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

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

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

RESERVATIONS: (202) 741–6008

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Rules and Regulations

Federal Register
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Tuesday, May 12, 2009

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

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

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1487

RIN 0551–AA71

Technical Assistance for Specialty Crops

AGENCY: Foreign Agricultural Service (FAS) and Commodity Credit Corporation (CCC), USDA.

ACTION: Final rule.

SUMMARY: This final rule amends the regulations to incorporate changes into three existing Technical Assistance for Specialty Crops (TASC) provisions. First, it increases the funding cap on individual proposals from $250,000 to $500,000 per year. Second, it increases the maximum duration of an activity from 3 years to 5 years. Finally, it increases the number of approved projects that a TASC participant can have underway at any given time, from three to five. The rule also makes other minor administrative changes to two other provisions for clarity.

DATE: *Effective Date:* June 11, 2009.

FOR FURTHER INFORMATION CONTACT: Mark Slupek at (202) 720–1169, fax at (202) 720–9361, or by email at: *podadmin@fas.usda.gov*.

SUPPLEMENTARY INFORMATION:

Background

This final rule amends the regulations at 7 CFR part 1487 applicable to the TASC program. The Farm Security and Rural Investment Act of 2002, which was reauthorized by the Food, Conservation, and Energy Act of 2008, directs CCC to establish a program to provide mandatory funding to assist U.S. organizations with funding for projects that address sanitary, phytosanitary, and technical barriers that prohibit or threaten the export of U.S. specialty crops. FAS, which administers the TASC program, provides grant funds as direct assistance to U.S. organizations.

Executive Order 12866

This rule is issued in conformance with Executive Order 12866. It has been determined to be not significant for the purposes of Executive Order 12866 and has not been reviewed by the Office of Management and Budget (OMB). A cost-benefit assessment of this rule was not completed.

Executive Order 12988

This rule has been reviewed in accordance with Executive Order 12988. This rule would preempt State laws to the extent such laws are inconsistent with it. This rule would not be retroactive.

Executive Order 12372

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

Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule because CCC is not required by 5 U.S.C. 553 or any other law to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

Environmental Assessment

CCC has determined that this rule does not constitute a major State or Federal action that would significantly affect the human or natural environment consistent with the National Environmental Policy Act (NEPA), 40 CFR 1502.4, major Federal actions requiring the preparation of Environmental Impact Statements, and Compliance with NEPA implementing the regulations of the Council on Environmental Quality, 40 CFR parts 1500–1508. Therefore, no environmental assessment or environmental impact statement will be prepared.

Unfunded Mandates

Although CCC is publishing this as a final rule, Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) does not apply to this rule because CCC is not required by 5 U.S.C. 553 or any other law to publish a final rulemaking for the subject of this rule. Further, this rule contains no unfunded mandates as defined in sections 202 and 205 of UMRA. Nor does this rule potentially affect small governments or contain significant Federal intergovernmental mandates.

Paperwork Reduction Act of 1995

In accordance with the Paperwork Reduction Act of 1995, CCC has previously received approval from OMB with respect to the information collection required to support this program. The information collection is described below:

Title: Technical Assistance for Specialty Crops.

OMB Control Number: 0551–0038.

E-Government Act Compliance

CCC is committed to complying with the E-Government Act to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services and for other purposes. The forms, regulations, and other information collection activities required to be utilized by a person subject to this rule are available at *http://www.fas.usda.gov*.

List of Subjects in 7 CFR Part 1487

Agricultural commodities, Exports, Specialty crops.

Summary and Analysis of Comments

CCC published a rule in the **Federal Register** (73 FR 73617, Dec. 3, 2008) proposing three changes to the regulations which govern the operations of the TASC program. That rule requested interested parties to submit comments by January 2, 2009.

Following is a summary of the comments which specifically address the proposed rule and CCC's responses to these comments. General comments relating to the value of the program, editorial suggestions, and non-substantive comments have been omitted.

Increase the Funding Cap From $250,000 to $500,000 per Year

CCC received six comments on this issue. One of the six opposed the increase.

Comment: We support amending the regulations used to administer the TASC program by increasing the amount of funding per proposal in any given year. The amendment to the TASC regulations will make the program more viable and relevant in addressing potential and existing trade barriers.

Comment: CCC should reconsider the proposed funding limitation by either reducing the funding limitation of $500,000 per project to allow for longer maximum durations, or by creating a discretionary fund to be designated specifically for projects extending beyond the maximum duration. The assessment of these types of circumstances should be based on the effectiveness of the project's activities by the measurement in reaching projected goals.

Response: Given the increase in program funding authorized by the Food, Conservation, and Energy Act of 2008, CCC believes that increasing the project funding limitation will not constrict the number or duration of approved projects. Therefore, CCC is adopting the rule as proposed.

Increase the Maximum Duration of an Activity From 3 Years to 5 Years

CCC received six comments on this issue. One of the six opposed the 5-year limitation.

Comment: The proposed rule change increasing the maximum duration of an activity from 3 years to 5 years should facilitate the efficient allocation of funding to the specialty crop industry and promote the design and implementation of projects that will benefit our industry.

Comment: The proposed 5-year limitation, although appreciated, is an unrealistic timeline when mitigating phytosanitary concerns of international trade partners. A discretionary fund should be specifically created for those projects that extend beyond the maximum duration.

Response: After 7 years of operating the TASC program, CCC believes that 3 years is not a sufficient length of time to complete certain projects. CCC believes that 5 years should be sufficient to complete all projects, and that making a provision to allow for projects to exceed 5 years in duration is unnecessary. Therefore, CCC is adopting the rule as proposed.

Increase the Number of Approved Projects From Three to Five That a TASC Participant Can Have Underway at Any Given Time

CCC received five comments on this issue, all of which favored the proposed change.

Comment: Allowing up to five approved projects for any one TASC participant at any given time should facilitate the efficient allocation of funding to the specialty crop industry and promote the design and implementation of projects that will benefit the industry.

Response: CCC will adopt the rule as proposed.

■ For the reasons set out in the preamble, 7 CFR part 1487 is amended as follows:

Title 7—Agriculture

PART 1487—TECHNICAL ASSISTANCE FOR SPECIALTY CROPS

■ 1. The authority citation for part 1487 continues to read as follows:

Authority: Sec. 3205 of Pub. L. 107–171.

■ 2. Revise § 1487.4 to read as follows:

§ 1487.4 Are there any limits on the scope of proposals?

(a) *Funding cap.* Proposals which request more than $500,000 of CCC funding in a given year will not be considered.

(b) *Length of activities.* Funding will not be provided for projects that have received TASC funding for 5 years. The 5 years do not need to be consecutive.

(c) *Target countries.* Proposals may target all eligible export markets, including single countries or reasonable regional groupings of countries.

(d) *Multiple proposals.* Applicants may submit multiple proposals, but no participant may have more than five approved projects underway at any given time.

■ 3. Amend § 1487.6 by revising paragraph (b) to read as follows:

§ 1487.6 Administration.

* * * * *

(b) *Evaluation process.* FAS will review all proposals for eligibility and completeness and will evaluate each proposal against the factors described in paragraph (a) of this section. The purpose of this review is to identify meritorious proposals, recommend an appropriate funding level for each proposal, and submit the proposals and funding recommendations to appropriate officials within FAS for decision. FAS may, when appropriate to the subject matter of the proposal, request the assistance of other U.S. government experts in evaluating the merits of a proposal.

■ 4. Amend § 1487.8 by revising paragraph (a)(4) to read as follows:

§ 1487.8 How are payments made?

(a) * * *

(4) Participants shall maintain all records and documents relating to TASC projects, including the original documentation which supports reimbursement claims, for a period of 3 calendar years following the expiration or termination date of the program agreement. Such records and documents will be subject to verification by FAS and shall be made available upon request to authorized officials of the U.S. Government. FAS may deny a claim for reimbursement if the claim is not supported by acceptable documentation.

* * * * *

Signed at Washington, DC, on the 28th of April 2009.

Patricia R. Sheikh,

Acting Administrator, Foreign Agricultural Service, and Vice President, Commodity Credit Corporation.

[FR Doc. E9–11053 Filed 5–11–09; 8:45 am]

BILLING CODE 3410–10–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 93

[Docket No. APHIS–2007–0095]

RIN 0579–AC63

Importation of Cattle From Mexico; Addition of Port at San Luis, AZ; Correction

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule; correction.

SUMMARY: We are correcting an error in the amendatory language in our final rule that added the port of San Luis, AZ, as a port through which cattle that have been infested with fever ticks or exposed to fever ticks or tick-borne diseases may be imported into the United States and that removed provisions that limit the admission of cattle that have been infested with fever ticks or exposed to fever ticks or tick-borne diseases to the State of Texas. The final rule was published in the **Federal Register** on January 2, 2009.

DATES: *Effective Date:* The effective date of this correction to § 93.427(b)(2) introductory text is delayed indefinitely. This delay is consistent with the delayed effective date of the amendment to § 93.427(b)(2) introductory text published in the **Federal Register** on January 2, 2009, at 74 FR 5–6. APHIS will publish a document announcing an effective date for this correction in the **Federal Register.**

FOR FURTHER INFORMATION CONTACT: Dr. Betzaida Lopez, Staff Veterinarian, National Center for Import and Export, VS, APHIS, 4700 River Road, Unit 39, Riverdale, MD 20737–1231; (301) 734–8364.

