition, a federal credit union cannot require the member to make payments with respect to a protected balance that exceeds the payments permitted under § 706.24(c).

2. *Variable rates.* If the annual percentage rate that applied to a category of transactions prior to commencement of the workout or temporary hardship arrangement varied with an index consistent with § 706.24(b)(2), the rate applied to that category of transactions following an increase pursuant to § 706.24(b)(5) must be determined using the same formula (index and margin).

3. *Examples.*

i. Assume that, consistent with § 706.24(b)(4), the margin used to determine a variable annual percentage rate that applies to a $5,000 balance is increased from 3 percentage points to 5 percentage points. Assume also that the federal credit union and the member subsequently agree to a workout arrangement that reduces the margin back to 3 points on the condition that the member pay a specified amount by the payment due date each month. If the member does not pay the agreed-upon amount by the payment due date, the federal credit union may increase the margin for the variable rate that applies to the $5,000 balance up to 5 percentage points. 12 CFR 226.9 does not require advance notice of this type of increase.

ii. Assume that a member fails to make four consecutive minimum payments totaling $480 on a consumer credit card account with a balance of $6,000 and that, consistent with § 706.24(b)(4), the annual percentage rate that applies to that balance is increased from a non-variable rate of 5% to a non-variable penalty rate of 15%. Assume also that the federal credit union and the member subsequently agree to a temporary hardship arrangement that reduces all rates on the account to 0% on the condition that the member pay an amount by the payment due date each month that is sufficient to cure the $480 delinquency within six months. If the member pays the agreed-upon amount by the payment due date during the six-month period and cures the delinquency, the federal credit union may increase the rate that applies to any remaining portion of the $6,000 balance to 5% or any other rate up to the 15% penalty rate.

24(c) Treatment of Protected Balances

* * * * *

24(c)(1) Repayment

* * * * *

Paragraph 24(c)(1)(i)

* * * * *

2. *Amortization when applicable rate is variable.* * * *

* * * * *

24(c)(2) Fees and Charges

1. *Fee or charge based solely on the protected balance.* A federal credit union is prohibited from assessing a fee or charge based solely on balances to which § 706.24(c) applies. For example, a federal credit union

is prohibited from assessing a monthly maintenance fee that would not be charged if the account did not have a protected balance. A federal credit union is not, however, prohibited from continuing to assess a periodic fee that was assessed before the account had a protected balance. Similarly, a federal credit union is not prohibited from assessing fees such as late payment fees or fees for exceeding the credit limit even if such fees are based in part on the protected balance or if the only balance on the account is a protected balance.

§ 706.25—Unfair Balance Computation Method

25(a) General Rule

* * * * *

3. *Charging accrued interest at expiration of certain promotional programs.* When a federal credit union offers a promotional program under which a member will not be obligated to pay interest that accrues on a balance if that balance is paid in full prior to a specified date or expiration of a specified period of time, § 706.25 does not prohibit the federal credit union from charging that accrued interest to the account if the balance is not paid in full prior to the specified date (consistent with applicable law and regulatory guidance).

* * * * *

By order of the Board of Governors of the Federal Reserve System, April 24, 2009.

Jennifer J. Johnson,

Secretary of the Board.

Dated: April 17, 2009.

By the Office of Thrift Supervision.

John E. Bowman,

Acting Director.

By the National Credit Union Administration Board, on April 24, 2009.

Mary F. Rupp,

Secretary of the Board.

[FR Doc. E9–9861 Filed 5–4–09; 8:45 am]

BILLING CODE 6210–01–P, 6720–01–P, 7535–01–P

Federal Register

Tuesday,
May 5, 2009

Part IV

Postal Regulatory Commission

39 CFR Parts 3001 and 3050
Periodic Reporting Rules; Final Rule

POSTAL REGULATORY COMMISSION

39 CFR Parts 3001 and 3050

[Docket No. RM2008–4; Order No. 203]

Periodic Reporting Rules

AGENCY: Postal Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Commission is adopting a set of rules to address the need for periodic reports from the Postal Service. Adoption of these rules will facilitate accountability and transparency of Postal Service operations, consistent with a new postal law. This document incorporates a revision to an internal reference in the rules. This revision was identified in a recent notice.

DATES: Effective June 4, 2009.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, 202–7689–6824 and *stephen.sharfman@prc.gov.*

SUPPLEMENTARY INFORMATION: *Regulatory History,* 73 FR 53324 (September 15, 2008).

I. Introduction

Under the Postal Accountability and Enhancement Act (PAEA), Public Law 109–435, 120 Stat. 3218 (2006), the Postal Regulatory Commission was given enhanced information gathering and reporting responsibilities. To implement its information gathering and reporting functions under the PAEA, the Commission issued its Notice of Proposed Rulemaking Prescribing Form and Content of Periodic Reports on August 22, 2008 (Order No. 104).

Initial comments on these proposed rules were filed by seven participants.[1] Reply comments were filed on November 14, 2008 by eight participants.[2] Comments were generally supportive of the proposed rules as appropriate and reasonable requirements on which to base financial reporting under the new regulatory regime under the PAEA. The Postal Service commends the rules for leaving the existing financial reporting structure essentially intact while adapting it from a subclass-based format to a product-based format. It notes that the fundamental building blocks of cost reporting will remain the same, separating accrued costs into segments, applying variability studies to form pools of attributable costs, and using data collection systems to distribute those pools to products, as summarized in the Cost and Revenue Analysis (CRA) Report and the Cost Segments and Components (CSC) Report. Costs avoided by worksharing and other characteristics will continue to be estimated, for the most part, by down-flow models supplemented by special studies. Postal Service Comments at 1–2.

The Postal Service also commends the rules for giving appropriate recognition to the transitional status of data reporting, providing a flexible approach for converting from subclass- to product-based reporting, and integrating negotiated service agreement (NSA) data into the larger reporting system. *Id.* The Postal Service concludes that overall the proposed new rules establish ''a workable framework for the ACR and periodic reporting.'' *Id.* at 2. Some participants argue that a few of the proposed rules should be pared back until experience indicates that there is a need for more robust versions of the rules while other participants argue that the proposed rules need to be made more robust in some respects. Comments are discussed in the context of the specific proposed rule to which they apply.

II. Proposals To Revise Specific Reporting Rules

A. Proposed Rule 3050.1 (Definitions)

Definition of ''Analytical Principle.'' Proposed rule 3050.1 defines certain terms used in the periodic reporting rules. Proposed paragraph (c) of this section defines ''analytical principle'' as:

> A particular economic, mathematical, or statistical theory, precept, or assumption applied by the Postal Service in producing a periodic report to the Commission.

Valpak argues that this definition is too narrow. Noting that the Commission considers a change in the specification of a regression model to be a change to an ''analytical principle,'' Valpak argues that a regression analysis ''may be viewed as a tool or a technique, or even a method, but it is not commonly understood to be a 'theory,' 'precept,' or 'assumption.' '' Valpak Comments at 21. Valpak's argument is supported by the Public Representative. Public Representative Reply Comments at 17.

The Commission believes that the ambiguity that Valpak and the Public Representative perceive is resolved when the definition of ''analytical principle'' in final rule 3050.1(c) is read together with the definition of ''quantification technique'' in final rule 3050.1(f). Final rule 3050.1(f) reads:

> *Quantification technique* refers to any data entry or manipulation technique whose validity does not require the acceptance of a particular economic, mathematical, or statistical theory, precept, or assumption. A change in quantification technique should not change the output of the analysis in which it is employed.

Together, the definitions of ''analytical principle'' and ''quantification technique'' divide the data manipulation techniques used to produce the Postal Service's periodic reports into two categories—those whose validity requires acceptance of a causal theory, and those whose validity does not.

Explanatory terms are included in a regression equation because they are assumed to ''explain,'' or partially cause, the phenomenon being measured. Because explanatory terms are assumed to influence the phenomenon being measured (or are being tested to see if they do), they fit the definition of ''analytical principle.'' In contrast, choosing a standard statistical package, such as SAS or STATA, to fit the regression equation to the data (using the standard mathematical formula for calculating least squares) does not depend on any assumption about what causes the phenomenon being measured and should not affect the result. The statistical package chosen to run the regression, therefore, fits the definition of ''quantification technique.'' This should clarify how the definitions in final rule 3050.1 fit together as a comprehensive whole. Because the Commission does not believe that the definition of ''analytical principle'' in § 3050.1(c) needs to be modified, it declines to accept Valpak's proposal.

[1] Comments of the Department of Defense in Docket No. RM2008–4, filed on October 15, 2008 (DOD Comments); Initial Comments of the Public Representative (Public Representative Comments); Initial Comments of the Greeting Card Association (GCA Comments); Initial Comments of Time Warner Inc. in Response to Order No. 104 (Time Warner Comments); Initial Comments of the United States Postal Service in Response to Order No. 104 (Postal Service Comments); Valpak Direct Marketing Systems, Inc. and Valpak Dealer's Association, Inc. Initial Comments Regarding Proposed Rules Prescribing Form and Content of Periodic Reports (Valpak Comments); and Initial Comments of Major Mailers Association (MMA Comments), filed on October 16, 2008.

[2] Reply Comments of Time Warner Inc. in Response to Order No. 104 (Time Warner Reply Comments); Reply Comments of the Public Representative (Public Representative Reply Comments); Reply Comments of United Parcel Service on Notice of Proposed Rulemaking Prescribing Form and Content of Periodic Reports (UPS Reply Comments); Reply Comments of Magazine Publishers of America, Inc., Alliance of Nonprofit Mailers and American Business Media (MPA/ANM/ABM Reply Comments); Reply Comments of Pitney Bowes Inc. (Pitney Bowes Reply Comments); Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Reply Comments Regarding Proposed Rules Prescribing Form and Content of Periodic Reports (Valpak Reply Comments); and Reply Comments of the United States Postal Service in Response to Order No. 104 (Postal Service Reply Comments), all filed on November 14, 2008.

Definition of the term ''product.'' Proposed rule 3050.1 defines terms that are of unique relevance to part 3050 of the Commission's rules. The Public Representative argues that the definitions contained in proposed rule 3050.1 should be consistent with and not redundant of those found in § 3001.5—the main definitional section of the Commission's rules. He notes, in particular, that the term ''product'' is defined in proposed rule 3050.1 and in § 3001.5, and that the definitions are not precisely the same. The Commission agrees that the term ''product'' does not need to be defined in its periodic reporting rules. Accordingly, it has eliminated the term ''product'' from the definitions provided in final rule 3050.1.

Definitions of ''Annual Report'' and ''section 3652 report.'' Proposed rule 3050.1(e) defined the term ''Annual Report'' as ''the report that section 3652 of the Postal Accountability and Enhancement Act requires the Postal Service to provide to the Commission each year.'' In its discussion of revisions to § 3050.20, *infra,* the Commission observes that the analysis that § 3050.20 requires the Postal Service to provide is meant to implement § 3652 of the PAEA. Generally, § 3652 requires the Postal Service to analyze how rates and service in the previous year complied with the requirements of title 39 of the United States Code.

The comments received concerning proposed rule 3050.20 have persuaded the Commission that instead of ''Annual Report,'' its periodic reporting rules need to employ two standard references to the annual reports that the Postal Service is required to file with the Commission—one broader than the term ''Annual Report,'' and one that is slightly more narrow. Where a broader definition is intended, the final rules use the phrase ''annual periodic reports to the Commission.'' Where the narrower definition is intended, the final rules use the phrase ''section 3652 report.'' That phrase, however, will be used to encompass all of the Postal Service reports required by § 3652 except for the program performance reports referenced by § 3652(g). Those reports are also required to be reported at the time that the Postal Service files its comprehensive statement with Congress. *See* 39 U.S.C. 2804(a) and 2401(e). To avoid redundant reporting, ''section 3652 report'' is understood to exclude program performance reporting under §§ 2803 and 2804. *See* final rule 3050.1(g).

B. Proposed Rule 3050.2 (Corrections and Changes in Input Data or Quantification Techniques)

Proposed rule 3050.2 requires that the Postal Service document its periodic reports. Paragraph (a) requires it to list and explain corrections, changes in input data, and changes in quantification techniques made since the report was last filed. Paragraphs (b) and (c) require the submission of workpapers and spreadsheets that meet certain standards. Paragraph (d) allows portions of the documentation required by ''this section'' that are not time critical to be filed up to two weeks late if the Postal Service gets advance approval of the Commission.

Delayed filing of documentation. Valpak observes that it is less appropriate to file the material required by paragraph (a) 2 weeks later than the other material required by proposed rule 3050.2. The Commission agrees. Final rule 3050.2 applies the deferral option only to paragraphs (b) and (c).

Tracking the impact of errors. Valpak argues that where errors have been corrected, the impact of the correction could be masked by other changes in the relevant periodic report. It argues that proposed rule 3050.2 would lead to more transparency if it were to state:

> Corrections should be presented in a manner that permits replication of the calculation both before, and after, correction of the error.

Id. at 22.

The Postal Service argues that complying with the proposed requirement might be a straightforward exercise if a model with an error consisted of a single spreadsheet. The spreadsheet program would allow the program to be run both with the error and with the error corrected. It points out, however, that where there is an elaborate set of linked models, as occurs in the CRA, complying with the proposal might require a large number of time-consuming model runs if there were multiple errors whose impact needed to be separately demonstrated. Under this circumstance, the Postal Service argues that complying with the proposal would be a large waste of effort and resources. Postal Service Reply Comments at 7–8. The Commission agrees. Accordingly, it declines to adopt the revision to proposed rule 3050.2 that Valpak proposes.

Duty to explain variations in results that exceed a quantitative threshold. MMA argues that the Postal Service's choices of what input data to use can be as significant in their impacts as what analytical methods the Postal Service chooses to apply to data. As an illustration, it complains that the Postal Service's insistence on using theoretical Delivery Point Sequencing (DPS) percentages rather than actual DPS percentages has had a major impact on the cost of the kind of mail that it sends. It notes that proposed rule 3050.2 would require the Postal Service to identify input data or quantification techniques and to list any corrections that it has made since a periodic report was last submitted and to explain the change or correction. The listing and explanation are to be provided when the Postal Service submits the relevant periodic report. It argues that where the impact of such changes is sufficiently large, this proposed procedure is inadequate. It proposes that there be an opportunity for advance review of changes to input data, quantification techniques, or corrections that impact avoided costs by more than 0.1 cent. MMA Comments at 2–4. It argues that this issue will grow with the adoption of the Intelligent Mail barcode. *Id.* at 4–5.

The Postal Service opposes the proposal, arguing that it is impossible to identify the complete set of input changes that cause changes to cost avoidance estimates in excess of a particular threshold until the workshare models are finalized. It asserts that there is ''virtually no lag time between finalization of the workshare models and filing of the ACR.'' Postal Service Reply Comments at 22. The Commission accepts the Postal Service's representation that there is not a sufficient interval between the finalization of its avoided cost model results and the filing of its § 3652 report to accommodate MMA's proposal.

Valpak offers a related proposal. It asks that the Postal Service be required to identify and explain its § 3652 report results that are anomalous from a logical perspective, and to explain results that change a product's unit attributable costs from year to year by more than the change in the Consumer Price Index plus or minus 5 percent. Otherwise, Valpak states, in the brief time available to mailers, they ''would need to search for such peculiarities on their own and, even if found, mailers would be left wondering about the relevant facts and their significance, because they would have received no explanation from the Postal Service.'' Valpak Comments at 20.

The Postal Service responds by arguing that the definition of a logical anomaly is too subjective to serve as a workable rule. It also argues that the plus-or-minus 5 percent standard for variations in unit attributable costs is too objective; that is, it cannot be varied for small mail classes whose unit cost

results vary substantially due to the problem of small sample size. It also questions the value of pursuing such details of cost analysis in a price cap regulatory regime. Postal Service Reply Comments at 7.

The Commission urges the Postal Service to include in its § 3652 report, to the maximum extent possible, explanations of both logical anomalies and unusually large swings from year to year in its unit attributable cost results. Nevertheless, it declines to adopt a quantitative threshold triggering this obligation as arbitrary. It also agrees that logical anomalies are too subjective to serve as a workable rule. It, therefore, declines to adopt periodic reporting rules with quantitative thresholds as Valpak requests.