SUPPLEMENTARY INFORMATION:

In a final rule published in the **Federal Register** on January 2, 2009 (74 FR 1–6, Docket No. APHIS–2007–0095), we amended the regulations regarding the importation of cattle from Mexico by adding San Luis, AZ, as a port through which cattle that have been infested with fever ticks or exposed to fever ticks or tick-borne diseases may be imported into the United States. We also amended the regulations to remove provisions that limit the admission of cattle that have been infested with fever ticks or exposed to fever ticks or tick-borne diseases to the State of Texas. In amendatory instruction 3, it was our intent to further amend the introductory text of § 93.427(b)(2) to add the port of San Luis. However, we inadvertently omitted San Luis, AZ, from the text that followed. This document corrects that error.

After port facilities at San Luis, AZ, are constructed and approved by the Animal and Plant Health Inspection Service (APHIS), APHIS will publish a document announcing an effective date for this correction in the **Federal Register.**

Correction

In FR Doc. E8–31212, published on January 2, 2009 (74 FR 1), under amendatory instruction 3 on page 5, third column, and page 6, first column, § 93.427(b)(2) introductory text is corrected to read as follows:

§ 93.427 Cattle from Mexico.

* * * * *

(b) * * *

(2) Cattle that have been exposed to splenetic, southern, or tick fever, or that have been infested with or exposed to fever ticks, may be imported from Mexico for admission into the United States, except into areas of Texas quarantined because of said disease or tick infestation as specified in § 72.5 of this chapter, at one of the land border ports in Texas listed in § 93.403(c), the port of Santa Teresa, NM, or the port of San Luis, AZ, provided that the following conditions are strictly observed and complied with:

* * * * *

Done in Washington, DC, this 6th day of May 2009.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E9–11059 Filed 5–11–09; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0975; Directorate Identifier 2008–NE–29–AD; Amendment 39–15905; AD 2009–08–51]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce Corporation (RRC) AE 3007A Series Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule; request for comments.

SUMMARY: This document publishes in the **Federal Register** an amendment adopting emergency airworthiness directive (AD) 2009–08–51 that was sent previously to all known U.S. owners and operators of RRC AE 3007A series turbofan engines. This AD requires performing an eddy current inspection (ECI) or surface wave ultrasonic test (SWUT) inspection on each affected high-pressure turbine wheel. This AD results from additional reports of cracks in the high-pressure turbine (HPT) stage 2 wheels identified from the required inspections in AD 2008–26–06. A revised risk assessment that includes these additional reports indicates we need to require a higher inspection rate. We are issuing this AD to prevent an uncontained failure of the HPT stage 2 wheel and damage to the airplane.

DATES: This AD becomes effective May 27, 2009 to all persons except those persons to whom it was made immediately effective by emergency AD 2009–08–51, issued on April 10, 2009, which contained the requirements of this amendment. The Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulations as of May 27, 2009.

We must receive any comments on this AD by July 13, 2009.

ADDRESSES: Use one of the following addresses to comment on this AD.

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

FOR FURTHER INFORMATION CONTACT: Kyri Zaroyiannis, Aerospace Engineer, Chicago Aircraft Certification Office, Small Airplane Directorate, FAA, 2300 E. Devon Ave., Des Plaines, IL 60018; e-mail: *kyri.zaroyiannis@faa.gov;* telephone (847) 294–7836; fax (847) 294–7834.

Contact Rolls-Royce Corporation, P.O. Box 420, Indianapolis, IN 46206; telephone (317) 230–3774; fax (317) 230–8084; e-mail: *indy.pubs.services@rolls-royce.com,* for the service information identified in this AD.

SUPPLEMENTARY INFORMATION: On April 10, 2009, the FAA issued emergency AD 2009–08–51, that applies to RRC AE 3007A series turbofan engines. That AD supersedes AD 2008–26–06, and requires performing an ECI or SWUT inspection on HPT stage 2 wheels for cracks. That AD resulted from additional reports of cracks in the HPT stage 2 wheels identified from the required inspections. A revised risk assessment that includes these additional reports indicates we needed to require a higher inspection rate. That emergency AD also addresses a group of low utilization engines above 16,350 cycles-since-new (CSN) that might not yet have been inspected. This condition, if not corrected, could result in a possible uncontained failure of the HPT stage 2 wheel and damage to the airplane.

Relevant Service Information

We have reviewed RRC Alert Service Bulletin (ASB) AE 3007A–A–72–367, Revision 1, dated April 7, 2009, that describes procedures for ECI of the HPT stage 2 wheel on AE 3007A series turbofan engines and RRC SB AE 3007A–72–368, Revision 1, dated April 6, 2009, that describes the procedures for SWUT inspection of the HPT stage 2 wheel on AE 3007A series turbofan engines.

FAA's Determination and Requirements of This AD

Since the unsafe condition described is likely to exist or develop on other engines of the same type design, we

issued emergency AD 2009–08–51 to prevent an uncontained failure of the HPT stage 2 wheel, and damage to the airplane. This AD requires performing an ECI or SWUT inspection on each affected wheel. You must use the service information described previously to perform the actions required by this AD.

FAA's Determination of the Effective Date

Since an unsafe condition exists that requires the immediate adoption of this AD, we have found that notice and opportunity for public comment before issuing this AD are impracticable, and that good cause existed to make the AD effective immediately on April 10, 2009, to all known U.S. owners and operators of RRC AE 3007A series turbofan engines. These conditions still exist, and we are publishing the AD in the **Federal Register** as an amendment to Section 39.13 of part 39 of the Code of Federal Regulations (14 CFR part 39) to make it effective to all persons.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety and was not preceded by notice and an opportunity for public comment. However, we invite you to send us any written relevant data, views, or arguments regarding this AD. Send your comments to an address listed under **ADDRESSES**. Include ''AD Docket No. FAA–2008–0975; Directorate Identifier 2008–NE–29–AD'' in the subject line of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify it.

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 with FAA personnel concerning this AD. Using the search function of the Web site, anyone can find and read the comments in any of our dockets, including, if provided, the name of the individual who sent the comment (or signed the comment 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 19477–78).

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 the same as the Mail address provided in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

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 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 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, Incorporation by reference, Safety.

Adoption of the Amendment

■ Under the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (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 39–15772 (73 FR 78927, December 24, 2008), and by adding the following new airworthiness directive:

2009–08–51 Rolls-Royce Corporation (RRC) (Formerly Allison Engine Company): Amendment 39–15905. Docket No. FAA–2008–0975; Directorate Identifier 2008–NE–29–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective May 27, 2009, to all persons except those persons to whom it was made immediately effective by emergency AD 2008–08–51, issued April 10, 2009, which contained the requirements of this amendment.

Affected ADs

(b) This AD supersedes AD 2008–26–06.

Applicability

(c) This AD applies to RRC AE 3007A series turbofan engines with high-pressure turbine (HPT) stage 2 wheels, part number (P/N) 23065892, 23069116, 23069438, 23069592, 23074462, 23074644, 23075345, 23084520, or 23084781, installed. These engines are installed on, but not limited to, Empresa Brasileira de Aeronautica S. A. (EMBRAER) EMB–135 and EMB–145 airplanes.

Unsafe Condition

(d) This AD results from additional reports of cracks in the HPT stage 2 wheels identified from the required inspections in AD 2008–26–06. A revised risk assessment that includes these additional reports indicates we need to require a higher inspection rate. We are issuing this AD to prevent uncontained failure of the HPT stage 2 wheel and damage to the airplane.

Compliance

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

Eddy Current Inspection or Surface Wave Ultrasonic Test Inspection

(f) Perform an eddy current inspection (ECI) or surface wave ultrasonic test (SWUT) inspection on each affected wheel by the cycle limit specified in Table 1 of this AD. Use paragraphs 2.A. through 2.C.(4) of RRC

Alert Service Bulletin (ASB) AE 3007A–A–72–367, Revision 1, dated April 7, 2009, or use paragraphs 2.A through 2.M.(8) of RRC Service Bulletin (SB) AE 3007A–72–368, Revision 1, dated April 6, 2009, to perform the inspections.

TABLE 1—COMPLIANCE TIMES FOR ECI OR SWUT INSPECTION OF THE HPT STAGE 2 WHEELS BY CYCLES-SINCE-NEW (CSN)

For HPT stage 2 wheels with CSN on the effective date of this AD:	Remove or inspect:
17,500 or more	Before the next flight.
15,560 to 17,499	Within 75 cycles-in-service (CIS).
15,000 to 15,559	Within 150 CIS.
14,700 to 14,999	Within 200 CIS.
14,000 to 14,699	Within 250 CIS.
13,580 to 13,999	Within 450 CIS.
12,460 to 13,579	Within 600 CIS.

Installation Prohibition

(g) After the effective date of this AD, don't return to service, any HPT stage 2 wheel that was installed in any RRC AE 3007A series turbofan engine removed from service as a result of paragraph (f) of this AD unless the HPT stage 2 wheel has passed an inspection specified in RRC ASB AE 3007A–A–72–367, Revision 1, dated April 7, 2009 or RRC SB AE 3007A–72–368, Revision 1, dated April 6, 2009.

Removal From Service

(h) After the effective date of this AD, remove from service any HPT stage 2 wheel covered by this AD that has accumulated 22,500 CSN.

(i) After the effective date of this AD, don't install any HPT stage 2 wheel that has 22,500 or more CSN.

Credit for Previous Inspections

(j) HPT stage 2 wheels already inspected and passed using RRC ASB AE 3007A–A–72–367, Revision 1, dated April 7, 2009, or earlier issue; or RRC SB AE 3007A–72–368, Revision 1, dated April 6, 2009, or earlier issue, meet the requirements for the initial inspections specified in paragraph (f) of this AD.

Alternative Methods of Compliance

(k) The Manager, Chicago Aircraft 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.

Special Flight Permits

(l) Under 14 CFR part 39.23, we are limiting the special flight permits for this AD by restricting the flight to essential flight crew only.

Related Information

(m) Contact Kyri Zaroyiannis, Aerospace Engineer, Chicago Aircraft Certification Office, Small Airplane Directorate, FAA, 2300 E. Devon Ave., Des Plaines, IL 60018; e-mail: *kyri.zaroyiannis@faa.gov;* telephone (847) 294–7836; fax (847) 294–7834, for more information about this AD.

Material Incorporated by Reference

(n) You must use the service information specified in Table 2 of this AD to perform the inspections required by this AD. The Director of the Federal Register approved the incorporation by reference of the documents listed in Table 2 of this AD in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You can get a copy from Rolls-Royce Corporation, P.O. Box 420, Indianapolis, IN 46206; telephone (317) 230–3774; fax (317) 230–8084; e-mail: *indy.pubs.services@rolls-royce.com.* You may review copies at the FAA, New England Region, 12 New England Executive Park, Burlington, MA; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

TABLE 2—INCORPORATION BY REFERENCE

Rolls-Royce Corporation service information No.	Page	Revision	Date
Alert Service Bulletin AE 3007A–A–72–367 Total pages: 6	ALL	1	April 7, 2009.
Service Bulletin AE 3007A–72–368 Total pages: 22	ALL	1	April 6, 2009.

Issued in Burlington, Massachusetts, on May 4, 2009.

Peter A. White,

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

[FR Doc. E9–11126 Filed 5–11–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2009–0120; Airspace Docket No. 09–ACE–2]

Establishment of Class E Airspace; Rushville, NE

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class E airspace at Rushville, NE. Controlled airspace is necessary to accommodate Area Navigation (RNAV) Standard Instrument Approach Procedures (SIAPs) at Modisett Airport, Rushville, NE. The FAA is taking this action to enhance the safety and management of Instrument Flight Rule (IFR) operations at Modisett Airport.

DATES: *Effective Date:* 0901 UTC, August 27, 2009. The Director of the Federal Register approves this incorporation by reference action under 1 CFR Part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd, Fort

Worth, TX 76137; telephone (817) 321–7716.

SUPPLEMENTARY INFORMATION:

History

On March 2, 2009, the FAA published in the **Federal Register** a notice of proposed rulemaking to establish Class E airspace at Rushville, NE, adding controlled airspace at Modisett Airport, Rushville, NE. (74 FR 9053, Docket No. FAA–2009–0120). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9S signed October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR Part 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) Part 71 by establishing Class E airspace at Rushville, NE, adding controlled airspace at Modisett Airport, Rushville, NE, for the safety and management of IFR aircraft operations.

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR Part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

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

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

§ 71.1 [Amended]

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

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface

* * * * *

ACE NE E5 Rushville, NE [New]

Rushville, Modisett Airport, NE
(Lat. 42°44′12″ N., long. 102°26′40″ W.)

That airspace extending upward from 700 feet above the surface within a 7.3-mile radius of Modisett Airport.

* * * * *

Issued in Fort Worth, TX, on April 24, 2009.

Roger M. Trevino,

Acting Manager, Operations Support Group, Central Service Center.

[FR Doc. E9–10989 Filed 5–11–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

International Trade Administration

19 CFR Part 361

[Docket Number: 090416682–9683–01]

Mexican Cement Import Licensing System

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

ACTION: Final rule; removal of regulations.

SUMMARY: The Department of Commerce is removing its Mexican Cement Import Licensing (''MCILS'') regulations currently published at 19 CFR Part 361. This action is being taken pursuant to provisions of the Agreement Between the Office of the United States Trade Representative and the Department of Commerce of the United States of America and the Ministry of Economy of the United Mexican States (Secretaria de Economia) on Trade in Cement (''Cement Agreement''), signed March 6, 2006. The Cement Agreement was terminated at 11:59 p.m. on March 31, 2009. Accordingly, the MCILS will no longer be necessary.

DATE: *Effective Date:* May 12, 2009.

FOR FURTHER INFORMATION CONTACT: Sally C. Gannon, (202) 482–0162 or Judith Wey Rudman, (202) 482–0192.

SUPPLEMENTARY INFORMATION: On March 6, 2006, the Office of the United States Trade Representative (''USTR'') and the United States Department of Commerce (''Commerce'') entered into an agreement with the Secretaria de Economia of Mexico pertaining to imports of gray portland cement and clinker from Mexico (''Mexican Cement''). The Cement Agreement provided for the settlement or suspension of ongoing litigation before North American Free Trade Agreement and World Trade Organization panels challenging various antidumping duty determinations involving Mexican Cement. Pursuant to the terms of the Cement Agreement, on February 28, 2007, Import Administration (''IA'') issued a rule to add new regulations implementing the MCILS. This rule required all importers of cement from Mexico covered by the scope of the Cement Agreement to obtain an import license from the Department prior to completing their U.S. Customs and Border Protection entry summary documentation. IA used the information recorded via the MCILS to monitor compliance with the Cement Agreement. The Cement Agreement also provided that if all interested parties had abided by its terms, Commerce would terminate the Cement Agreement on March 31, 2009, and would revoke the underlying antidumping duty order. All obligations of the Cement Agreement were fulfilled; therefore, Commerce has terminated the Cement Agreement, and revoked the underlying antidumping duty order through a notice entitled *Gray Portland Cement and Clinker from Mexico: Final Results of Changed-Circumstances Review,*

Revocation of Antidumping Duty Order, and Termination of Five-Year (Sunset) Review of Antidumping Duty Order published in the **Federal Register** on April 6, 2009 (74 FR 15435). As a result, the MCILS is no longer necessary and Commerce is removing the regulations pertaining to it. Commerce will also discontinue the associated collection-of-information authorization provided by the Office of Management and Budget under Control Number 0625–0259.

Classification

Executive Order 12866: This action has been determined to be not significant under E.O. 12866.

Administrative Procedure Act: The Department of Commerce finds good cause under 5 U.S.C. 553(b)(B) to waive prior notice and opportunity for public comment as it is contrary to the public interest. The regulations implementing the MCILS required all importers of cement from Mexico covered by the scope of the Cement Agreement to obtain an import license from the Department through the MCILS prior to completing their U.S. Customs and Border Protection entry summary documentation. IA used the information recorded via the MCILS to monitor compliance with the Cement Agreement. The Cement Agreement provided that if all interested parties had abided by its terms, Commerce would terminate the Cement Agreement on March 31, 2009, and would revoke the underlying antidumping duty order. All obligations of the Cement Agreement were fulfilled; therefore, Commerce terminated the Cement Agreement on the agreed upon date. Commerce also revoked the underlying antidumping duty order effective April 1, 2009. *See* 74 FR 15435. Accordingly, it is no longer necessary to collect licensing information via the MCILS, and is therefore in the public interest to discontinue regulations requiring importers to use, and for IA to maintain, the MCILS. If the Department continued to allow the operation of the MCILS, the public would be unduly burdened by the MCILS regulations. For the above reasons, the Department waives the notice and comment rulemaking requirements of 5 U.S.C. 553(b)(B) and issues this rule in final form.

The Department of Commerce finds good cause under 5 U.S.C. 553(d)(1) to waive the 30-day delay in effectiveness as this rule relieves a restriction. This rule removes the regulations requiring all importers of cement from Mexico covered by the scope of the Cement Agreement to obtain an import license from the Department prior to completing their U.S. Customs and Border Protection entry summary documentation because it is no longer necessary to collect this information. Pursuant to the terms of the Agreement, the Department terminated the Cement Agreement on March 31, 2009, and revoked the underlying antidumping duty order effective April 1, 2009. *See* 74 FR 15435. Because it is no longer necessary to collect the information through the MCILS, the Department discontinues the MCILS, and removes the related implementing regulations through this final rule. The removal of the MCILS regulations constitutes a relief of a restriction as importers of cement from Mexico would no longer be required to obtain an import license from the Department. In order to implement this action immediately, the Department makes this rule effective upon publication.

Regulatory Flexibility Act: Because notice and opportunity for 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 is not required and has not been prepared.

List of Subjects in 19 CFR Part 361

Mexican Cement Import Licensing System.

■ Accordingly, pursuant to 13 U.S.C. 301(a) and 302, and section XI of the Cement Agreement, the Department is removing 19 CFR Part 361 in its entirety.

Dated: May 4, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

[FR Doc. E9–10955 Filed 5–11–09; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2009–0106]

RIN 1625–AA08

Special Local Regulation for Marine Events; Temporary Change of Dates for Recurring Marine Events in the Fifth Coast Guard District

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is temporarily changing the enforcement period of special local regulations for recurring marine events in the Fifth Coast Guard District. These regulations apply to only five recurring marine events that conduct on-water activities such as power boat races, swimming competitions, and harbor celebrations. Special local regulations are necessary to provide for the safety of life on navigable waters during the events. This action is intended to restrict vessel traffic in portions of the Chester River, MD; Rappahannock River, VA; Elizabeth River, Southern Branch, VA; North Atlantic Ocean, Ocean City, MD; and Pasquotank, River, Elizabeth, NC during each event.

DATES: Effective May 15, 2009, through July 12, 2009.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2009–0106 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–2009–0106 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 temporary rule, call Dennis Sens, Project Manager, Fifth Coast Guard District, Prevention Division, at 757–398–6204 or e-mail at *Dennis.M.Sens@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On March 25, 2009, we published a notice of proposed rulemaking (NPRM) entitled Special Local Regulation for Marine Events; Temporary Change of Dates for Recurring Marine Events in the Fifth Coast Guard District in the **Federal Register** (74 FR 12769). We received no comments on the proposed rule. No public meeting was requested, and none was held.