C. Proposed Rule 3050.3 (Confidential Treatment of Periodic Reports)

Part 3007, proposed in Docket No. RM2008–1, would implement the provisions of the PAEA that generally authorize the Postal Service to designate information in the periodic reports that it provides to the Commission as confidential within the meaning of 5 U.S.C. 552(b) or as commercially sensitive within the meaning of 39 U.S.C. 410(c). *See* 39 U.S.C. 3654(f). Proposed part 3007 would resolve the issue of how information so designated could be made public. The Commission contemplates initiating a series of rulemakings designed to identify in part 3050 specific categories of information that would be presumptively confidential and specific categories of information that presumptively would not, as a guide to future submissions by the Postal Service and third parties.

D. Proposed Rule 3050.11 (Procedures for Changing Accepted Analytical Principles)

Proposed rule 3050.11 sets forth procedures governing Commission review of a petition or notice of proceeding to change an accepted analytical principle. It would evaluate proposals to change accepted analytical principles under the informal rulemaking procedures of 5 U.S.C. 553. The proposed rule would allow the Commission, its Public Representative, the Postal Service, or private parties, to file a petition or notice of proceeding to change accepted analytical principles used in the Postal Service's annual reports to the Commission. The rule goes on to identify content that the petition should contain and the procedures to be followed in obtaining additional information that would support the petition.

Methodological rulemakings initiated by the Commission. Valpak points out that proposed rule 3050.11 would allow the Commission to institute this process on its own behalf although the rule has provisions with respect to the content of the instituting document and the procedures for gathering supporting information that are explicitly related only to ''petitions.'' It correctly observes that this leaves it unclear whether these provisions are meant to apply to proceedings begun by the Commission on its own initiative. Valpak Comments at 14. To remove this ambiguity, final rule 3050.11 explicitly relates these provisions not just to a ''petition,'' but to a ''notice of proceeding'' issued by the Commission.

Methodological rulemakings initiated by a Public Representative. Proposed rule 3050.11 lists a ''Public Representative'' among those who would be authorized to petition for a rulemaking to change an accepted analytical principle. Valpak notes that the current Commission practice is to appoint public representatives only after a formal docket has been established. It says ''[i]n such a situation, it is unclear whether anyone among the Commission's rotating Pubic Representatives could initiate a change in an 'accepted analytical principle.' '' Valpak Comments at 24. The Public Representative makes a related recommendation that a public representative should be appointed in a methodology rulemaking immediately after the Commission has concluded that a petition should move from the evaluation stage (*see* paragraphs (a) and (b) of proposed rule 3050.11) to the notice of proposed rulemaking stage (*see* paragraph (c)(2) of proposed rule 3050.11). Public Representative Comments at 7.

The Commission appoints a public representative in every proceeding. 39 U.S.C. 505. Thus, the public will be represented in strategic rulemakings as described in this order. Furthermore, public representatives are appointed in Annual Compliance Determination (ACD) dockets as well as dockets established to consider rate and classification adjustments. A public representative in any such proceeding could determine that petitioning to initiate a rulemaking would be an appropriate exercise of responsibility.

Discovery. Paragraph (b) of proposed rule 3050.11 provides:

> To better evaluate a petition to change an accepted analytical principle, the Commission may order that it be made the subject of discovery. By request of any interested person, or on its own behalf, the Commission may order that the petitioner and/or the Postal Service provide experts on the subject matter of the proposal to participate in technical conferences, prepare statements clarifying or supplementing their views, or be deposed by officers of the Commission.

This paragraph allows the Commission to make a petition for a methodological rulemaking the subject of discovery at its discretion. Valpak argues that ''optional discovery provides neither protection nor due process.'' Valpak Comments at 33. It comments that:

> This provision implicitly assumes that the Commission will be able to decide on its own, from the face of a petition to change, whether mailers should have the due process right to investigate the proposed change. But such an assumption is unlikely to be accurate. Mailers often focus on changes which appear significant to them, giving greater attention to details than the Commission staff can devote to the issues and consequences presented by such changes. Moreover, not all weaknesses are apparent of the face of each proposal.

Id. Accordingly, Valpak contends that discovery should be provided for as of right. It recommends that this be accomplished by applying the formal hearing procedures of part 3001, subpart A, of the Commission's rules to methodological rulemakings. *Id.* at 12.

As explained in Order No. 104 at 30–35, the Commission has drafted proposed rule 3050.11 to accommodate methodological rulemakings that run the gamut from broad surveys of the Postal Service's need for new data and research into analytical issues (which Order No. 104 labels ''strategic rulemakings'') to narrow relatively minor methodological changes that could be placed on a ''fast track'' to be evaluated in time to incorporate them into the next section 3652 report. Where technical issues are complex or controversial, technical conferences are likely to be the first procedure authorized as a vehicle for interested parties to identify issues that need to be explored. Where technical conferences demonstrate a need for follow up in more depth, discovery requests will be entertained and, very likely, granted. Where proposed methodological changes are relatively minor and non-controversial, and time is of the essence, however, making discovery a ''right'' could take away the Commission's ability to adapt review procedures to fit the underlying issues presented. This could ultimately hinder, rather than improve, the compliance review process if it results in a diversion of the technical resources of all concerned from more pressing issues. The Postal Service generally agrees. Postal Service

Reply Comments at 4–6. For these reasons, final rule 3050.11 retains the Commission's discretion to order discovery in evaluating petitions for review of changes in analytical principles.

''Missing role of other parties.'' In Valpak's comments on paragraph (b) of proposed rule 3050.11, the topic heading ''Missing Role of Other Parties'' appears. Valpak Comments at 26. Under that heading, Valpak notes that paragraph (b) authorizes the Commission to ''order'' the ''petitioner'' and/or the ''Postal Service'' to provide experts on the subject matter of the petition ''to participate in technical conferences, prepare statements * * * or be deposed.'' *Id.*

Valpak complains that ''there is no express authority in this rule for expert testimony to be filed by other parties.'' *Id.* From the fact that the rule does not *require* the expert testimony of third parties, Valpak seems to conclude that the rules do not *permit* such testimony. To remedy this alleged defect, it proposes that the language of paragraph (b) be expanded from ''the Commission may order that the petitioner and/or the Postal Service'' to ''the Commission may order that the petitioner, any interested persons, and/or the Postal Service [provide experts to participate in the process.]'' *Id.* at 27.

As Valpak recognizes, the Commission does not have the authority to order experts employed by third parties to participate in a methodological rulemaking. Therefore, the fact that § 3050.11 does not do so should not give rise to any inference that third-party experts would not be permitted to participate in the petition evaluation stage of a rulemaking. Such participation will be encouraged, but the Commission does not believe that it is something that it can require. As the Commission noted in its notice of proposed rulemaking in this docket, it views collaboration as the ideal approach to the development and evaluation of analytical principles in postal ratemaking. *See* Order No. 104 at 30–31.

Referring to the procedures that it had to follow in vetting analytical issues under the Postal Reorganization Act (PRA), the Commission made the following observation:

> [T]he Commission was required to resolve an analytical issue by accepting or rejecting competing analyses submitted by opposing witnesses. * * * In almost all cases, analyses were presented as *faits accomplis,* with no opportunity for input or feedback from either the Commission or interested third parties. The process was cumbersome and the results were often less than satisfactory.

Id. at 30. Valpak reads this comment as a Commission preference for a procedure that ''eliminates all counter-proposals'' to those contained in a petition. Valpak Comments at 32, n.13. Valpak contends:

> The new process is likely to be more satisfactory only if various parties (i) are allowed to, and (ii) do, participate vigorously in the proposed process, from the outset. Otherwise, Postal Service studies will go largely unchallenged, and the Commission will be unaided by input from the parties.

Id.

The Commission agrees that broad and vigorous public participation is beneficial. The Commission believes this goal can be more fully realized by expanding the informal rulemaking process. In ''on the record'' hearings under the PRA, the Commission was required to choose one from among what typically was a very limited set of models that was sponsored ''on the record'' by the Postal Service or an intervenor. Any correction of a model, or synthesizing of competing models that the Commission tried to do to support a decision, was likely to be challenged as procedurally infirm because it was not ''sponsored by a witness on the record.'' The PAEA, on the other hand, allows methodological issues to be resolved through informal rulemakings which allow collaborative research and multi-party input. That is the Commission's goal in conducting methodological rulemakings under § 3050.11.

Deposing witnesses. Among other things, paragraph (b) of proposed rule 3050.11 provides that the petitioner or the Postal Service provide witnesses on the subject matter of the petition to be ''deposed by officers of the Commission.'' Valpak associates the term ''depose'' with adversarial interrogation. It asserts that if the Commission's officers were to depose witnesses, it would put them in the untenable position of being both litigators and decision-makers.

To call informal rulemaking such as that which proposed rule 3050.11 would authorize ''litigation'' mischaracterizes that process. Nevertheless, it may be beneficial to replace the phrase ''deposed by officers of the Commission'' with the phrase ''or answer questions posed by the Commission or its representatives'' as the Postal Service proposes. *See* Postal Service Reply Comments at 9. This should eliminate the inference that Valpak draws. Final rule 3050.11 incorporates that change.

Oral input. Valpak notes that proposed rule 3050.11 gives the Commission discretion to prescribe the form of input (oral or written) that it will receive from interested parties. It does this at two points in the informal rulemaking process. In paragraph (a)(2), it allows the petitioner to request access to Postal Service data to support its petition, and gives the Commission discretion to require that the Postal Service's answers or objections be presented orally or in writing. In paragraph (c)(1), the rule allows interested parties to comment on any notice of proposed rulemaking that is issued based on a petition to change accepted analytical principles. It gives the Commission discretion to require that their comments be made orally as well as in writing. Valpak Comments at 24–25.

Valpak argues that requiring a petitioner to make its requests for Postal Service data to support its petition orally (paragraph (a)(1)) and requiring interested parties to comment on notices of proposed rulemaking orally (paragraph (c)(1)) ''almost certainly would add confusion to a proceeding and, possibly, would restrict the due process rights of interested parties'' because the answers could address ''some of the most complex, sometimes arcane, and significant matters that come before the Commission.'' *Id.* at 25. It also argues that oral comments presented by lawyers would rarely be as useful as ''thoughtful, written commentary.'' *Id.,* n.11. It requests that the discretion to require oral rather than written responses be eliminated from the two paragraphs referenced above. *Id.* at 25–26.

The answer to Valpak's concerns is that where complex or arcane matters are under review, the Commission is likely to reflect those considerations in its decision, and allow comments to be submitted in written form. While it might share Valpak's skepticism of the value of oral comments presented by attorneys, the Commission notes that oral comments on technical matters could be presented by technical experts. The Commission notes that 5 U.S.C. 553(c) affords interested persons a right to submit written comments in rulemakings covered by its procedures. Accordingly, the Commission has revised proposed rule 3050.11(c) [3] to provide interested persons with the right to submit written comments in response to a notice of proposed rulemaking issued under § 3050.11. Final rule 3050.11, however, preserves the Commission's discretion to require answers or objections to data requests

[3] Proposed rule 3050.11(c) has become final rule 3050.11(d).

made under § 3050.11(a)(2)[4] to be oral or in writing. This will allow the Commission to adjust procedures and review periods to fit the issues presented by a particular petition.

Notice of pending studies. The purpose of proposed rule 3050.11 is to provide for the input of mailers and the Commission before the Postal Service settles upon the analytical principles that it will apply in its annual reports to the Commission. Valpak argues that the rule will not be effective in accomplishing that purpose unless it requires the Postal Service to notify mailers and the Commission of special studies that are intended to result in changes to accepted analytical principles while those studies are still in their formative stage. *Id.* at 30–35. It proposes that the Postal Service be required to publish a ''short status report'' on all special studies that it proposes or are already underway, regardless of whether they would have to be submitted as § 3050.11 proposals. It proposes that the list be updated quarterly, and include the ''unit within the Postal Service'' that is responsible for conducting the study, the study's beginning date, current status, and expected completion date, and the analytical principles that the study ''may affect.'' *Id.* at 35.

The Postal Service considers adding such a requirement to § 3050.11 as impractical, burdensome and unnecessary. It argues that it has little incentive under the current regulatory system to keep its pending special studies secret until completed. It asserts that:

> The Commission has ample authority to discourage such inclinations simply by rejecting the resulting methodologies when the Postal Service 'unveils' its proposals. Consequently, not wishing to waste time, effort, and money, the Postal Service is not going to proceed with major new studies in the PAEA regulatory environment without engaging in what it believes will be deemed by the Commission to be an appropriate amount of prior consultation. This entire portion of the Valpak comments is written as if Valpak did not bother to read the Commission's careful discussion of Strategic Rulemakings. Order No. 104 at 32–33.

Postal Service Reply Comments at 10–11 (footnote omitted).

The Postal Service validly comments that strategic rulemakings are intended to provide mailers and the Commission with a description of its plans for new special studies and status reports on any special studies that are already underway. This is because a strategic rulemaking's main task is to obtain an overview of the Postal Service's research efforts, take inventory of its research needs, and set priorities for future research. In the interim between strategic rulemakings, the Postal Service is expected to keep mailers and the Commission current on major special studies, planned or pending, that are expected to lead to proposed changes in the analytical principles that it will use to prepare its annual reports to the Commission. If its voluntary efforts to provide mailers and the Commission notice of its plans for special studies should falter, the Commission could always reconsider Valpak's proposal to make notice mandatory.

Advance review of changes to data reporting systems. The periodic reporting rules proposed by the Commission make an important distinction between analytical principles and mere quantification techniques. Analytical principles are methods that reflect a theory, precept, or assumption about causation. Changing analytical principles can be expected to change the results of an analysis. Quantification techniques, in contrast, are the mechanics of calculating numbers that are theory neutral. The classic example would be multiplying two numbers with a hand calculator versus multiplying the same two numbers with a slide rule. The technique used should not change the result. *See* proposed rules 3050.1 and 3050.2. The Commission's periodic reporting rules are designed to allow the Commission and the public to review changes to analytical principles before they are applied by the Postal Service to estimate its financial results. These rules intend to make this a manageable task by exempting mere quantification techniques from advance review and acceptance by the Commission.

In Order No. 104, the Commission used a number of examples designed to illustrate the distinction between analytical principles, for which advance review is required, and quantification techniques, for which advance review is unnecessary. The Postal Service questions the appropriateness of several of these examples.

One example used was a major change that the Postal Service recently made to the way that it collects Mail Processing Data System (MODS) data. MODS data is primarily used by postal managers to estimate plant workload so that the manager can adjust his staffing to match that workload. MODS data has long played a central role in modeling volume-variable mail processing costs, distributing those costs to subclasses, and in determining mail processing productivities in cost avoidance models.

For decades, the Postal Service has relied on calculating First Handled Pieces (FHP) from MODS data as a proxy for how much volume was being handled by each processing plant. Finding a valid plant-wide estimate of FHP required that collection mail be weighed and the weight converted to the equivalent of pieces. This process was cumbersome, time consuming, and became less accurate if conversion factors were not updated. Nevertheless, for decades FHP has been the only reasonable proxy for plant-level volume that is available for modeling the volume variability of mail processing labor costs.

Without knowing how much volume is coming in to mail processing plants, there is little chance of accurately estimating the share of the nearly $22 billion of variable mail processing costs for which each product is responsible. If the Postal Service cannot successfully model how different products incur different shares of system mail processing costs, it cannot know how profitable its various products are at the rates it has chosen. Not surprisingly, to lose the empirical basis for modeling how mail processing costs are caused is of concern to the Commission, which is charged by the PAEA with the responsibility of determining cost estimation methods.

The Postal Service emphasizes that MODS is a management data system first, and a ratemaking data system second. It asserts that this makes it inappropriate for the Commission to require advance review of its decisions about how and when this data collection system should be modified. Postal Service Comments at 30–31.[5]

Time Warner expands on the theme that the Commission should play a more passive role in the decisions that are made to modify the Postal Service's basic data collection systems. It extends that theme to data systems, like the IOCS, that were established primarily for ratemaking purposes. Time Warner argues that there are myriad minor changes to the IOCS that the Postal Service implements at the beginning of each fiscal year, and that it would be burdensome and unnecessary for the Postal Service to have to get advance

[4] Proposed rule 3050.11(a)(2) has become final rule 3050.11(b)(2).

[5] It is worth pointing out that it is the Postal Service that has made the decision to have MODS perform dual service as both a management data system and a data system that plays a central role in ratemaking. To find mail processing volumes, it could have chosen to establish a data system that is designed primarily as a ratemaking data system comparable to the In-Office Cost System (IOCS) or the City Carrier Cost System (CCCS). As long as it has made this choice, it should recognize that it has made the Commission and the mailing public a stakeholder in the way that MODS is administered.

approval in an informal rulemaking before implementing most of these changes. As a substitute for that approach, Time Warner makes this proposal:

> A sounder, more moderate approach would be for the Postal Service, at the beginning of each fiscal year, to announce changes it is making in the instructions to IOCS data collectors and for interested parties to have an opportunity at that time to petition for the initiation of a rulemaking proceeding to review changes that seem questionable. Advance knowledge of the changes in format and content of the IOCS sample data would facilitate analysis by the Commission and interested parties of such data when it becomes available after the fiscal year is ended.

Time Warner Reply Comments at 4–5 (footnote omitted).

The procedure that Time Warner describes seems to be similar to the one in proposed rule 3050.2 for handling changes made by the Postal Service in the quantification techniques that it uses. In that proposed rule, the change is listed and briefly described after the Postal Service has already incorporated it into its analysis and it is, for all practical purposes, a *fait accompli.*

A procedure of this kind is appropriate for quantification techniques that have changed because quantification techniques are, by definition, not supposed to affect the results of an analysis. Changes to a basic data system such as IOCS, however, could affect the results of an analysis that relies on IOCS data. For that reason, if the Postal Service plans myriad minor changes to the IOCS or other basic data systems used in ratemaking, the Postal Service should treat them as changes to analytical principles and solicit public comment on them early enough that revisions can be made, if needed, without jeopardizing the planned implementation date for the changes. Accordingly, the proposal of Time Warner is not accepted.

E. Proposed Rule 3050.12 (Obsolete Special Studies)

Proposed rule 3050.12 was inspired by some recent examples of cost estimates with important rate consequences that were significantly inaccurate because the Postal Service had relied on a one-time study or one-time data collection effort that had become grossly non-representative with the passage of time. An example is the bundle-flow model that the Postal Service continued to use for Periodicals. It reflected a flat-processing environment that had largely disappeared roughly 5 years before the Postal Service began a field study to update the bundle-flow model to reflect post-AFSM 100 bundle flows. Another example is the Barcode Sorter accept rate for letters, which has a major impact on estimates of avoided costs for workshared letters. Nearly a decade passed before the Postal Service updated an accept rate that was originally based on a special survey.[6] Proposed rule 3050.12 would have required the Postal Service to list such one-time studies or one-time data collection efforts that it relies on to produce its annual periodic reports to the Commission and the study's completion date. The proposed rule would have required the Postal Service to either certify that each one-time study on which it continues to rely still reflects the current operating environment or provide a timetable for updating the study so that it does. The proposed rule included a presumption that a one-time study or data collection effort that is more than 5 years old is obsolete. It also included liberal waiver provisions. *See* Order No. 104 at 36, 43.

Even though one-time cost variability and cost avoidance studies are not routinely updated, the Postal Service asserts that they are ''tied to'' basic data reporting systems that are updated every year, thus minimizing the need for the proposed rule. Postal Service Comments at 15–16. It also argues that the proposed rule would be burdensome and unworkable.

To make that case, it focuses on cost avoidance models that underlie the calculation of worksharing discounts. It asserts that it would be impractical to list such models and identify the completion date of each because it continually refines such models in minor ways which, it claims, would make it difficult to determine their vintage. *Id.* at 15–20. It says that cost avoidance models ''have evolved over decades of postal litigation and incorporate new data as possible.'' *Id.* at 18. For example, ''wage rates, total mail processing costs by shape, piggyback factors, MODS data, and other inputs to these models are updated every year.'' It then asks ''[w]hat is the date that the Commission will use as a reference? * * * If one input in a study is more than five years old, is the study presumed to be obsolete?'' *Id.* It argues that such difficulties make it prudent to make proposed rule 3050.12 a mere placeholder, to be available when the need for such a rule becomes more compelling. *Id.* at 14–15, 17.

The Postal Service's argument that the vintage date of cost avoidance models is difficult to identify is essentially a ''straw man.'' It works only if one chooses to disregard the clearly drawn distinction in these periodic reporting rules between changed analytical principles on the one hand, and mere updating of input data on the other. *See* Order No. 104 at 27–29. The string of examples cited by the Postal Service all fall clearly into the latter category and, therefore, would not have a bearing on the ''completion date'' of a cost avoidance model. Postal Service Comments at 18. The completion data of a cost avoidance model is determined by the analytical method on which it is based. As Order No. 104 explains, changed analytical principles are those that change a causal theory or assumption. With respect to cost avoidance models, this would include a change in the underlying operations that are being modeled, piggybacking a type of cost for the first time, a redefined MODS pool, a new CRA adjustment factor, or a new density study. The Commission's recent experience with cost methodology rulemakings has demonstrated that the distinction between changing the analytical principles underlying cost models and updating the data that are input to those models is comprehensible and workable.

The Commission, however, recognizes that the Postal Service's technical staff has limited time and resources to devote to the problem of updating the cost studies. Final rule 3050.12, therefore, is revised to impose the minimum reporting requirement that will still give the Commission a systematic indicator of the potential scope of the problem of reliance on obsolete special studies. Only paragraph (a) of the proposed rule (*see* Order No. 104 at 43) is retained in final rule 3050.12. It now requires the Postal Service to list each special study relied on to produce its annual periodic reports to the Commission and its completion date. It requires the Postal Service to indicate whether the special study still reflects current operating conditions and procedures. It also requires the Postal Service to annually update the list. This will indicate to the Commission and the postal community where potential obsolescence problem areas might be.

In paring back the requirements of § 3050.12, the Commission accepts the suggestion of the Postal Service (Postal Service Comments at 17 and Time Warner (Time Warner Reply Comments at 2–3) that the problem of what to do about obsolescent special studies be addressed as part of a ''strategic rulemaking'' such as that described in Order No. 104 at 32. A strategic

[6] The same data are now collected automatically and routinely updated.

rulemaking would be one designed to make a comprehensive evaluation of the costing research needed by the Postal Service, prioritize those needs, and reach a consensus within the postal community on a timetable for achieving them.

F. Proposed Rule 3050.13 (Explanation of Changes Made to Accepted Analytical Principles)

Proposed rule 3050.13(a) states:

> At the time the Postal Service files its Annual Report, it shall include a brief narrative explanation of any changes to accepted analytical principles that have been made since the most recent Annual Compliance Determination was issued, and the reasons that those changes were accepted.

Valpak proposes adding to the proposed rule a requirement that the Postal Service provide a table of analytical principles that have been changed since the last section 3652 report, that specifies the docket in which the change was approved, and estimates the effect of the change using current-year data. Valpak comments that the latter requirement would be especially useful since the analytical principle would have been approved on the basis of the previous year's data. Valpak Comments at 36–37.

The Postal Service vigorously objects to adding the latter requirement. It emphasizes that Valpak is proposing that the Postal Service be required to run multiple versions of the current-year models for each approved change, one version with the change, and one version without. The Postal Service argues that this would be a waste of effort because these changes would have all been approved in advance.

The Commission agrees with the Postal Service that the benefit of requiring this information is limited since the analytical principles will have already been approved in an informal rulemaking. The burden on the Postal Service could be substantial, however, if it were required to run its current-year model multiple times in the very brief period that it has to prepare its section 3652 report for the previous year. *See* Postal Service Reply Comments at 13–14. Because the burden appears to outweigh the benefit, the Commission declines to adopt the change proposed by Valpak.

Paragraph (b) of proposed rule 3050.13 stated that the Postal Service's annual report was subject to proposed rule 3050.2. Proposed rule 3050.2 requires the Postal Service to identify changes in input data, quantification techniques, and corrections of errors in its periodic reports. Since the section 3652 report is a periodic report, the Commission concludes that paragraph (b) of this section is superfluous. Accordingly, paragraph (b) of this section has been deleted from final rule 3050.13.

G. Proposed Rule 3050.14 (Reporting the CRA in a More Disaggregated Format)

Proposed rule 3050.14 states that the Postal Service's Cost and Revenue Analysis (CRA) report shall be presented in a format that reflects the current Mail Classification Schedule, but should also be presented in an alternative, more disaggregated format that is capable of reflecting the classification structure that was in effect prior to the adoption of the PAEA. The purpose is to report data in a way that can serve as building blocks. This would allow the data to be structured to coincide with historical data, which would facilitate analysis of trends in postal finances and operations and support model building with the use of time series and panel data. It would also accommodate future changes in the Mail Classification Schedule without destroying the usefulness of historical data for analysis and modeling going forward. The alternative, disaggregated format is illustrated by the Appendix to Order No. 104 entitled ''Products and Categories.'' A comparable Appendix accompanies this order.

The Public Representative proposes that the Commission clarify the status of the Appendix. He argues that it should be made a formal appendix to part 3050 of the Commission's rules for inclusion in the Code of Federal Regulations (CFR), or that the Appendix be issued as a guidance document, consistent with OMB Bulletin 07–02, 72 FR 3432 (January 25, 2007). Otherwise, he says, the mailing public might be unaware of the alternative information that it contains. Public Representative Comments at 8.

The Commission believes that it would be inappropriate to make the Appendix a formal appendix that would appear in the CFR because it would be too cumbersome to update, should that become necessary. The Commission, however, will consider making it a guidance document.

The Postal Service suggests that the Commission make minor refinements to the categories of international mail listed in the alternative reporting format in the Appendix, ''Products and Categories,'' accompanying Order No. 104. Postal Service Comments at 41. The Postal Service proposes that product names in the Appendix conform to the new product names that it gave to its ''rebranded'' outbound international mail products on May 14, 2008. *See* 72 FR 16604 (April 4, 2007). The Postal Service also seeks to update the Appendix to reflect the elimination of outbound economy mail services that use surface transportation. *Id.* Additional refinements requested include the use of a consistent naming convention for reporting purposes, and the elimination of reporting categories for which ''neither revenue nor cost information exists.'' *Id.* at 43.

Most of the Postal Service's suggested refinements are adopted in the revised Appendix. However, the Commission adds certain inbound Special Services categories for which data should be reported. The revised Appendix replaces ''International First-Class Mail'' and ''International Priority Mail'' with the rebranded names ''First-Class Mail International'' and ''Priority Mail International,'' respectively. The revised Appendix also removes references to ''surface'' under First-Class Mail International for outbound single-piece letters, flats, IPPs, and parcels, and outbound single-piece cards.[7] However, the revised Appendix shows that data for ''air'' and ''surface'' categories should be reported under ''Inbound Single-Piece Mail (Letter Post)'' because air and surface were not eliminated as service offerings for inbound First-Class Mail International.

In keeping with the rebranded naming of outbound mail products, the Commission adds a reporting requirement for Global Express Guaranteed (GXG) and Express Mail International (EMI) under ''Outbound International Expedited Services'' in the Competitive Products section of the Appendix. This added reporting requirement is consistent with the Postal Service's existing reporting of GXG and EMI in the FY 2007 and FY 2008 International Cost and Revenue Analysis (ICRA) reports.

The revised Appendix adopts a consistent, new naming convention for reporting data related to outbound and inbound international mail. The new naming convention preserves the Commission's proposed reporting of disaggregated cost, volumes, and revenue data separately by terminal dues regime. *See* Order No. 104 at 18. The new naming convention also simplifies reporting by reducing the number of categories, primarily for inbound single-piece mail. Thus, the following naming convention is

[7] The acronym ''IPPs,'' or irregular parcels and pieces, refers to parcels that ''do not meet the dimensional criteria of machinable parcels and other parcels that cannot be processed by parcel sorters.'' Glossary of Postal Terms, Publication 32, May 1977 (Updated With Revisions through July 5, 2007) at 56.

adopted: Target System Countries at UPU rates, Transition System Countries at UPU rates, Subject to Agreement, Canada, Other.

The new naming convention is applicable to First-Class Mail International, outbound single-piece letters, flats, IPPs, and parcels, outbound single-piece cards, and inbound single-piece mail (*i.e.*, ''letter post'') separately for inbound air and surface letter post; and Priority Mail International for outbound Priority Mail subject to terminal dues. For Inbound Air Parcel Post, the naming convention replaces ''At Non-UPU Rates'' with ''Subject to Agreement.''

The new naming convention reference ''Subject to Agreement'' throughout the revised Appendix is intended to encompass the separate reporting of data by negotiated agreements that are both bilateral and multilateral in nature.[8] In this regard, ''Canada'' is listed for the relevant products and categories of mail covered by an existing bilateral agreement, while ''Other'' is intended as a placeholder for reporting data in response to future bilateral or multilateral agreements.

International Ancillary Services is currently defined as a product on both the market dominant and competitive product lists. Among the component categories of that product are Inbound International Return Receipt and Inbound International Insurance. The FY 2008 ICRA includes line items for these services as well, although no revenue or cost information is reported.[9] The Postal Service asserts that these categories should be dropped from the Appendix because revenue and cost information for them ''does not exist.'' Postal Service Comments at 43–44. As long as these categories remain components of International Ancillary Services, and appear as line items in the ICRA, the Commission prefers that they appear in the alternative format as well. If there is no data to report, the Postal Service may enter an ''N/A'' notation.

At the Postal Service's request, the Appendix is revised to include ''Inbound International Delivery Confirmation'' as a reporting category for data on ''revenue from the delivery confirmation surcharge for [inbound] Xpresspost and Expedited Services [from] Canada.'' *Id.* at 44.

Pitney Bowes proposes that the Commission attach a 3-year sunset provision to the Appendix, following up on the Commission's remark in Order No. 104 at 16, that the alternative format might not be needed after a few transitional years. The Commission prefers to watch events unfold to see how quickly the Mail Classification Schedule stabilizes, after which it will make a decision about the usefulness of the alternative format in the longer run.

H. Proposed Rule 3050.20 (Compliance and Other Postal Service Analyses)

Time Warner provides several intricate arguments in support of what it terms ''a relatively clear-cut jurisdictional issue'' that it sees in § 3050.20 as originally proposed. Time Warner Comments at 13. At the center of its discussion is concern over the types of circumstances where Commission action might be appropriate in response to a finding of ''noncompliance'' under 39 U.S.C. 3653(b). While some of Time Warner's arguments are unpersuasive, the Commission finds that the language of proposed rule 3050.20 should be modified to eliminate confusion in this area.

The Commission finds misguided Time Warner's suggestion that the Postal Service is not required to develop and implement rates that comply with the rate policies of § 3622. *Id.* at 9–10. The PAEA provides an integrated set of policy guidelines for the Postal Service to follow in setting rates. Although the Commission is responsible for reviewing the Postal Service's performance, most commenters believe that the initial responsibility for balancing and achieving these policies is, and should be, with the Postal Service rather than the Commission.

Section 3622(a) does direct the Commission to establish, and when necessary revise, a system of ratemaking to foster achievement of the requirements, objectives, and factors spelled out in subsequent paragraphs. Order No. 43 implemented such a system, directing that the Postal Service accompany each planned rate increase with a demonstration of compliance with those policies. *See* 39 CFR 3010.14.

However, even if no regulations had been implemented by the Commission, the Governors would have to establish rates that comply with the policies of § 3622. 39 U.S.C. 404(b) only authorizes the Governors to establish rates that are in accordance with the policies of chapter 36 of title 39 of the United States Code.

Time Warner contends that the concept of ''compliance'' is not easily applicable to such things as objectives and factors, which by their nature must be weighed and balanced. To ease concerns over the potential misuse of the Commission's broad remedial powers, Time Warner requests a Commission statement on how or when it might find the Postal Service to be not in compliance with such subjective terms. The Commission believes that Time Warner's request is well intentioned, but this rulemaking is not an appropriate vehicle for such a discussion.

The Postal Service joins Time Warner in arguing that it should not have to analyze the extent to which it has achieved its program performance goals established under §§ 2803 and 2804 as part of the compliance analysis required by proposed rule 3050.20. It argues that these sections already require the Postal Service to discuss its performance goals and evaluate its achievement of those goals in the comprehensive statement that it is required to file with Congress by 39 U.S.C. 2401(e). When evaluating whether the Postal Service has met its program performance goals, the Postal Service argues, it is the Commission's duty to review the Postal Service's comprehensive statement. Postal Service Comments at 49.