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.** The necessary information regarding change of dates for these

annual recurring marine events were not provided to the Coast Guard in sufficient time. The potential dangers posed by high speed power boat races conducted on the waterways with other vessel traffic makes special local regulations necessary. Delaying the effective date would be contrary to the public interest, since immediate action is needed to ensure the safety of the event participants, support vessels, spectator craft and other vessels transiting the event area. However, advance notifications will be made to users of the affected waterways via marine information broadcasts, local notice to mariners, commercial radio stations and area newspapers.

Background and Purpose

Marine events are frequently held on the navigable waters within the boundary of the Fifth Coast Guard District. The on-water activities that typically comprise marine events include sailing regattas, power boat races, swim races and holiday parades. For a description of the geographical area of each Coast Guard Sector Marine Inspection Zone and Captain of the Port Zone, *please see* 33 CFR 3.25.

This regulation proposes to temporarily change the enforcement period of special local regulations for recurring marine events within the Fifth Coast Guard District. This proposed regulation applies to five marine events in 33 CFR 100.501, Table to § 100.501.

Annually, the District of Columbia Aquatics Club sponsors the ''Maryland Swim for Life'', on the waters of the Chester River near Chestertown, MD. The regulation at 33 CFR 100.501 is effective annually for the Maryland Swim for Life marine event. The event is an open water swimming competition held on the waters of the Chester River, near Chestertown, Maryland. Approximately 150 swimmers will start from Rolph's Wharf and swim up-river 2.5 miles then swim down-river returning back to Rolph's Wharf. A large fleet of support vessels accompanies the swimmers. Therefore, to ensure the safety of participants and support vessels, 33 CFR 100.501 would be enforced for the duration of the event. This temporary final rule changes the period of enforcement for this event from the third Saturday in June or July to 5:30 a.m. until 2:30 p.m. on July 11, 2009. During that period, vessels may not enter the regulated area unless they receive permission from the Coast Guard Patrol Commander. Vessel traffic may be allowed to transit the regulated area only when the Patrol Commander determines it is safe to do so.

On June 6, 2009, the Rappahannock River Boaters Association (RRBA) will sponsor the ''2009 RRBA Spring Radar Shootout'', on the waters of the Rappahannock River near Layton, Virginia. The regulation at 33 CFR 100.501 is effective annually for this river boat race marine event. The event consists of approximately 35 powerboats participating in high-speed competitive races, traveling along a 3-mile straight line race course. Participating boats race individually within the designated course. A fleet of spectator vessels is anticipated to gather nearby to view the competition. Due to the need for vessel control during the event, vessel traffic will be temporarily restricted to provide for the safety of participants, spectators and transiting vessels. The regulation at 33 CFR 100.501 would be enforced for the duration of the event. This temporary final rule changes the period of enforcement for this event from the last Saturday in June to 12 p.m. until 5 p.m. on June 6, 2009, or rain date June 7, 2009. During that period, vessels may not enter the regulated area unless they receive permission from the Coast Guard Patrol Commander.

Norfolk Festevents Ltd., Norfolk, VA, sponsors the annual ''Norfolk Harborfest Celebration'', on the waters of the Elizabeth River between Norfolk and Portsmouth, VA. The regulation at 33 CFR 100.501 is effective annually for Norfolk Harborfest marine event. This annual celebration of Norfolk Harbor consists of a variety of on the water activities that include an Opening Ceremony—Parade of Sail; jet ski, water ski, wake board demonstrations; Fire boat demonstrations; Lazy Lizzie Anything That Floats Parade and Race; Dinghy Parade; Search and Rescue demonstrations by USCG & USN; and Quick and Dirty Boat Race. Evening fireworks displays will be fired from barges on the Elizabeth River as part of the Harborfest celebration. A large fleet of spectator vessels is anticipated to view the Harborfest activities. Therefore, to ensure the safety of participants, spectators and transiting vessels, 33 CFR 100.501 would be enforced for the duration of the event. This temporary final rule changes the period of enforcement for this event from the first Friday, Saturday and Sunday in June to 9 a.m. on July 3, 2009 until 11 p.m. on July 5, 2009. During that period, vessels may not enter the regulated area unless they receive permission from the Coast Guard Patrol Commander. Vessel traffic will be allowed to transit the regulated area between the water events, when the Patrol Commander determines it is safe to do so.

The Offshore Performance Association (OPA) Racing LLC annually sponsors the ''Offshore Grand Prix'', on the waters of the North Atlantic Ocean near Ocean City, MD. The regulation at 33 CFR 100.501 is effective annually for the Ocean City offshore race marine event. The event is conducted on the waters of the North Atlantic Ocean along the shoreline near Ocean City, MD. The event consists of approximately 50 V-hull and twin-hull inboard hydroplanes racing in heats counter-clockwise around an oval race course. A fleet of spectator vessels is anticipated to gather nearby to view the competition. Therefore, to ensure the safety of participants, spectators and transiting vessels, 33 CFR 100.501 would be enforced for the duration of the event. This temporary final rule changes the period of enforcement for this event from the first Friday and Saturday in June to 10 a.m. on May 30, 2009 until 5 p.m. on May 31, 2009. During that period, vessels may not enter the regulated area unless they receive permission from the Coast Guard Patrol Commander. Due to the need for vessel control during the event, vessel traffic will be temporarily restricted to provide for the safety of participants, spectators and transiting vessels.

The Carolina Cup Regatta, Inc. annually sponsors a power boat race on the waters of the Pasquotank River near Elizabeth City, NC. The regulation at 33 CFR 100.501 is effective annually for this power boat race marine event. The event consists of approximately 25 inboard hydroplanes racing in counter clockwise heats around an oval race course. A fleet of spectator vessels is anticipated to gather nearby to view the competition. Therefore, to ensure the safety of participants, spectators and transiting vessels, 33 CFR 100.501 will be enforced for the duration of the event. This temporary final rule changes the period of enforcement for this event from the second Saturday and Sunday in June to 9 a.m. on May 16, 2009 until 5 p.m. on May 17, 2009. During that period, vessels may not enter the regulated area unless they receive permission from the Coast Guard Patrol Commander. Due to the need for vessel control during the event, vessel traffic will be temporarily restricted to provide for the safety of participants, spectators and transiting vessels.

Discussion of Comments and Changes

The Coast Guard did not receive comments in response to the notice of proposed rulemaking (NPRM) published

in the **Federal Register**. Accordingly, the Coast Guard is establishing temporary special local regulations on specified waters of the Chester River, Rappahannock River, Elizabeth River, Pasquotank River and North Atlantic Ocean.

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.

Although this rule prevents traffic from transiting a portion of certain waterways during specified events, the effect of this regulation will not be significant due to the limited duration that the regulated area will be in effect and the extensive advance notifications that will be made to the maritime community via marine information broadcasts, local radio stations and area newspapers so mariners can adjust their plans accordingly. Additionally, this rulemaking does not change the permanent regulated areas that have been published in 33 CFR 100.501, Table to § 100.501. In some cases, vessel traffic may be able to transit the regulated area when the Coast Guard Patrol Commander deems it is safe to do so.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule would affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit or anchor in the areas where marine events are being held. This regulation will not have a significant impact on a substantial number of small entities because it will be enforced only during marine events that have been permitted by the Coast Guard Captain of the Port. The Captain of the Port will ensure that small entities are able to operate in the areas where events are occurring when it is safe to do so. In some cases, vessels will be able to safely transit around the regulated area at various times, and, with the permission of the Patrol Commander, vessels may transit through the regulated area. Before the enforcement period, the Coast Guard will issue maritime advisories so mariners can adjust their plans accordingly.

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.

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 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 0023.1 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 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)(h), of the Instruction. This rule involves implementation of regulations within 33 CFR Part 100 that apply to organized marine events on the navigable waters of the United States that may have potential for negative impact on the safety or other interest of waterway users and shore side activities in the event area. The category of water activities includes but is not limited to sail boat regattas, boat parades, power boat racing, swimming events, crew racing, and sail board racing.

Under figure 2–1, paragraph (34)(h), 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 100

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

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233.

■ 2. In § 100.501, amend Table to § 100.501, as follows:

■ a. Suspend line numbers 21, 37, 38, 40, and 54 from May 15, 2009 through July 12, 2009.

■ b. Add temporary line numbers 58, 59, 60, 61, and 62, from May 15, 2009 through July 12, 2009 to the end of the table to read as follows:

§ 100.501 Special Local Regulations; Marine Events in the Fifth Coast Guard District.

TABLE TO § 100.501—ALL COORDINATES LISTED IN THE TABLE TO § 100.501 REFERENCE DATUM NAD 1983

Number	Date	Event	Sponsor	Location
*	*	*	*	*
Coast Guard Sector Baltimore—COTP Zone				
*	*	*	*	*
58	5:30 a.m. to 2:30 p.m. July 11, 2009.	Maryland Swim for Life	District of Columbia Aquatics Club.	The waters of the Chester River from shoreline to shoreline, bounded on the south by a line drawn at latitude 39°10′16″ N, near the Chester River Channel Buoy 35 (LLN–26795) and bounded on the north at latitude 39°12′30″ N by the Maryland S.R. 213 Highway Bridge.
Coast Guard Sector Hampton Roads—COTP Zone				
59	12 p.m. to 5 p.m. June 6, 2009; rain date: June 7, 2009.	RRBA Spring Radar Shootout.	Rappahannock River Boaters Association (RRBA).	The waters of the Rappahannock River, adjacent to Layton, VA, from shoreline to shoreline, bounded on the west by a line running along longitude 076°58′30″ W, and bounded on the east by a line running along longitude 076°56′00″ W.

TABLE TO § 100.501—ALL COORDINATES LISTED IN THE TABLE TO § 100.501 REFERENCE DATUM NAD 1983—Continued

Number	Date	Event	Sponsor	Location
60	9 a.m. July 3, 2009 to 11 p.m. July 5, 2009.	Norfolk Harborfest	Norfolk Festevents, Ltd	The waters of the Elizabeth River and its branches from shore to shore, bounded to the northwest by a line drawn across the Port Norfolk Reach section of the Elizabeth River between the northern corner of the landing at Hospital Point, Portsmouth, Virginia, latitude 36°50′51.0″ N, longitude 076°18′09.0″ W and the north corner of the City of Norfolk Mooring Pier at the foot of Brooks Avenue located at latitude 36°51′00.0″ N, longitude 076°17′52.0″; W; bounded on the southwest by a line drawn from the southern corner of the landing at Hospital Point, Portsmouth, Virginia, at latitude 36°50′50.0″ N, longitude 076°18′10.0″ W, to the northern end of the eastern most pier at the Tidewater Yacht Agency Marina, located at latitude 36°50′29.0″ N, longitude 076°17′52.0″ W; bounded to the south by a line drawn across the Lower Reach of the Southern Branch of the Elizabeth River, between the Portsmouth Lightship Museum located at the foot of London Boulevard, in Portsmouth, Virginia at latitude 36°50′10.0″ N, longitude 076°17′47.0″ W, and the northwest corner of the Norfolk Shipbuilding & Drydock, Berkley Plant, Pier No. 1, located at latitude 36°50′08.0″ N, longitude 076°17′39.0″ W; and to the southeast by the Berkley Bridge which crosses the Eastern Branch of the Elizabeth River between Berkley at latitude 36°50′21.5″ N, longitude 076°17′14.5″ W, and Norfolk at latitude 36°50′35.0″ N, longitude 076°17′10.0″ W.
61	10 a.m. May 30, 2009 to 5 p.m. May 31, 2009.	Ocean City Maryland Offshore Grand Prix.	Offshore Performance Association, OPA Racing, LLC.	The waters of the Atlantic Ocean commencing at a point on the shoreline at latitude 38°25′42″ N, longitude 075°03′06″ W; thence east southeast to latitude 38°25′30″ N, longitude 075°02′12″ W, thence south southwest parallel to the Ocean City shoreline to latitude 38°19′12″ N, longitude 075°03′48″ W; thence west northwest to the shoreline at latitude 38°19′30″ N, longitude 075°05′00″ W. The waters of the Atlantic Ocean bounded by a line drawn from a position along the shoreline near Ocean City, MD at latitude 38°22′25.2″ N, longitude 075°03′49.4″ W, thence easterly to latitude 38°22′00.4″ N, longitude 075°02′34.8″ W, thence southwesterly to latitude 38°19′35.9″ N, longitude 075°03′35.4″ W, thence westerly to a position near the shoreline at latitude 38°20′05″ N, longitude 075°04′48.4″ W, thence northerly along the shoreline to the point of origin.
Coast Guard Sector North Carolina—COTP Zone				
62	9 a.m. May 16, 2009 to 5 p.m. May 17, 2009.	Carolina Cup Regatta	The Carolina Cup Regatta Inc.	The waters of the Pasquotank River, adjacent to Elizabeth City, NC, from shoreline to shoreline, bounded on the west by the Elizabeth City Draw Bridge and bounded on the east by a line originating at a point along the shoreline at latitude 36°17′54″ N, longitude 076°12′00″ W, thence southwesterly to latitude 36°17′35″ N, longitude 076°12′18″ W at Cottage Point.

Dated: April 27, 2009.

Fred M. Rosa, Jr.,

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

[FR Doc. E9–11056 Filed 5–11–09; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2008–1013]

RIN 1625–AA87

Security Zones; Escorted Vessels, Mobile, AL, Captain of the Port Zone

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is making permanent an interim rule establishing a security zone around any vessel being escorted by one or more Coast Guard assets, or other Federal, State, or local law enforcement assets, within the Captain of the Port Zone Mobile, AL. This action is necessary to ensure the safe transit and mooring of escorted vessels as well as the safety and security of personnel and port facilities. No vessel or person is allowed inside the security zone unless authorized by the Captain of the Port Mobile, AL or a designated representative.

DATES: This rule is effective June 11, 2009.

ADDRESSES: Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket USCG–2008–1013 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–2008–1013 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 Coast Guard Sector Mobile Prevention Office located on South Broad Street, Mobile, Alabama 36615, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call LT Jonathan Mangum at Coast Guard Sector Mobile Prevention Department, at 251–441–5940. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On November 13, 2008, we published an Interim Rule with request for comments (IR) entitled Security Zones; Escorted Vessels, Mobile, AL, Captain of the Port Zone in the **Federal Register** (73 FR 67104). We received comments from three commenters. No public meeting was requested, and none was held.

Background and Purpose

The terrorist attacks of September 11, 2001, heightened the need for development of various security measures throughout the seaports of the United States, particularly around vessels and facilities whose presence or movement creates a heightened vulnerability to terrorist acts; or those for which the consequences of terrorist acts represent a threat to national security. The President of the United States found that the security of the United States is and continues to have been endangered following the attacks of September 11 (E.O. 13273, 67 FR 56215 (Sep. 3, 2002), and 73 FR 54489 (Sep. 18, 2008)). Additionally, national security and intelligence officials continue to warn that future terrorist attacks are likely. The ports within the Captain of the Port (COTP) Zone Mobile, AL, as described in 33 CFR 3.40–10, frequently receive vessels that require additional security, including, but not limited to, vessels carrying sensitive Department of Defense cargoes, vessels carrying dangerous cargoes, and foreign naval vessels. The COTP has determined that these vessels have a significant vulnerability to subversive activity by other vessels or persons, or, in some cases, themselves pose a risk to a port and the public within the COTP Zone. This rule enables the COTP Mobile to provide effective port security, while minimizing the public's confusion and easing the administrative burden of implementing separate temporary security zone rules for each escorted vessel.

Discussion of Comments and Changes

All three commenters expressed concern that a 500-yard security zone would exceed the width of some navigable waters in the COTP Zone and thereby effectively shutdown navigation. These comments recognized that the COTP Mobile intends to permit vessels to transit through the zone if such transit can be done safely, but the commenters expressed concern that the volume of maritime traffic in some of the waterways may create congestion and delays. We appreciate these concerns, but it is imperative that the law enforcement assets on-scene have an adequately sized buffer zone around the vessel to increase their ability to distinguish threats and to respond to threats that materialize. We also do not believe that a 500-yard security zone, even if extending bank-to-bank, will appreciably affect commercial navigation. Law enforcement assets on-scene will be designated by the COTP Mobile to allow safe transit through the zone, which is now routinely done for the many safety and security zones throughout the COTP Mobile zone without undue impact on navigation. The IR and this Final Rule establish a permanent mechanism for vessels requiring escort instead of using the ad-hoc security zone processes that had been COTP Mobile's past practice, and in doing so provide law enforcement assets with the appropriate legal basis and tools to ensure the security of the marine transportation system. Accordingly, this Final Rule does not change the size of the security zones established in the IR.

Two commenters expressed concern with the IR's provisions that allow, in some instances, the continuation of a security zone while the vessel is moored, even when law enforcement assets are not present. These commenters explained that without law enforcement assets on-scene the public would not be aware of the existence of the security zone, and there would be no efficient mechanism for obtaining approval from the COTP Mobile to transit through the zone. In instances where the security zone will continue without law enforcement assets present, the IR requires continued notice to the public through visible signs and markings and a Broadcast Notice to Mariners. We believe these requirements ensure sufficient notice to the public regarding the establishment of the security zone. However, we do agree that the lack of law enforcement assets on-scene in such cases could decrease the COTP Mobile's response to requests to transit through the zone in circumstances where that zone extends bank-to-bank or well into a navigable channel. Therefore, in the final rule, we are amending the definition of an *escorted vessel* to continue to permit the continuation of a security zone under this Final Rule for an escorted vessel that is moored, but only when Coast Guard or other Federal, State, or local

law enforcement assets remain on-scene to enforce the zone. Under the final rule, notice is provided to the public that the security zone remains in effect around a moored vessel through the continued presence of these properly marked law enforcement assets and the Broadcast Notice to Mariners. This change from the interim rule to the final rule does not constrain COTP Mobile from taking any additional regulatory or other action that may be deemed necessary to ensure the safety and security of the marine transportation system. Continuing a security zone around a moored vessel is unlikely to occur in most cases, further minimizing impacts to navigation, but the COTP Mobile must retain the flexibility to continue the security zone by maintaining the presence of law enforcement assets while the vessel is moored to address emerging threats without having to undertake additional rulemaking.

One commenter questioned how the public will know when a security zone that remains around a moored vessel ends. While not specific, we interpret this comment to relate to those situations where no law enforcement assets remained on-scene to continue to enforce the zone. We resolved this issue with the change noted above: The security zone around an escorted vessel while moored will remain in effect only when Coast Guard or other Federal, State, or local law enforcement assets remain on-scene to enforce the zone. In the final rule, we modified paragraph (e) *Notice of Security Zone* to also reflect this change. In paragraph (e) we note that public notice about the existence of a security zone will be continuously broadcast, typically at 30-minute intervals, for the duration of the security zone, and escorted vessels will be identified by the presence of law enforcement assets. Thus, under the final rule, when all law enforcement assets depart the scene, the security zone ends, and the Broadcast Notice to Mariners will terminate, whether the vessel is underway or moored.