Sections 2803 and 2804 require the Postal Service to evaluate the degree to which its individual programs have met their objectives, by quantitative criteria where possible. The comprehensive statement that the Postal Service must file with Congress under § 2401(e) includes these program performance evaluations. Those evaluations, if done properly, would allow the Commission to determine whether the performance goals established under §§ 2803 and 2804 have been met. Because it is redundant, the requirement in proposed rule 3050.20 that the Postal Service analyze whether it has met the program performance goals established under §§ 2803 and 2804 has been deleted from final rule 3050.20. The Commission does this on the understanding that the Postal Service's comprehensive statement filed under § 2401(e) will be sufficiently specific and concrete to allow the Commission to make an informed determination as to whether the Postal Service has met the performance goals established for specific programs, as §§ 2803 and 2804 contemplate.

Section 3653(d) authorizes the Commission annually to make ''recommendations'' to the Postal Service ''related to the protection or promotion of public policy objectives set out in this title.'' This authorization is broader in subject matter than the Postal Service's comprehensive statement, which is limited to an analysis of how the Postal Service's

[8] For purposes of this category, the term ''multilateral'' refers to an agreement other than the multilateral agreement of the UPU convention.

[9] FY 2008 ICRA Report, December 29, 2008, worksheet tab A Pages (md) and A Pages (c).

programs have met the public policy objectives of § 101 of title 39 of the United States Code. Because it is not redundant of the analyses required in the Postal Service's comprehensive statement, the requirement in proposed rule 3050.20 that the Postal Service analyze how its products (individually or collectively) have promoted the public policy objectives of title 39 remains in final rule 3050.20.

Section 3653 allows the Commission the latitude to evaluate compliance ''for products individually or collectively.'' This language appears to authorize the Commission to determine what level of disaggregation makes sense when analyzing compliance with a particular criterion derived from the statute. The Commission believes that it will be beneficial to harmonize the analyses required of the Postal Service under proposed rule 3050.20 with the evaluations that § 3653 authorizes the Commission to make. Therefore, the Commission revises the language of final rule 3050.20 to allow the Postal Service to analyze whether its products have complied with a particular statutory goal, objective, or mandate, both at the individual product level, or for products collectively, where analysis at that level is appropriate.

The Commission agrees with Time Warner that using the term ''compliance'' in the title of proposed rule 3050.20 does not appropriately describe the task it assigns to the Postal Service—to analyze how its products have promoted the public policy objectives of title 39 of the United States Code. The Public Representative agrees. *See* Public Representative Reply Comments at 3. The solution is to broaden the title of proposed rule 3050.20. Final rule 3050.20 is now entitled ''Compliance and other analyses in the Postal Service's section 3652 report to the Commission.'' This broadened title indicates that an analysis can be required annually by § 3050.20 without constituting a ''compliance'' issue. In this regard, the Commission notes that the set of rules adopted in this docket are generally referred to as ''periodic reporting rules'' rather than ''compliance rules'' because they are intended to provide the information needed for all reports that the Commission is obligated by the PAEA to produce, whether or not they are compliance related.

Special reporting requirements for products out of compliance. Valpak proposes to amend proposed rule 3050.20 to require the Postal Service to provide supplemental information about products that ''do not comply with all applicable provisions of PAEA.'' For such products, it proposes that the rule:

> i. Require the Postal Service to explain the most important circumstances underlying the failure to meet the applicable provisions of PAEA;
>
> ii. Explain what steps the Postal Service plans to take to bring the products into full compliance with PAEA; and
>
> iii. Indicate the time frame within which the Postal Service contemplates * * * achieving full compliance.

Valpak Comments at 39.

For example, for a product that failed to cover its costs, Valpak would require the Postal Service to (1) explain why it did not cover its costs; (2) explain what steps the Postal Service plans to take to ensure that it will cover its costs; and (3) indicate when it expects those steps to bring the product's revenues above costs. Valpak argues that unless proposed rule 3050.20 is strengthened in this way, neither mailers who are cross-subsidizing such products, nor the Commission, will know how to respond to the failure of a product to comply with the requirements of the PAEA. *Id.* at 39–40.

The Postal Service responds only briefly to Valpak's proposal. It notes that Valpak would have the Postal Service give public notice in proposed rule 3050.20 of forward-looking remedial steps. It argues that such requirements are not appropriate for that rule since it is intended to implement a section of the PAEA (3652) that is focused on the past year. Postal Service Reply Comments at 14 and n.7.

MPA/ANM/ABM criticize Valpak's proposal as one that misconstrues the role that § 3622(c)(2) plays in the statutory structure. (Section 3622(c)(2) requires each ''class or type'' of mail to cover its attributable costs.) Though § 3622(c)(2) is characterized in the PAEA as a ''requirement,'' the coalition argues that it is little more than advisory in nature, since the price cap overrides it and all other objectives and factors that are found in the statute. They argue that failing to comply with an objective or factor in the course of complying with a more important one (the cap) does not give rise to a Postal Service obligation to explain anything in the context of compliance analysis.[10] The coalition, however, considers it ''not unreasonable'' for the Commission to add a new paragraph (k) to proposed rule 3050.21 requiring the Postal Service to:

> [p]rovide an explanation when revenues for a mail class or service do not cover attributable costs, and provide any other explanation that the Postal Service believes will be helpful to clarify how the Postal Service has considered the objectives of 39 U.S.C. § 3622(b) and the factors of 39 U.S.C. 3622(c).

MPA/ANM/ABM Reply Comments at 4.

With respect to a product with a history of non-compliance with some requirement of the PAEA, the Commission agrees with Valpak that it would be helpful in the compliance review process to know what the Postal Service considers to be the causes of that product's non-compliance, what the Postal Service plans to do to bring that product into compliance, and how long it expects that process to take. In the Commission's view, providing such information with the section 3652 report itself would greatly benefit the review process. As the Commission observed in its FY 2007 ACD at 91:

> The Postal Service should support its annual report with more complete explanations, and discuss data which may be perceived as anomalous, such as large variations in unit costs. With only 90 days available for the Commission to make its findings and even less time for interested parties to analyze the data and submit comments, it is crucial to the process that the data filed by the Postal Service is accompanied by accurate descriptions and a thorough analysis.

To encourage the Postal Service to provide a more thorough analysis of high priority topics relating to whether particular products have met particular standards articulated in the PAEA, the Commission has added paragraph (c) to final rule 3050.20. That paragraph provides:

> (c) [The Postal Service] shall address such matters as non-compensatory rates, discounts greater than avoided costs, and failures to achieve stated goals for on-time delivery standards, particularly where the Commission observed and commented upon the same matter in its Annual Compliance Determination for the previous year.

This provision reflects the revision by Valpak to proposed rule 3050.20 in the sense that it establishes a specific duty to include in the section 3652 report an analysis of results for products that do not satisfy certain provisions of the PAEA.

The Commission is mindful of the burdens that the Postal Service faces in preparing its section 3652 report and, therefore, the duty that it imposes on the Postal Service is narrower than that which Valpak's proposal would have imposed. Rather than require the Postal

[10] The coalition does not address scenarios in which a type of mail service does not cover its costs even though it, or the ''class'' to which it belongs, has cap room. Congress, however, contemplated scenarios under which a ''loss-making'' product could be out of compliance with the PAEA. *See* 39 U.S.C. 3662(c).

Service to explain the reasons that an outcome did not meet a particular standard of the PAEA, its plans for curing that deficiency, together with an expected timetable, it merely requires the Postal Service to ''address'' a very brief list of outcomes that do not satisfy a particular, objective PAEA standard.

The purpose of the provision is essentially to provide interested persons and the Commission with salient information when a particular PAEA standard is not satisfied by a particular result involving a particular product. The breadth of the explanations will vary with each factual situation. Paragraph (c) is framed in a manner that does not require a conclusion that a product that fails to comply with some statutory policy does or does not ''comply'' with the PAEA as a whole. It merely calls for relevant facts in those instances in which certain PAEA standards were not satisfied. Because the Commission has added paragraph (c) to final rule 3050.20, it declines to adopt Valpak's proposed revision of proposed rule 3050.20 or the related suggestion by MPA/ANM/ABM to revise proposed rule 3050.21.

I. Proposed Rule 3050.21 (Period for Measuring Institutional Cost Contribution of NSAs)

Proposed rule 3050.21(f) prescribed the reporting requirements for market dominant NSAs. Among other things, the proposed rule requires the Postal Service to report results for the NSA's contract year where that does not correspond to a fiscal year. The Postal Service observes that:

> it may also be possible to devise a means of conducting contribution assessments based directly on the fiscal year. If so, NSA data linked to the fiscal year would be more amenable to integration with the rest of the fiscal year reporting presented in the ACR. Therefore, the Postal Service requests that the proposed rule be amended to allow it the option to report on either a fiscal year basis or on the most recent year of operation. Building this flexibility into the rule could result in reporting procedures that are more efficient for both the Postal Service and the Commission.

Postal Service Comments at 36 (footnote omitted).

The Commission agrees with the goal expressed by the Postal Service of being able to report NSA results in a way that can be synchronized with the fiscal year report for the rest of the system. The problem appears to be that the Postal Service has not yet found a way to do that without sacrificing the accuracy of the resulting estimates.

In library reference USPS–FY08–30, the Postal Service provides financial results for NSAs that were active in FY 2008. Consistent with its proposal, the Postal Service provided volume data on a fiscal year basis. The analysis that used this volume information is, however, a flawed method of analyzing the compliance of volume-based NSAs with § 3622(c)(10) because it does not compare apples to apples. The Commission has approved application of a price elasticity test to NSAs as an objective way to measure the net contribution from any discount offered. The purpose of the elasticity test is to develop a meaningful before-rates forecast to measure possible revenue leakage from the discount. Applying the elasticity test to fiscal year volumes that do not align with the discount schedule, however, severs the connection between discounts and volumes, making any net contribution analysis meaningless. This approach creates a before-rates volume that does not correspond to any discount earned. The disconnect between contract years and fiscal years prevents a meaningful estimate of the net institutional cost contribution of NSAs. Accordingly, the Commission defers the Postal Service's proposal until it can demonstrate that it has found a way to adjust data for NSAs that are out of phase with the fiscal year to a fiscal-year basis without substantially distorting the resulting estimates.

J. Proposed Rule 3050.25 (Volume and Revenue Data)

Proposed rule 3050.25 identifies the data reports that the Commission needs to estimate volumes and revenues, such as the Revenue, Pieces, and Weight System (RPW) reports, the Quarterly Statistics Reports, and the billing determinants. The Postal Service objects only to the proposal that it provide billing determinants on a quarterly basis. It explains that meeting this requirement would require added expense to generate special weight reports and other input data that it now generates only annually. It argues that the added expense is not warranted in view of the limited benefits of this requirement. *Id.* at 37–39.

Time Warner supports the Postal Service's comments in this regard. It points out, however, that most of the volume and mail characteristic data on bulk mail comes from electronically filed reports by bulk mailers. It suggests that quarterly billing determinants for bulk mail classes could be produced at little additional expense, with the understanding that revisions might need to be made to the results at the end of the year. It says that such information might provide useful indications ''of the extent to which mailers are taking advantage of the various worksharing discounts offered by the rate structure[,]'' which ''might indicate the cost trends to anticipate for the various classes of mail.'' Time Warner Reply Comments at 5–6.

The Commission proposed that the Postal Service provide quarterly billing determinants primarily as an aid to analyzing the consistency of proposed rates with the price cap constraint. Because rate increases under the current calendar are out of phase with the annual billing determinant data, quarterly data are helpful in isolating what revenue changes are the result of changes in rates. The Commission believes that the benefits of this form of reporting outweigh its burdens, absent a more definitive estimate of the extra time and resources that providing quarterly billing determinants would entail. Therefore, final rule 3050.25 requires the Postal Service to provide billing determinants quarterly within 40 days of the close of the quarter. Annual billing determinants are required to be broken out by quarter as well.

Additionally, it would be extremely helpful if the Postal Service could develop billing determinant data separated between periods when different sets of rates were in effect. The Commission requests that, if possible, the Postal Service provide this information on a voluntary basis.

An example of the separation that the Commission requests is the set of new market dominant prices that will go into effect on May 11, 2009, roughly in the middle of the third quarter of FY 2009. If the Postal Service were able to separate the quarterly data between pre-May 11 and post-May 11 revenue and volume information, the Commission would be able to develop a set of volume weights that correspond to the periods in which different prices were in effect. These weights could be used to develop weighted-average-rates per piece by class for comparison with the planned weighted-average-rate per piece by class, developed using historic billing determinant data in accordance with the Commission's rules in Docket No. R2009–2. Of course, data for one part of a quarter would not be sufficient for such a comparison, but since the rates generally stay in effect for a year, the Commission and the public, by virtue of the periodic reporting rules, would eventually have access to data for a full year reflecting one set of rates.[11]

[11] The Commission is not asking the Postal Service to make this separation in billing determinant data to reflect new price categories, new discounts, or new surcharges. The post-implementation data can be compared with the pre-

Continued

These data would prove useful for the evaluation of the efficacy of the price cap. They would be particularly useful 7 years from now when the Commission must re-evaluate the current system of ratemaking. *See* 39 U.S.C. 3622(d)(3).

Although the Postal Service implements price changes for competitive products at a different time of year and although these prices are not subject to the price cap, competitive product billing determinants split between the pre- and post-rate implementation date would also be helpful. It would enable the Commission to evaluate more accurately the effects of price changes on the financial condition of the Postal Service and how such pricing activities help the Postal Service meet the requirements of 39 U.S.C. 3633(a).

K. Proposed Rule 3050.26 (Demand Elasticity and Volume Forecasting)

The proposed periodic reporting rules would have required the Postal Service to provide econometric estimates of demand elasticity for all postal products accompanied by the underlying econometric models and input data sets used. The provision establishing these requirements was proposed rule 3050.26. To accommodate the Postal Service's internal operational preferences, proposed rule 3050.26 requires that this information be filed with the Commission by January 20 of each year. Proposed rule 3050.26 is not associated specifically with the Postal Service's section 3652 report. The specific information items (other than avoided cost information) that the Commission deems necessary for it to carry out the compliance analysis required of it by § 3653 are found primarily in proposed rule 3050.21. For the sake of completeness, the requirement that the Postal Service provide a demand elasticity estimate for each postal product was included there as well. *See* Order No. 104, proposed rules 3050.21(f) and (g), at 45–46.

The Postal Service points out that proposed rules 3050.21(f) and (g) are redundant of proposed rule 3050.26, but require the same demand information to be filed with the Commission several weeks in advance of January 20 in late December of each year. It urges the Commission to resolve this redundancy in favor of the January 20 due date incorporated in proposed rule 3050.26. Postal Service Comments at 29. We accept the Postal Service's suggestion, and delete the references to demand elasticities from final rule 3050.21.

Explanatory narrative. The Postal Service emphasizes that it includes an explanatory narrative of its methods for estimating demand in its January 20 filing under proposed rule 3050.26 (even though that proposed rule did not explicitly require a narrative explanation of methods). It then notes that proposed rule 3050.60(f) requires a brief narrative explanation of how the estimates in the most recent ACD were calculated and the reasons that particular analytical principles were followed (due on July 1 of each year). *Id.* at 24–25.

Based on the Commission's narrative in Order No. 104, the Postal Service correctly concludes that the Commission had intended the term ''analytical principle'' to be broad enough to encompass the analytical principles used in econometric models of demand. The Postal Service argues that the brief narrative explanation of analytical principles underlying its demand analysis that proposed rule 3050.60(f) would require is redundant of the narrative explanation that it provides to the Commission in January of each year under proposed rule 3050.26. It urges the Commission to interpret proposed rule 3050.60(f) as not requiring a brief narrative explanation of analytical principles used in estimating demand elasticities. *Id.* at 29–30.

The Commission had intended the brief narrative explanations called for by proposed rule 3050.60(f) as explanations ''in a nutshell'' similar to those traditionally provided in Library Reference 1 in rate cases under the PRA. The main value of a set of such explanations of methods is that they would serve as a quick guide to the non-expert in understanding the arcane world of postal cost, volume, and revenue analysis. Therefore, it is not entirely accurate to characterize the § 3050.60(f) narrative as redundant of the more technical and detailed narrative that the Postal Service provides in January under proposed rule 3050.26. The Commission believes that this ''quick guide'' is quite helpful in making postal analysis more accessible to the lay public, and that this is as true of demand analysis as of other kinds of analysis. It therefore continues to interpret final rule 3050.60(f) [12] as applicable to analytical principles underlying the Postal Service's estimates of demand elasticity. Because a ''nutshell'' explanation is all that is expected, it is unlikely to significantly add to the Postal Service's reporting burden.