One commenter proposed that we provide 12-hours advance notice of a security zone and disseminate this notice through a Marine Safety Information Broadcast (MSIB). We did not adopt this proposal for several reasons. Primarily, giving such broad and early notice to the public increases the security risk to the escorted vessel, as well as the Coast Guard and other agency escort assets, by providing advance targeting information to potential terrorist threats. Also, many times the Coast Guard may not know until shortly before a vessel's arrival that an escort is required, making 12-hour advance notice impractical. We believe that the visual notice provided by the presence of the properly marked law enforcement escorts, usually undertaken well before the vessel's arrival inside the port environment, as well as the advance notice provided by the Broadcast Notice to Mariners, gives ample awareness to the public of the security zone.

Another commenter proposed that non-Coast Guard assets escorting vessels and enforcing the security zone be placed under Coast Guard command responsibility. We disagree. Each law enforcement agency supporting the escort and ensuring the integrity of the security zone will be acting under its own organic legal authority. However, we will ensure that the COTP has adequate communications with all law enforcement assets involved in the escort to ensure adequate Coast Guard oversight and response and appropriate COTP engagement.

Finally, one commenter questioned whether the Coast Guard had the resources to sustain a continuous presence on-scene to enforce a security zone around a moored vessel. Concerns about Coast Guard capacity, and other law enforcement asset capabilities, are beyond the scope of this rulemaking.

Regulatory Analyses

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

Regulatory Planning and Review

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

We expect the economic impact of this rule to be so minimal that a full Regulatory Evaluation is unnecessary. The limited geographic area impacted by the security zone will not restrict the movement or routine operation of commercial or recreational vessels through the Ports within the Captain of the Port Zone Mobile. Vessels requiring transit through the security zone also may be permitted to do so with approval by COTP Mobile or a designated representative.

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 may affect the following entities, some of which may be small entities: The owners or operators of vessels intending to transit in the vicinity of escorted vessels on the navigable waters of the Captain of the Port Zone, Mobile, Alabama. This rule would not have a significant impact on a substantial number of small entities because the zones are limited in size, encompassing the escorted vessel and a 500-yard radius around the vessel only. In most cases, the security zones will leave ample space for vessels to navigate around them. If not, and security conditions permit, the COTP will attempt to provide flexibility for individual vessels to transit trough the zones as needed. Therefore, the security zones will not significantly impact commercial and passenger vessel traffic patterns. Additionally, mariners will be given advance notice of all security zones created under this rule via broadcast notice to mariners.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), in the IR 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. Although 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 5100.1 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 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. Paragraph (34)(g) covers regulations establishing, disestablishing, or changing security zones. This rule involves establishing security zones around escorted vessels in the COTP Zone Mobile, AL. 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.

■ Accordingly, the interim rule amending 33 CFR part 165, which was published at 73 FR 67107 on November 13, 2008, is adopted as a final rule with the following changes:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Amend § 165.836, as follows:

■ a. In paragraph (a), revise the definition of ''escorted vessel'' as set forth below;

■ b. In paragraph (a), in the definition of ''minimum safe speed'', remove the two occurrences of the phrase ''for navigation'';

■ c. In paragraph (c), remove the word ''in'' from the last sentence and add in its place the phrase ''described in paragraph (b) of'';

■ d. In paragraph (d)(1), add the phrase ''of this part'' after ''§ 165.33'';

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

The additions and revisions read as follows:

§ 165.836 Security Zone; Escorted Vessels, Mobile, Alabama, Captain of the Port.

(a) * * *

Escorted vessel means a vessel, other than a large U.S. naval vessel as defined in 33 CFR 165.2015, that is accompanied by one or more Coast Guard assets or other Federal, State, or local law enforcement agency assets clearly identifiable by flashing lights, vessel markings, or with agency insignia as follows: Coast Guard surface or air asset displaying the Coast Guard insignia. State and/or local law enforcement asset displaying the applicable agency markings and/or equipment associated with the agency. *Escorted vessel* also means a moored or anchored vessel that was escorted by Coast Guard assets or other Federal, State, or local law enforcement agency assets to its present location and some or all of those properly marked assets

remain on-scene to continue to enforce the security zone.

* * * * *

(e) *Notice of security zone.* The COTP will inform the public of the existence or status of the security zones around escorted vessels in the regulated area by broadcast notices to mariners, normally issued at 30-minute intervals while the security zones remains in effect. Escorted vessels will be identified by the presence of Coast Guard assets or other Federal, State or local law enforcement agency assets.

* * * * *

Dated: March 27, 2009.

E.M. Stanton,

Captain, U.S. Coast Guard Captain of the Port Mobile.

[FR Doc. E9–10969 Filed 5–11–09; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AM98

Reimbursement for Interment Costs

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs (VA) adjudication regulations on burial benefits to incorporate a change made by the Dr. James Allen Veteran Vision Equity Act of 2007. Specifically, this document eliminates a 2-year time limitation for States to file with VA claims for reimbursement of interment costs. The removal of this time limitation is necessary to conform the regulations to recent legislation and governing statutes.

DATES: *Effective Date:* This amendment is effective *May 12, 2009.*

Applicability Date: In accordance with section 202(a)(2) of the Dr. James Allen Veteran Vision Equity Act of 2007, this amendment will apply with respect to interments and inurnments of unclaimed remains of deceased veterans occurring on or after October 1, 2006. This amendment will apply to all other interments and inurnments occurring on or after the date of publication in the **Federal Register.**

FOR FURTHER INFORMATION CONTACT: Thomas Kniffen, Chief of Regulations Staff (211D), Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–9725.

SUPPLEMENTARY INFORMATION: Section 3.1604 of title 38, Code of Federal Regulations, governs VA burial benefits when non-VA sources have paid or contributed to burial expenses. Section 3.1604(d) governs payment of the plot or interment allowance to a State or political subdivision of a State. Section 3.1604(d)(2) governs claims for the plot or interment allowance, and the second sentence in § 3.1604(d)(2) requires that such a claim be filed with VA within 2 years after the permanent burial or cremation of the body. Section 202(a) of the Dr. James Allen Veteran Vision Equity Act of 2007, Public Law 110–157, repealed this second sentence as it pertains to unclaimed remains of a deceased veteran.

Although the legislation removed the 2-year time limit only for claims regarding the unclaimed remains of a deceased veteran, we have decided to eliminate the 2-year time limit on all claims for plot or interment allowances.

Currently, 38 U.S.C. 2304 contains the only statutory time limitation on the filing of an application for burial benefits within title 38, United States Code. Section 2304 requires that applications for payment of the burial allowance for non-service-connected deaths under 38 U.S.C. 2302 must be filed within 2 years after the burial of the veteran. However, this time limit does not extend to the plot or interment allowance authorized by 38 U.S.C. 2303(b), the benefit § 3.1604(d)(2) governs. Therefore, we are removing the second and the third sentences of current § 3.1604(d)(2), which limit the time for filing claims for the plot or interment allowance under section 2303(b).

Administrative Procedure Act

This final rule merely conforms VA regulations governing burial benefits to a recent legislative change and relieves a restriction (eliminates a time limit). Accordingly, there is good cause for dispensing with the notice-and-comment and delayed-effective-date procedures otherwise required by 5 U.S.C. 553 because such procedures are impractical, unnecessary, and contrary to the public interest.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. The Secretary does acknowledge that this final rule may affect some States and political subdivisions of States, including a few political subdivisions of States that may be considered small entities; however, the economic impact is not significant. This final rule does not impose any new requirements on States or political subdivisions of States in order to receive the burial benefits governed by 38 CFR 3.1604. It merely eliminates the time restriction on when they may file for such benefits. To the extent that small entities are affected, the impact of this amendment is both minimal and entirely beneficial. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Order 12866

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

The economic, interagency, budgetary, legal, and policy implications of this final rule have been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the

expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any year. This final rule would have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance Numbers and Titles

The Catalog of Federal Domestic Assistance program numbers and titles for this rule are 64.101, Burial Expenses Allowance for Veterans; 64.201, National Cemeteries; 64.203, State Cemetery Grants.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Radioactive materials, Veterans, Vietnam.

Approved: April 9, 2009.

John R. Gingrich,

Chief of Staff, Department of Veterans Affairs.

■ For the reasons set forth in the preamble, 38 CFR part 3 is amended as follows:

PART 3—ADJUDICATION

Subpart B—Burial Benefits

■ 1. The authority citation for part 3, subpart B continues to read as follows:

Authority: 105 Stat. 386, 38 U.S.C. 501(a), 2302–2308, unless otherwise noted.

§ 3.1604 [Amended]

■ 2. Amend § 3.1604(d)(2) by removing the second and third sentences.

[FR Doc. E9–10982 Filed 5–11–09; 8:45 am]

BILLING CODE P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[MD Docket No. 08–65; FCC 09–21]

Assessment and Collection of Regulatory Fees for Fiscal Year 2008

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission adopts a new methodology for calculating regulatory fees for international submarine cable operators. Beginning in FY 2009, the Commission will calculate regulatory fees for international submarine cable operators on a per cable landing license basis, with higher fees being assessed for larger submarine cable systems and lower fees for smaller systems. However, this change in methodology does not amend the licensing rules regarding submarine cable systems, nor does it change the methodology on how the Commission calculates regulatory fees for terrestrial and satellite facilities—these facilities will continue to be assessed on a per 64 kbps circuit basis.