Advance review of analytical principles underlying demand and volume forecasting models. With respect to demand elasticity estimates, the Postal Service's major criticism is not redundancy, but the Commission's inclusion of demand elasticity estimates in its requirement that analytical principles used in its periodic reports be reviewed in advance by the Commission and the public. *See* proposed rule 3050.11. The Postal Service argues that the econometric models that it uses to estimate demand elasticity and to forecast volume are not like econometric models that it uses to estimate volume-variable costs. It asserts that the former are respecified, reworked, or tweaked almost every time that new input data are used. Accordingly, it argues, it is impractical for it to subject such frequent model revisions to advance review in a rulemaking context, as proposed rule 3050.11 would apparently require. *Id.* at 22–29. Although it concedes that demand elasticities play an important role in evaluating rates under the PAEA, it asserts that the Commission does not have authority to ''dictate'' the methods by which it forecasts volumes comparable to what it arguably had under the PRA since the evaluations that the Commission is obligated to make are primarily retrospective. *Id.* at 26. It, therefore, asks that analytical principles that underlie its volume and demand models be exempt from advance review.

The Postal Service contends that the goals of advance review could largely be served by the opportunity that the Commission would have to react to the Postal Service's demand modeling and volume forecasting methods, either in the course of the ACD or at another time of the Commission's choosing. It states that it would remain receptive to Commission input as to how such modeling could be improved. *Id.* at 29.

The Commission agrees with the Postal Service that its mandate to review analytical principles that the Postal Service uses to model demand elasticity and to forecast volume is not ''parallel'' with its mandate to review analytical principles that the Postal Service uses to estimate its costs. Its mandate to review

implementation data based on current reporting techniques. For example, the quarterly data that will include volume and revenue data subject to the planned Intelligent Mail barcode (IMb) discount will not require separate reporting for the IMb discount because no corresponding revenue and volume will exist in the quarter until the discount goes into effect. Thus, any data that are reported for the IMb discount can only reflect the effect of the new discount. However, if the level of that discount is subsequently changed, the quarterly data would have to be separated between the two discount regimes for accurate comparisons of actual weighted-average-rate per piece with planned weighted-average-rate per piece.

[12] Proposed rule 3050.60(f) has become final rule 3050.60(g).

cost principles is based directly on the language of § 3652(a)(1) that the Postal Service shall analyze ''costs, revenues, rates, and quality of service, using such methodologies as the Commission shall by regulation prescribe * * *.'' Its mandate to review the analytical principles used to estimate demand elasticities arises from its duty to evaluate rates and service in terms of the many objectives and factors of the PAEA that implicitly incorporate elasticity of demand. *See* Order No. 104 at 10–11. Elasticity of demand also provides essential evidence of ''market power,'' which is the root concept underlying the Commission's determinations under § 3642 that certain products be given market dominant or competitive product status under the PAEA.

The Commission's mandate to review analytical principles underlying volume forecasting arises where forecasting volumes is an intermediate step in estimating unit attributable costs or unit revenues.[13] Even though the Commission does not have rate design or revenue requirement responsibilities that require it to use the kind of roll forward that was part of formal rate cases under the PRA, it still has a need for volume forecasts to carry out some of its responsibilities. One is to review the compliance of rates proposed by the Postal Service with the price cap. Where, as in the last general rate adjustment, the Postal Service proposed rate increases for some products to take effect later than others, an accurate estimate of the revenue likely to be earned requires a product-level volume forecast. Volume forecasts are also needed to accurately assess whether revenues for specific competitive products with low profit margins are likely, at proposed rates, to remain above their attributable costs. In this regard, the Postal Service has voluntarily provided 1-year volume projections for a number of its competitive products at new rates to allow the Commission to more accurately verify the likelihood that they will, in fact, recover their costs in the coming year. Finally, in establishing service standards under § 3691, the Postal Service, in consultation with the Commission, is directed to take into account, among other things, ''mail volume and revenues projected for future years[.]'' *See* 39 U.S.C. 3691(c)(4).

In addition to the role that the Commission plays in evaluating rates and service, the Commission has the duty to calculate the cost (understood as profit impact) of the various Universal Service Obligation (USO) mandates. Estimating the costs for at least two of these mandates—Nonprofit Mail discounts and uniform rates for First-Class Mail—requires analysis of volume effects. Volume forecasts are also a necessary part of an analysis of the Postal Service's near-term financial outlook, which is relevant to the Commission's duties under § 3651 to assess the degree to which the modern system of rate regulation is achieving the objectives of §§ 3622 and 3633. The need for volume forecasts to adequately discharge this duty is obvious from the current alarm shared by the postal community over dramatic volume declines experienced and expected in the current fiscal year. The extent of near-term volume declines, current and expected, is highly relevant to a § 3651 assessment, as is the method by which those volume declines have been estimated.

Finally, volume forecasts can play an important role in the remedial phase of compliance review under §§ 3653(c) and 3662(c). For example, in its FY 2007 ACD, the Commission found that the performance of several loss-making products was not consistent with all of the applicable provisions of the PAEA. It did not take remedial action because new rates had already been recommended for those products before the issuance of the ACD. In that situation, volume and cost projections are needed to determine whether or not the new rates are likely to bring the affected products back above attributable costs. Because of their value in accomplishing the tasks described above, and because they are so closely related to the Postal Service's econometric model of demand elasticity, the Commission has added to final rule 3050.26 the requirement that the Postal Service provide its volume forecasting model and underlying documentation in January of each year.

As explained above, the Commission has a number of legitimate needs for estimates of demand elasticity and for volume forecasts, and to be able to evaluate the methods used to do them. That review, however, should interfere as little as possible with postal management's administration of its volume forecasting capability. Accordingly, the Commission will not require advance review of the methods by which the Postal Service estimates demand elasticity or forecasts volumes. To that end, final rule 3050.10 has been revised to make it clear the analytical principles that the Postal Service applies in estimating demand elasticities or forecasting volumes need not be reviewed in advance by the Commission.[14]

Current-year roll forward. The Public Representative proposes that the periodic reporting rules include a requirement that the Postal Service provide a current-year financial forecast. He notes that § 3651 requires the Commission to evaluate its own operations, including ''the extent to which regulations are achieving the objectives under sections 3622 and 3633, respectively.'' (Emphasis omitted.) Public Representative Comments at 3. He emphasizes that the task assigned to the Commission is to evaluate the current, rather than the past, success of its regulations in achieving their objectives. To do this effectively, he argues, it would be helpful to have information about the current year as well as historical information. He notes that the objectives of §§ 3622 and 3633 referred to in § 3651 primarily address rate, classification, service, and other issues that Congress expects the Commission to assess on a current basis, including whether products cover their attributable costs and whether competitive products are contributing an appropriate share to institutional costs. With respect to the latter assessment, he notes, § 3633 requires the Commission to take into account ''prevailing,'' as opposed to past, conditions in the market. He argues that to adequately meet the mandate of § 3651, current as well as historical data would be required. *Id.* at 3–4. He argues that such projections will highlight any unusual trends expected in product costs, and allow the public to better determine whether particular products are likely to cover their attributable costs. *Id.* at 5. He assumes that the Postal Service projects costs and revenues for the current year as part of the process of selecting new rates and to meet numerous other management needs. Therefore, he argues, providing a current-year financial roll forward is unlikely to add significantly to the Postal Service's reporting burden. *Id.*

[13] Volume information (with respect to market dominant products) is also mentioned in section 3652(a)(2) as within the Commission's purview.

[14] The Postal Service conjectured that the Commission viewed the presence of the term ''elasticity of demand'' in proposed rule 3050.11(a)(1) as the basis of its authority to require advance review of the analytical principles that it applies in estimating demand elasticities. It, therefore, requested that that term be deleted from proposed rule 3050.11. A close reading of that provision reveals that it is one item in a list of types of *impact* that the Postal Service should estimate (where feasible) that would arise from adopting a proposed change in an analytical principle. However, to remove any ambiguity about the Commission's intentions in this regard, that term has been removed from final rule 3050.11(a)(1) (renumbered as final rule 3050.11(b)(1)).

The Public Representative's logic is sound concerning the Commission's need for a current-year financial projection. A current assessment of the extent to which the Commission's regulations are achieving the objectives of §§ 3622 and 3633 would appear to require the best available data about the current as well as past years. Although the Public Representative is somewhat vague about the benefits of having a current-year projection to help the Commission in its evaluation, his general point is well taken. In its discussion of demand and volume forecasting, the Commission explained how having near-term cost and volume projections would improve its ability to carry out a number of specific tasks that have been assigned to it by the PAEA.

The Postal Service, however, takes issue with the Public Representative's assumption that providing the equivalent of a current-year roll forward would impose little added burden. It states that it ''does not routinely run its rate case roll-forward model, and there is no other way to get the set of comprehensive cost projections at the product and the rate category level that the PR describes.'' Postal Service Reply Comments at 20. It cautions that ''the Commission should [not] blithely add preparation and documentation of a roll-forward model to the already crushing list of activities which the Postal Service must complete in 90 days following the end of the fiscal year* * *.''

Although the Commission is sympathetic to the Postal Service's burden argument, it would prefer to have a better grasp of exactly how much extra time and resources would be required to provide a roll forward for the current year. The Commission believes that the benefits of being able to predict the net revenue effect of the Postal Service's proposed rates before it proposes them each year would be of substantial value to postal management. At the same time, it would be of significant benefit to the Commission in being able to more accurately evaluate the consistency of those rates with the price cap. Although a current-year roll forward would have these potentially important benefits, as discussed above, it is not clear at this time that it would outweigh the risk that this added requirement might be more than the Postal Service can handle in the very brief window available to it to produce the section 3652 report each year. Therefore, the Commission declines to adopt the Public Representative's proposal for a comprehensive roll forward for the current year at this time.

L. Proposed Rule 3050.28 (Monthly and Pay Period Reports)

Proposed rule 3050.28 deals with monthly and pay period reports. It would require that the Postal Service provides, among others things, the National Consolidated Trial Balance and the Revenue and Expense Summary. The Postal Service was originally opposed to providing them, presuming that its enterprise-wide public disclosure obligations were co-extensive with those of the private sector. *Id.* at 39–41. The Postal Service has since publicly provided similar, but somewhat less detailed information. That information, under the title ''Monthly Summary Financial Report'' has been added to the list of reports required by final rule 3050.28. The form in which that information will be reported accompanies the text of the final rule.

M. Proposed Rule 3050.30 (Universal Service Obligation)

Proposed rule 3050.30 would have required a set of data that was designed to facilitate modeling of the cost of various USO mandates. It included mail flow volumes by product between each pair of mail processing facilities. It also would have included costs, work hours, and CCCS/RCCS volumes by sampled product, route, facility, and ZIP Code. In addition, it would have included for sampled city routes, actual and possible deliveries by type, actual and possible stops by type, collection boxes, number of businesses served, and miles. Roughly comparable data would have been required for sample rural routes.

The general objection of the Postal Service to this proposed rule was that the USO studies underway were not yet complete (as of the October filing date for reply comments in this docket), and that it would be easier to isolate a set of data essential to costing the various USO mandates after the results of those studies were in. It reasons that the methodologies to be applied should be settled upon before the data is collected or reported.[15] *Id.* at 5–8.

Although this was an appropriate argument at the time, the USO studies conducted on behalf of both the Postal Service and the Commission have since been submitted and follow-up comments received. *See* Docket Nos. PI2008–3 and PI2009–1. This circumstance allows the Commission to form at least preliminary judgments about what data are likely to play an important role in estimating the costs of the various USO mandates. The Commission is aware, however, that issues of what data can reasonably be made available, and the costs and benefits of doing so, are complex and nuanced. The Postal Service recommends that when the studies are complete, that it, the Commission, and interested parties confer on what methodologies are appropriate to develop the annual USO cost estimates, what input data would be needed to apply those methodologies, and what data are already available or obtainable at reasonable cost. *Id.* at 5–6.

The Commission accepts the Postal Service's recommendation. It will retain proposed rule 3050.30 as a placeholder, as the Postal Service requests. It will institute a separate informal rulemaking docket to determine what data should be reported to allow the Commission to annually estimate the cost of the various USO mandates.

N. Proposed Rules 3050.40 and 3050.41 (SEC-Type Financial Reports)

Section 3654 of the PAEA requires the Postal Service to file with the Commission certain standard financial reports the Securities and Exchange Commission (SEC) normally requires publicly traded corporations to file, including the Form 10–K and the Form 10–Q. Section 3654 articulates the requirement in considerable detail. In an attempt to make the Commission's periodic reporting rules a comprehensive reflection of the reporting requirements that the PAEA imposes on the Postal Service, proposed rule 3050.40 essentially restates the SEC-style reporting requirement found in § 3654. Proposed rule 3050.41 restates the audit requirements of that section.

The Postal Service argues that § 3654 is detailed and unambiguous and should be regarded as definitively expressing its obligation to furnish the Commission with SEC-style reports. Therefore, it argues, there is no need for an implementing regulation. It urges the Commission to make proposed rule 3050.40 a placeholder to be available in the event that the Postal Service's reporting should be shown to be inaccurate or in need of modification. *Id.* at 9–14. In the event that the Commission decides to retain a detailed counterpart of § 3654 in its periodic reporting rules, the Postal Service provides alternative language as Attachment A to its initial comments.

The Commission agrees that § 3654 makes the SEC-style reporting required of the Postal Service explicit in most respects, and that it is not of critical

[15] While this is generally a prudent approach, a countervailing consideration is that where there is a lack of relevant data, that lack of data has a tendency to drive the selection of the method used.

importance that a detailed counterpart appear in the Commission's periodic reporting rules. However, both the Commission and the Postal Service support minor modifications of the manner in which these requirements are stated, which makes it beneficial to restate the requirements in the Commission's rules. There is also some value in collecting all of the Postal Service's obligations to report information to the Commission in one place to simplify the task of those interested in tracking compliance with those obligations.

Accordingly, final rule 3050.40 restates the Postal Service's SEC-style reporting obligations essentially as they appear in § 3654. One minor difference is that § 3654(a)(2) is omitted from the Commission's rule. This is done to accommodate the Postal Service's concern that it not be defined as a ''registrant'' for purposes of determining what SEC reports it is obligated to file. Some aspects of some of those reports are highly specific to entities that have the legal status of private corporations and are inapplicable to the Postal Service because it does not share that legal status. Another minor difference is that the Commission includes a requirement that when the Postal Service receives the pension and post-retirement health obligation information specified in § 3654(b)(1) from the Office of Personnel Management that it furnish copies of that information to the Commission.

O. Proposed Rules 3050.50 et seq. (Service Performance)

Section 3691 of title 39 of the United States Code requires the Postal Service, in consultation with the Commission, to establish and maintain a set of service standards for market dominant products. That section provides explicit statutory objectives for the service standards adopted, and requires a service performance measurement system in which the Commission plays a role. It also authorizes complaints under § 3662 for violations of the regulations that implement these service standards and performance measurement systems.

The Commission is deferring consideration of data reporting on service quality. Proposed rules 3050.50 *et seq.* are ultimately intended to describe the service performance information that would be required to implement the relevant provisions of the PAEA. A separate rulemaking docket will be initiated shortly to develop these reporting requirements.

P. Proposed Rule 3050.60 (Master List of Handbooks, Etc.)

Proposed rules 3050.60(a) through (c) would require the Postal Service to provide a master list of publications, handbooks, and data collection forms at the beginning of each fiscal year in hard copy and in electronic form. Data collection forms and corresponding training manuals would be provided ''when changed.''

The Postal Service argues that the proposed rules should only require a comprehensive set of these materials initially, and further materials in all the categories listed only ''when changed.'' It also alleges that providing electronic versions of all such materials could be a significant burden. *Id.* at 47–48. The Commission incorporates these suggestions in final rules 3050.60(b) through (d). It also limits the requirement that these items be provided in electronic format to those already in that format.

Q. Standardized Narrative Explanations

Valpak observes that various rules proposed in this docket imply a need for a narrative explanation of lesser or greater elaboration. It argues that such narrative explanations should be standardized. It proposes that the Commission express a uniform standard as a definitional rule. The definition it advocates reads as follows:

> Rule 3050.1a. Full and detailed explanation. Where the rules in this Part require the Postal Service to file or otherwise submit an explanation, including the explanatory reports, analyses, lists, estimates, and other such items required by the various rules in Part 3050, the Postal Service shall provide a narrative setting forth a full and detailed explanation, providing the information requested, such as how the items in question were calculated and/or determined, how they differ from such items in the immediately preceding report of the same type, and how they comply with the requirements of the law and/or those imposed by the Commission.

Valpak Comments at 16–17. The Public Representative generally supports Valpak's proposal. Public Representative Reply Comments at 16–17.

Providing full and detailed explanations everywhere an explanation would be helpful is ordinarily a laudable goal. Imposing a one-size-fits-all standard in the context of the periodic reporting rules, however, would tend to work at cross-purposes with these rules.

In drafting these periodic reporting rules, the Commission is mindful that the need for detailed explanations differs markedly from one report to another, and that the time available to produce detailed explanations differs dramatically from one report to another as well. For example, the ratemaking schedule that has been adopted under the PAEA puts the Postal Service under considerable strain to produce its annual section 3652 report. It has 90 days to prepare its CRA, apply the results of associated special studies, and to analyze the significance of the overall results. Rather than impose an obligation on the Postal Service to provide detailed explanations on every aspect of its section 3652 report, it would be more productive to allow the Postal Service to focus on the main issues that its report raises, and treat those in some depth.

Valpak itself has suggested that for any rate or service that has not complied with the standards of title 39 in the review year, the Postal Service should provide an explanation of the causes, the remedy that it plans to pursue, and the expected time frame for bringing the rate or service into compliance. This is an example of where the Postal Service's limited time in preparing a section 3652 report should be focused. The standard that Valpak proposes would interfere with this kind of prioritization.

The Commission views flexibility in the nature of the narrative required as one of the strengths of its periodic reporting rules. Some of the periodic reports required by the Commission are intended to elicit only brief, simplified explanations to orient the lay public, rather than in-depth, technical explanations of things that are not in controversy and, if required, are likely to divert resources from more important work. A good example is final rule 3050.60(f) which requires the Postal Service to submit the equivalent of the ''Library Reference 1'' quick guide that was traditionally submitted in PRA rate cases.[16]

Final rule 3050.2(a) is another good example. It requires the Postal Service to list corrections that it has made and input data and quantification techniques that have changed since the pertinent periodic report was last submitted, together with ''a brief narrative explanation of each listed change.'' The Commission regards this requirement as reasonable because the narrative explanation only requires a

[16] Because the section 3050.60(f) narrative is meant to serve as a ''Cliffs Notes'' for the lay public seeking to understand postal costing, it would not have to be comprehensively redone each year. It would have to be updated only where accepted analytical principles have changed. This is consistent with what Pitney Bowes recommends. *See* Pitney Bowes Reply Comments at 3.

''bare bones'' explanation sufficient to give the public and the Commission notice of the reason for the change, rather than an in-depth discussion or defense of the change.

In fashioning the periodic reporting rules, the Commission contemplates that in-depth technical or theoretical explanations will be reserved for the contexts in which they are most needed. Those would include the informal rulemakings where new analytical principles are evaluated, and the compliance review period where significant compliance issues have been identified. To keep the flexibility to adapt narrative explanations to the context in which they arise, the Commission believes it best not to impose the same standard on each. For that reason, the Commission declines to adopt Valpak's proposal.

III. Indirectly Related Proposals

A. Substantive Proposals

The Appendix to this order contains an illustrative alternative format for the CRA that breaks out costs, volumes, and revenues for products and for rate categories. The rationale for requiring this more detailed alternative format was provided in Order No. 104 at 16–17. Time Warner notes that for Outside County Periodicals, there have been distinct rate categories added for bundles, sacks, and pallets. It suggests that it is both feasible and desirable to further disaggregate the Outside County data in the Appendix by bundle, sack, and pallet. It argues that CRA costs could be disaggregated to this level by simply re-tabulating IOCS data that is already routinely gathered. It argues that this disaggregation of CRA costs would provide ''better guidance for rate setting, as well as better guidance for possible cost reductions'' within the Periodicals class. Time Warner Comments at 14–15.

The Postal Service opposes this proposal. It validly observes that changing the source of the estimates for the costs of bundles, sacks, and pallets would constitute a change in analytical principles, and, therefore, should be handled in an informal cost methodology rulemaking under the procedures outlined in proposed rule 3050.11. Postal Service Reply Comments at 25. For that reason, the Commission declines to adopt Time Warner's proposal.

Time Warner also suggests that because the alternative format illustrated in the Appendix is highly disaggregated, particularly with respect to international mail, some data might suffer from small-sample variation. To overcome this problem, it suggests that the data for small-volume categories be averaged over several years. This, too, would constitute a change in analytical principles. Time Warner Comments at 14. The Commission declines to adopt it in the context of this rulemaking for the same reason.

B. Procedural Proposals

Discovery. None of the rules proposed by the Commission in this docket involved altering the procedures by which the Postal Service's section 3652 report is reviewed. Nevertheless, a number of procedural proposals have been offered for the Commission's consideration, primarily by Valpak. Some of these proposals have been endorsed by the Public Representative.

Valpak argues that the procedures for reviewing the Postal Service's section 3652 report do not provide enough opportunity for private parties to participate effectively. Given the paucity of explanatory narrative in the report itself, Valpak contends that the Commission should adopt rules that expressly allow private parties to engage in discovery against the Postal Service. It makes the same recommendation with respect to informal rulemakings in which proposals to change analytical principles are reviewed. It suggests that this be accomplished by making the formal hearing procedures described in part 3001, subpart A applicable to annual compliance review. Valpak Comments at 14–15.

Time Warner responds that Valpak suffers from an illusion that the procedural due process rights that were guaranteed in rate hearings under the PRA were carried forward by Congress in the PAEA. It contends that Congress purposely omitted from the PAEA any right to a ''hearing on the record'' with its attendant rights of discovery, cross-examination, testimony, and briefs. It asserts that with respect to compliance review, the only procedure that the PAEA guarantees third parties is an opportunity to comment on the Postal Service's section 3652 report. It likewise asserts that no procedural due process rights attach to an informal rulemaking reviewing changes to analytical principles other than the right to comment. Time Warner Reply Comments at 14–16.

The Postal Service opposes Valpak's proposal as well. It emphasizes that the Commission is allowed only 90 days to review its section 3652 report and third parties have considerably less than that to prepare their comments if they are to be meaningfully reviewed by the Commission. It argues that this schedule is so compressed that the Commission must screen third-party discovery requests so that the limited resources of its technical staff are available to respond to issues that the third parties and the Commission collectively view as of the highest priority. It contends that it should only be obligated to respond to discovery requests to the extent that they are reflected in Commission information requests. It concludes that the Commission should have the discretion to follow a similar approach in conducting methodological rulemakings where there is a need to expedite the process. Postal Service Reply Comments at 4–6.

The Commission agrees with the Postal Service that the extremely compressed time schedules under which compliance review must be conducted, and under which some methodological rulemakings might have to be conducted, make it prudent for the Commission to retain the discretion to screen the kind and amount of discovery to which the Postal Service must respond. The Commission also agrees with Valpak and others that effective third-party participation in both compliance review and methodology review is extremely important. The Commission concludes that these rules will allow it to most effectively utilize the limited time and technical resources available to investigate the most pressing postal issues that arise in both annual compliance reviews and from methodological research.

Period allowed for comments in compliance review. Section 3653 requires the Commission to provide parties to a compliance review proceeding an opportunity for comment on the Postal Service's section 3652 report. The period allowed for comment is not prescribed by the Commission's rules. On an *ad hoc* basis, the Commission afforded 30 days for initial comments and 15 days for reply comments in the first two compliance review cycles.

Valpak argues that the Commission should adopt procedural rules governing compliance review, and that those rules should allow 45 days for initial comments and 15 for reply comments. It says that this would provide a more reasonable time for interested parties to review the complex documentation that accompanies the Postal Service's section 3652 report, and still leave the Commission with enough time to take the comments of the public into account in its determination. Valpak Comments at 13.

The Commission appreciates how challenging it is to evaluate the complex documentation that the Postal Service files supporting its section 3652 report.

The Commission, however, has found that the comment periods that have been established in the notices issued in the first two compliance review dockets have not provided it with any leeway in the amount of time that it has reserved to itself to draft and issue its Annual Compliance Determination. It, therefore, declines to act on Valpak's suggestion.

Appendix [Illustrative list referred to in part II.G. of **SUPPLEMENTARY INFORMATION**.]

Products and Categories

Market Dominant Products

Domestic First-Class Mail:
- Single-Piece:
- Letters
- Flats
- Parcels
- Total Single-Piece Letters, Flats & Parcels

Presort:
- Letters
- Flats
- Parcels
- Total Presort Letters, Flats & Parcels

Automation:
- Letters
- Flats
- Parcels
- Total Automation Letters, Flats & Parcels
- Total Letters, Flats & Parcels
- Single-Piece Cards
- Presort Cards
- Automation Cards
- Total Cards
- Total Domestic First-Class Mail

First-Class Mail International:

Outbound Single-Piece Letters, Flats, IPPs, and Parcels:
- Target System Countries at UPU Rates
- Transition System Countries at UPU Rates
- Subject to Agreement
- Canada
- Other
- Total Outbound Single-Piece Letters, Flats, IPPs, and Parcels

Outbound Single-Piece Cards:
- Target System Countries at UPU Rates
- Transition System Countries at UPU Rates
- Subject to Agreement
- Canada
- Other
- Total Outbound Single-Piece Cards
- Total Outbound Single-Piece Mail

Inbound Single-Piece Mail (Letter Post):

Air:
- Target System Countries at UPU Rates
- Transition System Countries at UPU Rates
- Subject to Agreement
- Canada
- Other

Surface:
- Target System Countries at UPU Rates
- Transition System Countries at UPU Rates
- Subject to Agreement
- Canada
- Other
- Total Inbound Single-Piece Mail
- Total International First-Class Mail
- Total First-Class Mail

Periodicals:
- Within County
- Outside County:
- Regular Rate
- Nonprofit
- Classroom
- Total Outside County
- Total Periodicals

Standard Mail:
- Regular Presort Mail:
- Letters
- Flats
- Parcels
- Not-Flat Machinables
- Total Regular Presort Mail

Regular Automation Mail:
- Letters
- Flats
- Total Regular Automation Mail
- Total Regular Mail

Nonprofit Presort Mail:
- Letters
- Flats
- Parcels
- Not-Flat Machinables
- Total Nonprofit Presort Mail

Regular Automation Mail:
- Letters
- Flats
- Total Nonprofit Automation Mail
- Total Nonprofit Mail
- Total Regular and Nonprofit Mail

Enhanced Carrier Route Mail:
- Basic Presort Letters
- High Density Letters
- Saturation Letters
- Total Enhanced Carrier Route Letters
- Basic Presort Flats
- High Density Flats
- Saturation Flats
- Total Enhanced Carrier Route Flats
- Basic Presort Parcels
- High Density Parcels
- Saturation Parcels
- Total Enhanced Carrier Route Parcels
- Total Enhanced Carrier Route Mail

Nonprofit Enhanced Carrier Route Mail:
- Basic Presort Letters
- High Density Letters
- Saturation Letters
- Total Non-enhanced Carrier Route Letters
- Basic Presort Flats
- High Density Flats
- Saturation Flats
- Total Non-enhanced Carrier Route Flats
- Basic Presort Parcels
- High Density Parcels
- Saturation Parcels
- Total Non-enhanced Carrier Route Parcels
- Total Nonprofit Enhanced Carrier Route Mail
- Total ECR and Non-ECR Mail
- Total Standard Mail

Package Services:
- Single-Piece Parcel Post:
- Intra-Bulk Mail Center
- Inter-Bulk Mail Center
- Total Single-Piece Domestic Parcel Post
- Inbound Surface Parcel Post (at UPU Rates)
- Total Single-Piece Parcel Post
- Bound Printed Matter:
- Bound Printed Matter Flats:
- Nonpresorted
- Presorted
- Carrier Route
- Total Bound Printed Matter Flats
- Bound Printed Matter Parcels:
- Nonpresorted
- Presorted
- Carrier Route
- Total Bound Printed Matter Parcels
- Total Bound Printed Matter
- Media Mail:
- Single Piece
- Presorted
- Total Media Mail
- Library Rate:
- Single Piece
- Presorted
- Total Library Mail
- Total Media and Library Mail
- Total Package Services
- USPS Penalty Mail
- Free-for-the-Blind Mail
- Negotiated Service Agreements (NSAs) (list each separately):
- Total Negotiated Service Agreement Mail
- Total Market Dominant Mail
- Special Services:
- Ancillary Services:
- Address Correction
- Applications and Mailing Permits:
- First-Class Mail Presort Fee
- Standard Mail Mailing Fee
- Total Applications and Mailing Permits
- Package Services Mailing Fees:
- Bound Printed Matter Destination Entry Mailing Fee
- Library Mail Presort Mailing Fee
- Media Mail Presort Mailing Fee
- Total Package Service Fees
- Parcel Return Service Fees:
- Account Maintenance Fee
- Permit Fee
- Total Parcel Return Service Fees
- Parcel Select Destination Entry Mailing Fee
- Periodicals Mailing Fees:
- Original Entry Fee
- Reentry Fee
- Additional Entry Fee
- News Agent Registry Fee
- Total Periodicals Mailing Fees
- Permit Imprint Fee
- Business Reply Mail:
- Per-Piece Fee
- Permit/Account Maintenance Fees
- Total Business Reply Mail
- Bulk Parcel Return Service:
- Per-Piece Fee
- Account Maintenance Fee
- Permit Fee
- Total Bulk Parcel Return Service
- Certified Mail
- Certificate of Mailing
- Collect-on-Delivery
- Delivery Confirmation
- Insurance
- Merchandise Return Service:
- Per-Piece Fee
- Account Maintenance Fee
- Permit Fee
- Total Merchandise Return Service
- Parcel Airlift
- Registered Mail
- Return Receipt
- Return Receipt for Merchandise
- Restricted Delivery
- Shipper Paid Forwarding
- Signature Confirmation
- Special Handling
- Stamped Envelopes
- Stamped Cards
- Premium Stamped Envelopes
- Premium Stamped Cards
- Total Ancillary Services
- International Ancillary Services:

International Certificate of Mailing
International Registered Mail:
Outbound International Registered Mail
Inbound International Registered Mail
Total International Registered Mail
International Return Receipt:
Outbound International Return Receipt
Inbound International Return Receipt
Total International Return Receipt
International Restricted Delivery:
Outbound International Restricted Delivery
Inbound International Restricted Delivery
Total International Restricted Delivery
Inbound International Insurance
Inbound International Delivery Confirmation
Customs Clearance and Delivery Fee
Total International Ancillary Services
Address List Services:
ZIP Coding of Mailing Lists
Correction of Mailing Lists
Address Changes for Election Boards
Carrier Sequencing of Address Cards
Total Address List Services
Caller Service/Reserve Numbers
Change-of-Address Credit Card Authentication
Confirm
International Reply Coupon Services:
Outbound International Reply Coupon Service
Inbound International Reply Coupon Service
Total International Reply Services
International Business Reply Mail Services:
Outbound Business Reply Mail Service
Inbound International Business Reply Mail Service
Total International Business Reply Service
Money Orders
Post Office Boxes
Other Special Services:
Standard Mail Forwarding/Return:
Forwarding/Return Fee
Weighted Factor Forwarding/Return Fee
Total Standard Mail Forwarding/Return
Total Market Dominant Special Services
Total Market Dominant Mail and Services
Competitive Products
Priority Mail:
Domestic Priority Mail
Priority Mail International:
Outbound Priority Mail International:
Subject to UPU Inward Land Rates
Subject to Terminal Dues
Target System Countries at UPU Rates
Transition System Countries at UPU Rates
Subject to Agreement
Canada
Other
Total Outbound Priority Mail International
Inbound Air Parcel Post:
Subject to UPU Inward Land Rates
Subject to Agreement
Canada
Other
Total Inbound Air Parcel Post
Total Priority Mail International
Total Priority Mail
Express Mail:
Domestic Express Mail:
Custom Designed
Next Day and Second Day Post Office-to-Post Office
Next Day and Second Day Post Office-to-Addressee
Total Domestic Express Mail
Outbound International Expedited Services
Global Express Guaranteed
Express Mail International
Inbound International Expedited Services:
Subject to UPU Rates
Subject to Agreement
Canada
Other
Total Inbound International Expedited Services
Total International Express Mail:
Total Express Mail
Package Services:
Bulk Parcel Post:
Inter-Bulk Mail Center:
Barcoded
Origin Bulk Mail Center Presort
Bulk Mail Center Presort
Total Inter-Bulk Mail Center
Intra-Bulk Mail Center Barcoded
Parcel Select:
Destination Bulk Mail Center
Destination Sectional Center Facility
Destination Delivery Unit
Total Parcel Select
Parcel Return Service:
Return Bulk Mail Center
Return Destination Units
Total Parcel Return Service
Total Bulk Parcel Post
International Mail:
International Priority Airmail
International Surface Airlift
International Direct Sacks—M–Bags
Outbound International Direct Sacks—M–Bags
Inbound International Direct Sacks—M–Bags
Total International Direct Sacks—M–Bags
Global Customized Shipping Services
Inbound Surface Parcel Post (at Non-UPU Rates):
Canada
Other
Total Inbound Surface Parcel Post (at Non-UPU Rates)
Total International Mail
International Special Services:
International Money Transfer Service:
Outbound International Money Transfer Service
Inbound International Money Transfer Service
Total International Money Transfer Service
International Ancillary Services:
International Certificate of Mailing
International Registered Mail
International Return Receipt:
Outbound International Return Receipt
Inbound International Return Receipt
Total International Return Receipt
International Restricted Delivery
International Insurance:
Outbound International Insurance
Inbound International Insurance
Total International Insurance
Custom Clearance and Delivery Fee
Total International Ancillary Services
Total International Special Services

IV. Ordering Paragraphs

It is Ordered:

1. The Commission hereby amends its rules of practice and procedure by deleting rules 3001.102 and 103, and adding new part 3050—Periodic Reporting as set forth below.