DATES: Effective July 13, 2009, which pursuant to section 9(b)(3) of the Communications Act, is 90 days from date of notification to Congress.

FOR FURTHER INFORMATION CONTACT: Mark Stone, Office of Managing Director at (202) 418–0816.

SUPPLEMENTARY INFORMATION:

Adopted: March 17, 2009.

Released: March 24, 2009.

By the Commission: Acting Chairman Copps and Commissioners Adelstein and McDowell issuing separate statements.

I. Introduction

1. In this Second Report and Order, the Commission adopts a new methodology for calculating regulatory fees from international submarine cable operators.[1] Beginning with Fiscal Year (''FY'') 2009, the Commission will calculate these regulatory fees on a per cable landing license basis, with higher fees for larger submarine cable systems and lower fees for smaller systems. In our FY 2008 regulatory fee Report and Order adopted on August 1, 2008 we agreed to evaluate further the issue of regulatory fees paid by submarine cable operators, which are a sub-set of carriers that pay International Bearer Circuit (''IBC'') fees, and release a Second Report and Order with a new regulatory fee methodology for submarine cable operators.[2] The new methodology we adopt here is based on a proposal (the ''Consensus Proposal'') by a large group of submarine cable operators, representing both common carriers and non-common carriers with both large and small submarine cable systems.[3] The new methodology allocates IBC costs among service providers in an equitable and competitively neutral manner, without distinguishing between common carriers and non-common carriers, by assessing a flat per cable landing license fee for all submarine cable systems.[4] In addition to being more equitable, we anticipate that the new methodology will encourage compliance with our regulatory fee requirements.

II. Background

2. For several years, submarine cable operators have asked the Commission to revise the historic per circuit regulatory fee methodology for submarine cable systems. We discussed this issue in our FY 2004 regulatory fee proceeding where Tyco Telecommunications (US), Inc. challenged the Commission's regulatory fee methodology, arguing, *inter alia,* that our capacity-based methodology was favoring older lower capacity submarine cable systems and that non-common carrier submarine cable operators should have their own separate category and pay a per-cable

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[1] This regulatory fee methodology only applies to international submarine cable systems that connect the United States with international points, and not to submarine cable systems connecting points within the United States, such as systems connecting the Hawaiian Islands or Alaska to the mainland.

[2] *Assessment and Collection of Regulatory Fees for Fiscal Year 2008,* MD Docket No. 08–65, RM–11312, Report and Order and Further Notice of Proposed Rulemaking, FCC 08–182 (rel. Aug. 8, 2008) (''*FY 2008 Report and Order*''). We use the term ''IBC'' in this proceeding as a general way of referring to this regulatory fee category; however, as we discuss below, our per cable landing license methodology we adopt in this order does not apply to terrestrial and satellite facilities.

Comments cited in this Second Report and Order are comments to our *FY 2008 Notice of Proposed Rulemaking, see Assessment and Collection of Regulatory Fees for Fiscal Year 2008,* MD Docket No. 08–65, RM–11312, Notice of Proposed Rulemaking and Order, 23 FCC Rcd 7987 (2008) (''*FY 2008 Notice of Proposed Rulemaking*''), and are listed in Appendix C to the *FY 2008 Report and Order.*

[3] *See* Letter from Kent D. Bressie, Harris, Wiltshire, and Grannis, to Marlene H. Dortch, Office of the Secretary, FCC, Sept. 23, 2008 (attachment is the ''Consensus Proposal''). The parties to the Consensus Proposal are: AT&T, Verizon, Apollo Submarine Cable System, Ltd.; Brasil Telecom of America, Inc.; Columbus Networks USA, Inc.; ARCOS–1 USA, Inc.; A.SUR Net, Inc.; Level 3 Communications, LLC; Hibernia-Atlantic US LLC; Marine Cable Corp.; Pacific Crossing Limited and its subsidiary PC Landing Corp.; Reliance Globalcom Limited and its indirect subsidiary FLAG Network USA Limited; and Tata Communications (US) Inc. Qwest Communications International, Inc. (''Qwest'') also supports the Consensus Proposal. *See* Letter from Melissa E. Newman, Qwest, to Marlene H. Dortch, Office of the Secretary, FCC, Sept. 29, 2008. GU Holdings, Inc., an indirect wholly-owned subsidiary of Google, Inc. also supports the Consensus Proposal. *See* Letter from Richard S. Whitt, Google, Inc., to Marlene H. Dortch, Office of the Secretary, FCC, Oct. 3, 2008. Pacific Crossing Limited and PC Landing Corp. contend that the Commission should adopt the Consensus Proposal and also further examine the regulatory fee methodology in this docket or in the FY 2009 regulatory fee proceeding to determine if a portion of the regulatory fee burden should be directly allocated to international common carriers. *See* Letter from Martin L. Stern, K&L Gates LLP, to Marlene H. Dortch, Office of the Secretary, FCC, Sept. 25, 2008.

[4] Terrestrial and satellite facilities do not have cable landing licenses and will continue to pay regulatory fees on a per circuit basis, under our historic methodology, as clarified herein. We have not received comments or *ex partes* specifically requesting a change in the regulatory fee rules for these entities.

landing license fee.[5] We concluded that the complex issues should be resolved after we have a more complete record of the issues.[6] In our FY 2005 regulatory fee proceeding we sought further comment on this issue,[7] but concluded not to change our methodology.[8] More recently, VSNL Telecommunications (US) Inc. (''VSNL''), now Tata Communications, filed a Petition for Rulemaking urging the Commission to revise its regulatory fee methodology for submarine cable operators.[9] Several parties subsequently filed a Revised Joint Proposal.[10] In response, AT&T and Verizon filed a proposal for a flat per cable landing license fee for all submarine cable operators.[11] The Consensus Proposal is similar to the AT&T/Verizon Proposal in that it is based on a flat[12] per cable landing license fee and it does not differentiate between common carriers and non-common carriers. The Consensus Proposal has brought together common carriers and non-common carriers with a proposal that was satisfactory to all interested parties, as no party has opposed it on the record of this proceeding.

3. Congress requires the Commission each year to collect regulatory fees ''to recover the costs of * * * enforcement activities, policy and rulemaking activities, user information services, and international activities.''[13] Section 9 of the Communications Act of 1934, as amended (the ''Act'') requires the Commission to make certain changes to the regulatory fee schedule ''if the Commission determines that the schedule requires amendment to comply with the requirements'' of section 9(b)(1)(A). The Commission must add, delete, or reclassify services in the fee schedule to reflect additions, deletions, or changes in the nature of its services ''as a consequence of Commission rulemaking proceedings or changes in law.''[14] These ''permitted amendments'' require Congressional notification[15] and resulting changes in fees within the Commission's jurisdiction are not subject to judicial review.[16]

4. Historically, regulatory fees for IBCs have been paid by facilities-based common carriers based on the number of active international bearer circuits they have in a transmission facility used to provide service to specified types of entities. Specifically, our current rules provide that regulatory fees for IBCs are paid by facilities-based common carriers that have active international bearer circuits in any transmission facility for the provision of service to an end user or resale carrier, which includes active circuits to themselves or to their affiliates.[17] Non-common carrier submarine cable operators pay fees for all international bearer circuits sold on an indefeasible right of use (''IRU'') basis or leased to any customer, including themselves or their affiliates, other than an international common carrier authorized by the Commission to provide U.S. international common carrier services.[18] Section 43.82 of the Commission's rules requires that each facilities-based common carrier engaged in providing international telecommunications services file a report by March 31 or each year showing the status of its circuits as of December 31 of the preceding calendar year.[19]

5. For several years, submarine cable operators have asked the Commission to revise the regulatory fee methodology. Submarine cable revenue and capacity have grown significantly in recent years and are expected to expand dramatically in the near future, so we agree that revisions to the old regulatory fee rule are overdue.[20] In 2006, VSNL

[5] *Assessment and Collection of Regulatory Fees for FY 2004,* MD Docket No. 04–73, Report and Order, 19 FCC Rcd 11662, 11671–73, para. 26–30 (2004) (''*FY 2004 Report and Order*'').

[6] *FY 2004 Report and Order,* 19 FCC Rcd at 11672, para. 29.

[7] *Assessment and Collection of Regulatory Fees for FY 2005,* MD Docket No. 05–59, Notice of Proposed Rulemaking, 20 FCC Rcd 3885, 3890–91, para. 11–17 (2005) (''*FY 2005 NPRM*'').

[8] *Assessment and Collection of Regulatory Fees for FY 2005,* MD Docket No. 05–59, Report and Order and Order on Reconsideration, 20 FCC Rcd 12259, 12263–64, para. 8–9 (2005) (''*FY 2005 Report and Order*'').

[9] *See* Petition for Rulemaking of VSNL Telecommunications (US) Inc., RM–11312 (filed Feb. 6, 2006) (''VSNL Petition''). We released a Public Notice designating the proceeding as RM–11312 and seeking comment on the Petition. *See* Consumer and Governmental Affairs Bureau, Reference Information Center, *Public Notice,* Report No. 2759 (rel. Feb. 15, 2006). In our *FY 2006 Report and Order* we stated that the issues presented in the Petition warranted consideration separately from the Commission's annual regulatory fee proceeding. *See Assessment and Collection of Regulatory Fees for Fiscal Year 2006,* MD Docket No. 06–68, Report and Order, 21 FCC Rcd 8092, 8098–99, para. 18 (2006) (''*FY 2006 Report and Order*''). In our *FY 2007 Report and Order* we observed that we had received joint comments filed by seven submarine cable landing licensees and that we would consider the matter separately from the annual regulatory fee proceeding. *See Assessment and Collection of Regulatory Fees for Fiscal Year 2007,* MD Docket No. 07–81, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15712, 15715–16, para. 10 (2007) (''*FY 2007 Report and Order*'').