2. These actions will take effect 30 days after publication in the **Federal Register**.

3. The Secretary shall arrange for publication of this order in the **Federal Register**.

List of Subjects

39 CFR Part 3001

Administrative practice and procedure; Confidential business information, Freedom of information, Sunshine Act.

39 CFR Part 3050

Administrative practice and procedure, Postal Service, Recordkeeping and reporting requirements.

Issued: April 16, 2009.

By the Commission.

Steven W. Williams,

Secretary.

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

PART 3001—RULES OF PRACTICE AND PROCEDURE

■ 1. The authority citation for part 3001 continues to read as follows:

Authority: 39 U.S.C. 404(d); 503; 3622; 3633; 3652; 3661.

§ 3001.102 [Removed]

■ 2. Remove and reserve § 3001.102 in subpart G.

§ 3001.103 [Removed]

■ 3. Remove and reserve § 3001.103 in subpart G.

■ 4. Add Part 3050—Periodic Reporting, to read as follows:

PART 3050—PERIODIC REPORTING

Sec.

3050.1 Definitions applicable to this part.
3050.2 Documentation of periodic reports.
3050.3 Access to information supporting Commission reports or evaluations.
3050.10 Analytical principles to be applied in the Postal Service's annual periodic reports to the Commission.
3050.11 Proposals to change an accepted analytical principle applied in the Postal Service's annual periodic reports to the Commission.
3050.12 Obsolescence of special studies relied on to produce the Postal Service's annual periodic reports to the Commission.
3050.13 Additional documentation required in the Postal Service's section 3652 report.
3050.14 Format of the Postal Service's section 3652 report.

3050.20 Compliance and other analyses in the Postal Service's section 3652 report.
3050.21 Content of the Postal Service's section 3652 report.
3050.22 Documentation supporting attributable cost estimates in the Postal Service's section 3652 report.
3050.23 Documentation supporting incremental cost estimates in the Postal Service's section 3652 report.
3050.24 Documentation supporting estimates of costs avoided by worksharing and other mail characteristics in the Postal Service's section 3652 report.
3050.25 Volume and revenue data.
3050.26 Documentation of demand elasticities and volume forecasts.
3050.27 Workers' Compensation Report.
3050.28 Monthly and pay period reports.
3050.30 Information needed to estimate the cost of the universal service obligation. [Reserved]
3050.35 Financial reports.
3050.40 Additional financial reporting.
3050.41 Treatment of additional financial reports.
3050.42 Proceedings to improve the quality of financial data.
3050.43 Information on program performance.
3050.50 Information on service performance for domestic products. [Reserved]
3050.51 Information on service performance for Special Services. [Reserved]
3050.52 Information on service performance for international products. [*Reserved*]
3050.53 Information on customer satisfaction and retail access. [Reserved]
3050.60 Miscellaneous reports and documents.

Authority: 39 U.S.C. 503, 3651, 3652, 3653.

§ 3050.1 Definitions applicable to this part.

(a) *Accepted analytical principle* refers to an analytical principle that was applied by the Commission in its most recent Annual Compliance Determination unless a different analytical principle subsequently was accepted by the Commission in a final rule.

(b) *Accepted quantification technique* refers to a quantification technique that was applied in the most recent iteration of the periodic report applying that quantification technique or was used to support a new analytical principle adopted in a subsequent rule 3050.11 proceeding.

(c) *Analytical principle* refers to a particular economic, mathematical, or statistical theory, precept, or assumption applied by the Postal Service in producing a periodic report to the Commission.

(d) *Annual Compliance Determination* refers to the report that 39 U.S.C. 3653 requires the Commission to issue each year evaluating the compliance of the Postal Service.

(e) *Annual periodic reports to the Commission* refers to all of the reports that the Postal Service is required to provide to the Commission each year.

(f) *Quantification technique* refers to any data entry or manipulation technique whose validity does not require the acceptance of a particular economic, mathematical, or statistical theory, precept, or assumption. A change in quantification technique should not change the output of the analysis in which it is employed.

(g) *Section 3652 report* refers to the annual compliance report provided by the Postal Service to the Commission pursuant to 39 U.S.C. 3652, but does not include the reports required by 39 U.S.C. 2803 and 2804.

§ 3050.2 Documentation of periodic reports.

(a) At the time that it submits any periodic report to the Commission, the Postal Service shall identify any input data that have changed, list any quantification techniques that it has changed, and list any corrections that it has made since that report was last submitted to and accepted by the Commission. It shall provide a brief narrative explanation of each listed change.

(b) If workpapers are required to support a periodic report, they shall:

(1) Show all calculations employed in producing each estimate;

(2) Be sufficiently detailed to allow all numbers used in such calculations to be traced back to public documents or to primary data sources; and

(3) Be submitted in a form, and be accompanied by sufficient explanation and documentation, to allow them to be replicated using a publicly available PC application.

(c) Spreadsheets used in preparing periodic reports shall be submitted in electronic form. They shall display the formulas used, their links to related spreadsheets, and shall not be password protected.

(d) Filing of portions of the documentation required by paragraphs (b) and (c) of this section that are not time critical may be delayed up to 2 weeks if the Postal Service obtains permission from the Commission to defer filing of such portions at least 30 days prior to the date on which the periodic report is due.

§ 3050.3 Access to information supporting Commission reports or evaluations.

(a) The Commission shall have access to material if, in its judgment, the information supports any report, assessment, or evaluation required by title 39 of the United States Code, including:

(1) The working papers and supporting matter of the Postal Service or the Postal Service Inspector General in connection with any information submitted under 39 U.S.C. 3652; and

(2) Information that supports the Commission's annual assessment under 39 U.S.C. 3651.

(b) [Reserved]

§ 3050.10 Analytical principles to be applied in the Postal Service's annual periodic reports to the Commission.

In its annual periodic reports to the Commission, the Postal Service shall use only accepted analytical principles. With respect to its submissions under § 3050.26, however, the Postal Service may elect to use an analytical principle prior to its acceptance by the Commission.

§ 3050.11 Proposals to change an accepted analytical principle applied in the Postal Service's annual periodic reports to the Commission.

(a) To improve the quality, accuracy, or completeness of the data or analysis of data contained in the Postal Service's annual periodic reports to the Commission, the Commission, acting on its own behalf, may issue a notice of proceeding to change an accepted analytical principle. In addition, any interested person, including the Postal Service or a public representative, may submit a petition to the Commission to initiate such a proceeding.

(b) *Form and content of notice or petition.* The notice of proceeding or petition shall identify the accepted analytical principle proposed for review, explain its perceived deficiencies, and suggest how those deficiencies should be remedied.

(1) If the notice of proceeding or petition proposes that a specific alternative analytical principle be followed, it should include the data, analysis, and documentation on which the proposal is based, and, where feasible, include an estimate of the impact of the proposed change on the relevant characteristics of affected postal products, including their attributable cost, avoided cost, average revenue, or service attainment.

(2) If the petitioner requests access to data from the Postal Service to support the assertions or conclusions in its petition, and such data are not otherwise available, it shall accompany the petition with a request to gain access to such data. The petitioner's request should identify the data sought, and include the reasons for believing that the data will support its petition. To

expedite its evaluation of the data request, the Commission may, after reasonable public notice, order that answers or objections be presented orally or in writing.

(c) *Procedures for processing a notice or petition.* To better evaluate a notice or petition to change an accepted analytical principle, the Commission may order that it be made the subject of discovery. By request of any interested person, or on its own behalf, the Commission may order that the petitioner and/or the Postal Service provide experts on the subject matter of the proposal to participate in technical conferences, prepare statements clarifying or supplementing their views, or answer questions posed by the Commission or its representatives.

(d) *Action on the notice or petition.* (1) After the conclusion of discovery procedures, if any, the Commission shall determine whether to issue a notice of proposed rulemaking based on the petition and the supporting material received. Such notice shall be evaluated by procedures that are consistent with 5 U.S.C. 553. Interested parties will be afforded an opportunity to present written comments and reply comments, and, if the Commission so orders, to present oral comments as well.

(2) If accepted by the Commission, the change proposed in the notice of proposed rulemaking shall be published in a final rule in the **Federal Register** and on the Commission's Web site.

§ 3050.12 Obsolescence of special studies relied on to produce the Postal Service's annual periodic reports to the Commission.

The Postal Service shall provide a list of special studies whose results are used to produce the estimates in its annual periodic reports to the Commission. It shall indicate the date the study was completed and whether the study reflects current operating conditions and procedures. The Postal Service shall update the list annually.

§ 3050.13 Additional documentation required in the Postal Service's section 3652 report.

At the time the Postal Service files its section 3652 report, it shall include a brief narrative explanation of any changes to accepted analytical principles that have been made since the most recent Annual Compliance Determination was issued and the reasons that those changes were accepted.

§ 3050.14 Format of the Postal Service's section 3652 report.

The Postal Service's Cost and Revenue Analysis (CRA) report shall be presented in a format reflecting the classification structure in the Mail Classification Schedule. It shall also be presented in an alternative, more disaggregated format capable of reflecting the classification structure in effect prior to the adoption of the Postal Accountability and Enhancement Act.

§ 3050.20 Compliance and other analyses in the Postal Service's section 3652 report.

(a) The Postal Service's section 3652 report shall include an analysis of the information that it contains in sufficient detail to demonstrate the degree to which, in the fiscal year covered by its report, each of its products (market dominant and competitive) comply with all of the applicable provisions of title 39 of the United States Code and the regulations promulgated thereunder, and promote the public policy objectives set out in title 39 of the United States Code.

(b) Its analysis shall be applied to products individually, and, where appropriate, to products collectively.

(c) It shall address such matters as non-compensatory rates, discounts greater than avoided costs, and failures to achieve stated goals for on-time delivery standards. A more detailed analysis is required when the Commission observed and commented upon the same matter in its Annual Compliance Determination for the previous fiscal year.

§ 3050.21 Content of the Postal Service's section 3652 report.

(a) No later than 90 days after the close of each fiscal year, the Postal Service shall submit a report to the Commission analyzing its cost, volume, revenue, rate, and service information in sufficient detail to demonstrate that all products during such year comply with all applicable provisions of title 39 of the United States Code. The report shall provide the items in paragraphs (b) through (j) of this section.

(b) The volume and revenue generated by each product;

(c) The attributable costs of, and the contribution to institutional costs made by, each product;

(d) The quality of service received by each market dominant product, including the speed of delivery and the reliability of delivery;

(e) For each market dominant workshare discount offered during the reporting year:

(1) The per-item cost avoided by the Postal Service by virtue of such discount;

(2) The percentage of such per-item cost avoided that the per-item workshare discount represents;

(3) The per-item contribution made to institutional costs; and

(4) The factual and analytical bases for its conclusion that one or more of the exception provisions of 39 U.S.C. 3622(e)(2)(A) through (D) apply.

(f) For each market dominant negotiated service agreement:

(1) Identify its rates and service features;

(2) Estimate its costs, volumes, and revenues;

(3) Analyze its effect on the operational performance of the Postal Service, specifying the affected operations and, to the extent possible, quantifying the effect;

(4) Analyze the contribution of the agreement to institutional costs for its most recent year of operation. The year analyzed shall end on the anniversary of the negotiated service agreement that falls within the fiscal year covered by the Postal Service's annual periodic reports to the Commission and include the 12 preceding months. The analysis shall show all calculations and fully identify all inputs. Inputs used to estimate the effect on total contribution to the Postal Service, such as unit costs and price elasticities, shall be updated using fiscal year values; and

(5) Analyze the effect of the negotiated service agreement (and other functionally equivalent negotiated service agreements) on the marketplace. If there were harmful effects, explain why those effects were not unreasonable.

(g) For each competitive negotiated service agreement:

(1) Identify its rates and service features; and

(2) Estimate its costs, volumes, and revenues.

(h) For market tests of experimental products:

(1) Estimate their costs, volumes, and revenues individually, and in aggregate, by market dominant and by competitive product group;

(2) Estimate the quality of service of each individual experimental product; and

(3) Indicate whether offering the experimental product has created an inappropriate competitive advantage for the Postal Service or any mailer.

(i) For each nonpostal service, estimate its costs, volumes, and revenues; and

(j) Provide any other information that the Postal Service believes will help the Commission evaluate the Postal Service's compliance with the applicable provisions of title 39 of the United States Code.

§ 3050.22 Documentation supporting attributable cost estimates in the Postal Service's section 3652 report.

(a) The items in paragraphs (b) through (p) of this section shall be reported when they have changed from those used in the most recent Annual Compliance Determination.

(b) The CRA report, including relevant data on international mail services;

(c) The Cost Segments and Components (CSC) report;

(d) All input data and processing programs used to produce the CRA report, to include:

(1) CSC Reconciliation to Financial Statement and Account Reallocations;

(2) Manual Input Requirement (reflecting direct accounting or modeled costs);

(3) The CSC ''A'' report (showing how indirect costs are distributed to products based on the distribution of direct costs);

(4) The CSC ''B'' report (showing how indirect Property Equipment Supplies Services and Administrative (PESSA) costs are distributed to products;

(5) The CSC ''D'' report (showing final adjustments to total attributable and product-specific costs);

(6) The CSC ''F'' report (containing distribution keys for indirect labor components);

(7) The control file that includes the CRA program control string commands used to produce the CRA and the above-described CSC reports; and

(8) The master list of cost segment components, including all of the components used as distribution keys in the development of the CSC report and its accompanying reports.

(e) Spreadsheet workpapers underlying development of the CSC report by component. These workpapers shall include the updated factors and input data sets from the supporting data systems used, including:

(1) The In-Office Cost System (IOCS);

(2) The Management Operating Data System (MODS);

(3) The City Carrier Cost System (CCCS);

(4) The City Carrier Street Time Sampling System (CCSTS);

(5) The Rural Carrier Cost System (RCCS);

(6) The National Mail Count;

(7) The Transportation Cost System (TRACS);

(8) System for International Revenues and Volumes/Outbound (SIRV/O);

(9) System for International Revenues and Volumes/Inbound (SIRV/I);

(10) Military and International Dispatch and Accountability System; and

(11) Inbound International Revenue Accounting Systems (IAB data).

(f) The econometric analysis of carrier street time, including input data, processing programs, and output;

(g) The Window Service Supply Side Variability, Demand Side Variability, and Network Variability studies, including input data, processing programs, and output;

(h) The econometric analysis of purchased highway transportation cost variability, including input data, processing programs, and output;

(i) The econometric analysis of freight rail cost variability, including input data, processing programs, and output;

(j) A list and summary description of any transportation contracts whose unit rates vary according to the level of postal volume carried. The description should include the product or product groups carried under each listed contract;

(k) Spreadsheets and processing programs distributing attributable mail processing costs;

(l) The Vehicle Service Driver Data Collection System;

(m) Input data, processing programs, and output of the Vehicle Service Driver Cost Variability Study;

(n) Econometric analysis of postmaster cost variability;

(o) Floor Space Survey; and

(p) Density studies used to convert weight to cubic feet of mail.

§ 3050.23 Documentation supporting incremental cost estimates in the Postal Service's section 3652 report.

Input data, processing programs, and output of an incremental cost model shall be reported.

§ 3050.24 Documentation supporting estimates of costs avoided by worksharing and other mail characteristics in the Postal Service's section 3652 report.

(a) The items in paragraphs (b) through (l) of this section shall be reported, including supporting calculations and derivations.

(b) Letter, card, flat, parcel and non-flat machinable mail processing cost models with Delivery Point Sequence percentages calculated, which shall include:

(1) Coverage factors for any equipment where coverage is less than 100 percent;

(2) MODS productivities;

(3) Piggyback factors and supporting data;

(4) Entry profiles, bundle sorts, and pieces per bundle;

(5) Bundle breakage, handlings, and density;

(6) Mail flow density and accept rates;

(7) Remote Computer Reader finalization costs, cost per image, and Remote Bar Code Sorter leakage;

(8) Percentage of mail finalized to carrier route;

(9) Percentage of mail destinating at post office boxes; and

(10) Wage rates and premium pay factors.

(c) Pallet cost models for Periodicals;

(d) Sack cost models for Periodicals;

(e) Bundle cost models for Periodicals;

(f) Other container cost models for Periodicals;

(g) Analysis of Periodicals container costs;

(h) Business Reply Mail cost supporting material;

(i) Mail processing units costs for Carrier Route, High Density, and Saturation mail;

(j) Mail processing unit costs by shape and cost pool for each product and benchmark category;

(k) Delivery costs by product, shape, presort level, automation compatibility, and machinability, including Detached Address Label cost calculations; and

(l) Dropship cost avoidance models.

§ 3050.25 Volume and revenue data.

(a) The items in paragraphs (b) through (e) of this section shall be provided.

(b) The Revenue, Pieces, and Weight (RPW) report, including estimates by shape, weight, and indicia, and the underlying billing determinants, broken out by quarter, within 90 days of the close of each fiscal year;

(c) Revenue, pieces, and weight by rate category and special service by quarter, within 30 days of the close of the quarter;

(d) Quarterly Statistics Report, including estimates by shape, weight, and indicia, within 30 days of the close of the quarter; and

(e) Billing determinants within 40 days of the close of the quarter.

§ 3050.26 Documentation of demand elasticities and volume forecasts.

By January 20 of each year, the Postal Service shall provide econometric estimates of demand elasticity for all postal products accompanied by the underlying econometric models and the input data sets used; and a volume forecast for the current fiscal year, and the underlying volume forecasting model.

§ 3050.27 Workers' Compensation Report.

The Workers' Compensation Report, including summary workpapers, shall be provided by March 1 of each year.

§ 3050.28 Monthly and pay period reports.

(a) The reports in paragraphs (b) through (f) of this section shall be provided within 15 days of the close of the relevant period or as otherwise stated.

(b) Monthly Summary Financial Report on the 24th day of the following month, except that the report for the last month of each quarter shall be provided at the time that the Form 10–Q report is provided.

(1) The report shall follow the formats as shown below.

BILLING CODE 7710–FW–P

Table 1—USPS Monthly Financial Statement

Month, Fiscal Year

[$ millions]

	Current Period					Year-to-Date				
	Actual	Plan	SPLY	% Plan Var	% SPLY Var	Actual	Plan	SPLY	% Plan Var	% SPLY Var
Operating Revenue:										
Mail and Services Revenue										
Government Appropriations										
Total Operating Revenue										
Operating Expenses:										
Personnel Compensation and Benefits										
Transportation										
Supplies and Services										
Other Expenses										
Total Operating Expenses										
Net Operating Income										
Interest Income										
Interest Expense										
Total Net Income										
Other Operating Statistics:										
Mail Volume (Millions):										
Total Market Dominant Volumes										
Total Competitive Product Volumes										
Total Mail Volume										
Total Workhours (Millions)										
Total Career Employees										
Total Non-Career Employees										

Table 2—Mail Volume and Mail Revenue

Month, Fiscal Year

[Thousands]

	Current Period			Year-to-Date		
	Actual	SPLY	% SPLY Var	Actual	SPLY	% SPLY Var
Market Dominant Products:						
First Class:						
Volume						
Revenue						
Periodicals:						
Volume						
Revenue						
Standard Mail:						
Volume						
Revenue						
Package Services:						
Volume						
Revenue						
All Other Market Dominant Mail:						
Volume						
Revenue						
Total Market Dominant Products:						
Volume						
Revenue						
Total Competitive Products:						
Volume						
Revenue						
Total All Mail:						
Volume						
Revenue						

Table 3—USPS Expenses

Month, Fiscal Year

[$ millions]

	Current Period					Year-to-Date				
	Actual	Plan	SPLY	% Plan Var	% SPLY Var	Actual	Plan	SPLY	% Plan Var	% SPLY Var
Personnel Expenses:										
Salaries and Benefits										
City Delivery										
Mail Processing										
Customer Services and Retail										
Rural Delivery										
Other, including Plant and Vehicle Maintenance										
Operational Support, Postmasters, and Administration										
Total Salaries and Benefits										
Other Personnel Related Expenses:										
Retiree Health Benefits										
Workers' Compensation										
All Other Personnel Related Expenses										
Total Other Personnel Related Expenses										
Total Personnel Compensation and Benefits										
Non-Personnel Expenses:										
Transportation										
Supplies and Services										
Depreciation and Amortization										
Rent and Utilities										
Vehicle Maintenance Service										
Information Technology										
Rural Carrier Equipment Maintenance										
Other Non-Personnel Expenses										
Total Non-Personnel Expenses										
Total Operating Expenses										
Interest Expense										
Total Expenses										

Table 4—USPS Workhours

Month, Fiscal Year

[data in thousands]

	Current Period					Year-to-Date				
	Actual	Plan	SPLY	% Plan Var	% SPLY Var	Actual	Plan	SPLY	% Plan Var	% SPLY Var
Workhours:										
City Delivery										
Mail Processing										
Mail Processing										
Customer Services and Retail										
Rural Delivery										
Other, including Plant and Vehicle Maintenance, Operational Support, Postmasters, and Administration										
Total Workhours										
Overtime Ratio per 100 Workhours										

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(2) [Reserved]

(c) National Consolidated Trial Balances and the Revenue and Expense Summary (monthly);

(d) National Payroll Hours Summary in electronic form (pay period);

(e) On-roll and Paid Employee Statistics (ORPES) (pay period); and

(f) Postal Service Active Employee Statistical Summary (HAT report) (pay period).

§ 3050.30 Information needed to estimate the cost of the universal service obligation. [Reserved]

§ 3050.35 Financial reports.

(a) The reports in paragraphs (b) through (d) of this section shall be provided annually at the time indicated.

(b) Annual Report of the Postmaster General (when released to the public);

(c) Congressional Budget Submission and supporting workpapers, including Summary Tables SE 1, 2, and 6 (within 7 days of the submission of the Federal Budget by the President to the Congress); and

(d) Integrated Financial Plan (within 7 days of approval by the Board of Governors).

§ 3050.40 Additional financial reporting.

(a) *In general.* The Postal Service shall file with the Commission:

(1) Within 40 days after the end of each fiscal quarter, a quarterly report containing the information required by the Securities and Exchange Commission to be included in quarterly reports under sections 13 and 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78o(d)) on Form 10–Q, as such form (or any successor form) may be revised from time to time;

(2) Within 60 days after the end of each fiscal year, an annual report containing the information required by the Securities and Exchange Commission to be included in annual reports under such sections on Form 10–K, as such form (or any successor form) may be revised from time to time; and

(3) Periodic reports within the time frame and containing the information prescribed in Form 8–K of the Securities and Exchange Commission, as such form (or any successor form) may be revised from time to time.

(b) *Internal control report.* For purposes of defining the reports required by paragraph (a)(2) of this section, the Postal Service shall comply with the rules prescribed by the Securities and Exchange Commission implementing section 404 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7262), beginning with the annual report for fiscal year 2010.

(c) *Financial reporting.* The reports required by paragraph (a)(2) of this section shall include, with respect to the Postal Service's pension and post-retirement health obligations:

(1) The funded status of the Postal Service's pension and post-retirement health obligations;

(2) Components of the net change in the fund balances and obligations and the nature and cause of any significant changes;

(3) Components of net periodic costs;

(4) Cost methods and assumptions underlying the relevant actuarial valuations;

(5) The effect of a 1 percentage point increase in the assumed health care cost trend rate for each future year on the service and interest costs components of net periodic post-retirement health cost and the accumulated obligation;

(6) Actual contributions to and payments from the funds for the years presented and the estimated future contributions and payments for each of the following 5 years;

(7) The composition of plan assets reflected in the fund balances; and

(8) The assumed rate of return on fund balances and the actual rates of return for the years presented.

(d) *Time of filing.* Within 5 business days of receiving the data listed under paragraph (c) of this section from the Office of Personnel Management, the Postal Service shall provide two copies of that data to the Commission.

(e) *Segment reporting.*

(1) Beginning with reports for fiscal year 2010, for purposes of the reports required under paragraphs (a)(1) and (2) of this section, the Postal Service shall include segment reporting.

(2) The Postal Service shall determine the appropriate segment reporting under paragraph (e)(1) of this section after consultation with the Commission.

§ 3050.41 Treatment of additional financial reports.

(a) For purposes of the reports required by § 3050.40(a)(2), the Postal Service shall obtain an opinion from an independent auditor on whether the information listed in § 3050.40(c) is fairly stated in all material respects, either in relation to the basic financial statements as a whole or on a stand-alone basis.

(b) *Supporting matter.* The Commission shall have access to the audit documentation and any other supporting matter of the Postal Service and its independent auditor in connection with any information submitted under § 3050.40.

§ 3050.42 Proceedings to improve the quality of financial data.

The Commission may, on its own motion or on request of an interested party, initiate proceedings to improve the quality, accuracy, or completeness of Postal Service data required under § 3050.40 whenever it shall appear that the data have become significantly inaccurate or can be significantly improved; or those revisions are, in the judgment of the Commission, otherwise necessitated by the public interest.

§ 3050.43 Information on program performance.

(a) The Postal Service shall provide the items in paragraphs (b)(1) through (3) of this section at the same time that the President submits an annual budget to Congress:

(b)(1) The comprehensive statement required by 39 U.S.C. 2401(e);

(2) The performance plan required by 39 U.S.C. 2803; and

(3) The program performance reports required by 39 U.S.C. 2804.

(c) Section 3050.10 does not apply to the reports referenced in this section.

§ 3050.50 Information on service performance for domestic products. [Reserved]

§ 3050.51 Information on service performance for Special Services. [Reserved]

§ 3050.52 Information on service performance for international products. [Reserved]

§ 3050.53 Information on customer satisfaction and retail access. [Reserved]

§ 3050.60 Miscellaneous reports and documents.

(a) The reports in paragraphs (b) through (g) of this section shall be provided at the times indicated.

(b) A master list of publications and handbooks, including those related to internal information procedures, data collection forms, and corresponding training handbooks by July 1, 2009, and again when changed;

(c) The items listed in paragraph (b) of this section in hard copy form, and in electronic form, if available;

(d) Household Diary Study (when completed);

(e) Input data and calculations used to produce the annual Total Factor Productivity estimates (by March 1 of each year);

(f) Succinct narrative explanations of how the estimates in the most recent Annual Compliance Determination were calculated and the reasons that particular analytical principles were followed. The narrative explanations shall be comparable in detail to that which had been provided in Library Reference 1 in omnibus rate cases processed under the Postal Reorganization Act (by July 1 of each year); and

(g) An update of the history of changes in postal volumes, revenues, rates, and fees that appears in library references USPS–LR–L–73 through 76 in Docket No. R2006–1 (by July 1 of each year).

[FR Doc. E9–9590 Filed 5–4–09; 8:45 am]

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Federal Register

Tuesday,
May 5, 2009

Part V

The President

Proclamation 8367—Law Day, U.S.A., 2009
Proclamation 8368—Loyalty Day, 2009

Federal Register
Vol. 74, No. 85
Tuesday, May 5, 2009

Presidential Documents

Title 3—

The President

Proclamation 8367 of April 30, 2009

Law Day, U.S.A., 2009

By the President of the United States of America

A Proclamation

In 1958, President Eisenhower established Law Day as ''a day of national dedication to the principles of government under law.'' Each year on Law Day, we celebrate our commitment to the rule of law. That great commitment is enshrined in the Declaration of Independence and the United States Constitution, and has been reaffirmed by the words and deeds of great Americans throughout our Nation's history.

This year we celebrate the bicentennial of the birth of one such American, President Abraham Lincoln. Lincoln rose from humble beginnings to guide our Nation through the most turbulent period in its history. His dedication to the rule of law and to equality under the law, and his refusal to retreat from the greatest moral challenge ever to confront us, gave us the Emancipation Proclamation and the preservation of our Union. His dedication also gave us the Gettysburg Address, with its resolution that ''government of the people, by the people, for the people, shall not perish from the earth.'' Indeed, Lincoln was one of the greatest Presidents and one of the greatest lawyers, in our Nation's history.

Lincoln's lasting legacy is his vision of the ''more perfect Union'' promised in our Constitution's preamble. According to Lincoln, ''The legitimate object of government is to do for a community of people whatever they need to have done, but cannot do at all, or cannot do so well for themselves, in their separate and individual capacities.'' This vision of a true United States of America, bound together by a recognition of the common good, guided our country through its darkest hour and helped it re-emerge as a beacon of freedom and equality under law.

On this Law Day, I encourage Americans to reflect on this legacy. By continuing a national conversation on the principles for which Lincoln stood, and by highlighting the attributes of this great American, we can help ensure that the legacy of our sixteenth President endures and that the United States remains dedicated to the principles of government under law.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, in accordance with Public Law 87–20, as amended, do hereby proclaim May 1, 2009, as Law Day, U.S.A. I call upon the people of the United States to acknowledge the importance of our Nation's legal and judicial systems with appropriate ceremonies and activities, and to display the flag of the United States in support of this national observance.

IN WITNESS WHEREOF, I have hereunto set my hand this thirtieth day of April, in the year of our Lord two thousand nine, and of the Independence of the United States of America the two hundred and thirty-third.

[FR Doc. E9–10557
Filed 5–4–09; 12:00 pm]
Billing code 3195–W9–P

Presidential Documents

Proclamation 8368 of May 1, 2009

Loyalty Day, 2009

By the President of the United States of America

A Proclamation

More than two centuries ago, our Nation's Founders declared the birth of a new Nation and began an experiment in self-governance. The young Republic committed itself to protecting the rights of life, liberty, and the pursuit of happiness for all citizens. These ideals inspired loyalty to the young Nation and moved volunteers to fight for their independence.

Generations later, these founding principles continue to unify and command the loyalty of the American people. The United States has expanded in size, increased in population, and grown in diversity, yet the promise of liberty and the pursuit of happiness arouse the patriotism and loyalty of Americans anew. Just as early settlers pledged to do their part to build the new Nation, now recent immigrants—loyal to the very same values—are helping America fulfill its promise.

We enjoy these blessings of liberty only because brave patriots have answered the call of duty. The men and women of the United States Armed Forces exemplify loyalty to our highest ideals, as do those who have fought valiantly for civil rights within our borders. These Americans and many others have made enormous sacrifices, and our Nation is grateful for their selflessness and unshakeable loyalty.

The Congress, by Public Law 85–529, as amended, has designated May 1 of each year as ''Loyalty Day.'' On Loyalty Day, we honor our Nation and remember with pride the courageous individuals who help keep it safe and strong and who honor its legacy of freedom and equal opportunity.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, do hereby proclaim May 1, 2009, as Loyalty Day. I call upon all the people of the United States to join in support of this national observance and to display the flag of the United States on Loyalty Day.

IN WITNESS WHEREOF, I have hereunto set my hand this first day of May, in the year of our Lord two thousand nine, and of the Independence of the United States of America the two hundred and thirty-third.

[FR Doc. E9–10559
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