[10] *See* Letter from Kent D. Bressie, Harris, Wiltshire, and Grannis, to Ms. Marlene H. Dortch, Secretary, FCC, July 14, 2008 (attachment is the ''Revised Joint Proposal''). The July 14, 2008 Revised Joint Proposal was supported by the following carriers: Brasil Telecom of America, Inc.; Columbus Networks USA, Inc.; ARCOS–1 USA, Inc.; A.SUR Net, Inc.; Global Crossing Ltd.; Level 3 Communications, LLC; Hibernia-Atlantic US LLC; Marine Cable Corp.; Pacific Crossing Limited and its subsidiary PC Landing Corp.; Reliance Globalcom Limited and its indirect subsidiary FLAG Network USA Limited; and Tata Communications (US) Inc. Marine Cable Corp. and Global Crossing Ltd. were new supporters since the filing of the earlier Joint Proposal.

[11] *See* ''Proposal of AT&T and Verizon,'' filed Sept. 2, 2008 (''AT&T/Verizon Proposal'').

[12] By ''flat'' we mean that the regulatory fee is no longer based on the number of active circuits, but is assessed on a per cable system basis. As we explain below, we are permitting carriers to pay a lower fee for smaller submarine cable systems.

[13] 47 U.S.C. 159(a)(1).

[14] 47 U.S.C. 159(b)(3).

[15] 47 U.S.C. 159(b)(4)(B).

[16] 47 U.S.C. 159(b)(3). *But see Comsat Corp.* v. *FCC,* 114 F.3d 223, 227 (D.C .Cir. 1997) (''Where, as here, we find that the Commission has acted outside the scope of its statutory mandate, we also find that we have jurisdiction to review the Commission's action.'').

[17] *See Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for Fiscal Year 2006*, Report and Order, 21 FCC Rcd 8092, 8107, n.62 (2006) (''*FY 2006 Report and Order*''); *Regulatory Fees Fact Sheet: What You Owe—International and Satellite Services Licensees for FY 2008* at 3 (rel. Aug. 2008) (the fact sheet is available on the FCC Web site at: *http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC–284863A4.pdf*).

The Commission's current guidance on its Web site provides the following information regarding international and satellite license fees, *see http://www.fcc.gov/fees/regfees.html:*

Who Must Pay: Regulatory fees for International Bearer Circuits are to be paid by facilities-based common carriers that have active international bearer circuits as of December 31, 2007 in any transmission facility for the provision of service to an end user or resale carrier, which includes active circuits to themselves or to their affiliates. In addition, non-common carrier satellite operators must pay a fee for each circuit sold or leased to any customer, including themselves or their affiliates, other than an international common carrier authorized by the Commission to provide U.S. international common carrier services. Non-common carrier submarine cable operators are also to pay fees for any and all international bearer circuits sold on an indefeasible right of use (IRU) basis or leased to any customer, including themselves or their affiliates, other than an international common carrier authorized by the Commission to provide U.S. international common carrier services. If you are required to pay regulatory fees, you should pay based on your active 64 KB circuit count as of December 31, 2007.

[18] *FY 2006 Report and Order,* 21 FCC Rcd at 8107, n.62.

[19] 47 CFR 43.82. The information included in the circuit status report is described in the Circuit Status Manual. All facilities-based carriers (including facilities-based resellers) are required to file the report regardless of whether or not they have activated circuits at the year-end. *See http://www.fcc.gov/ib/pd/pf/csmanual.html.*

[20] For example, since January 1, 2007, the Commission received applications for 14 new submarine cables, of which eight are for submarine cables in the Pacific Ocean representing a combined capacity of 19.84 Tbps (terabits per second). *See also* Communications Daily, Oct. 31, 2008, p. 16 (''International submarine cable is a growth market after seeming 'dead in the water' five or six years ago. * * * International Internet capacity grew 60 percent this year, and growth is expected to continue.'')

proposed[21] a flat annual fee per cable system for submarine cable operators,[22] and later, several other parties filed a Revised Joint Proposal.[23] The Revised Joint Proposal would assess a flat fee, per cable landing license, for both common carrier and non-common carrier submarine cable systems and in addition, there would be a new fee based on active circuits, for common carriers only. Thus, under the Revised Joint Proposal, common carriers would pay the flat per cable landing license fee and a per circuit fee and non-common carriers would pay only the flat per cable landing license fee. In response to that Revised Joint Proposal, AT&T and Verizon filed a proposal assessing a flat per cable landing license fee for all submarine cable systems, with a lower fee for smaller systems.[24] The AT&T/Verizon Proposal treated common carrier and non-common carrier systems alike.

6. A broad coalition of common carriers and non-common carriers submitted the Consensus Proposal,[25] on September 23, 2008. The Consensus Proposal is similar to the AT&T/Verizon Proposal in that it proposes to assess a flat fee on submarine cable systems, graduating the fee so that smaller systems pay less, and making no distinction between common carriers and non-common carriers.[26] Specifically, the Consensus Proposal divides the existing IBC category into two separate categories: one for terrestrial and satellite facilities, and a second for submarine cable operators. Using FY 2008 regulatory fees owed, for illustrative purposes, the Consensus Proposal would allocate 12.4 percent of the FY 2008 revenue requirement to terrestrial and satellite facilities and 87.6 percent of the FY 2008 revenue requirement to submarine cable operators.[27] Submarine cable operators would pay their share through a flat, per cable landing license fee. The Consensus Proposal would assess a flat fee per cable landing license for the 31 existing large submarine cable systems, with a reduced flat fee[28] for the small cable systems. A submarine cable system owned by multiple service providers or licensees would be considered one submarine cable system and each cable landing license holder would be jointly and severally liable for the fee.[29] As noted, in early 2009, we will propose FY 2009 regulatory fees and will address additional reporting requirements and the specific procedures for paying regulatory fees.

III. Discussion

7. As described above, we adopt the general methodology of the Consensus Proposal. We find that the Consensus Proposal is an improvement over our current submarine cable fee methodology, is responsive to the concerns expressed by the submarine cable operators, and is in the public interest. The methodology we adopt today will increase compliance with our regulatory fee requirements, is competitively neutral, is easy to administer, and is supported by a majority of the submarine cable community.

8. We find that the Consensus Proposal is in the public interest because it will increase compliance with our regulatory fee requirements. Under the existing framework, the Commission relies on carrier self-reporting of regulatory fee obligations, based on section 43.82 reports of active circuits. Non-common carriers do not file these reports, but are required to pay regulatory fees. Thus, the Commission does not have an independent check on whether non-common carriers are paying their share of regulatory fees. Parties have stated to the Commission that there are non-common carriers who should pay, but do not.[30] If our rules permit certain entities to avoid complying with our regulatory fee requirements because we do not have sufficient reporting requirements for part of the industry, the remaining carriers must pay a higher amount to compensate for those who avoid payment.[31] Today's action addresses this concern because the Commission has a record of the cable landing licenses issued to licensees (including those licensees who have avoided paying their share of regulatory fees) and will now assess the fee for each license.[32]

9. Further, we find that the Consensus Proposal is competitively neutral. Unlike several previous proposals submitted by submarine cable operators, the approach we adopt today treats common carriers and non-common carriers identically. Both common carrier and non-common carrier submarine cable operators support the Consensus Proposal.

10. In addition, the new methodology will be easier for the Commission to administer and submarine cable operators to comply with. Under the existing methodology, submarine cable operators must calculate their fee obligations based on the number of 64 kilobits per second (''kbps'') ''active'' circuits at the end of the year. Some entities chose to underreport the number of active circuits and thus underpay regulatory fees. Under the rule we adopt today, submarine cable operators will no longer pay regulatory fees based on how many active circuits they had on the previous December 31. Under our new rule they will pay a flat fee per cable landing license. Submarine cable operators will still need to advise the Commission of the number of circuits to identify whether they qualify as a small system for fee payment purposes, or certify to the category that they fit into, but this should be a relatively small burden, and is supported by the members of the consensus group who themselves would qualify as small system service providers.

11. Finally, we note that the Consensus Proposal is the product of broad agreement among the submarine cable operators. The 15 parties to the Consensus Proposal represent 35 of the 42 international submarine cable systems currently in operation, as well as three planned submarine cable systems. In 2008, these submarine cable systems accounted for over 95 percent of the international circuits carried on

[21] *See* VSNL Petition.

[22] VSNL Petition at 6. Subsequently, Tata and other carriers filed two joint proposals, similar to the VSNL Proposal. For additional discussion of the proposal, *see FY 2008 Report and Order* at para. 14–15.

[23] *See* Revised Joint Proposal. *See also FY 2008 Report and Order* at para. 16 for a discussion of the Revised Joint Proposal.

[24] *See* AT&T/Verizon Proposal.

[25] *See* note 3 for a list of signatories to the Consensus Proposal.

[26] Consensus Proposal at 1. The Consensus Proposal uses current regulatory fees in its description of the proposed methodology. Fees and allocations for FY 2009 and years thereafter will probably differ.

[27] *Id.*

[28] *Id.* at 3. The fee for the ''small'' submarine cable systems would vary depending on the size.

[29] *Id.* at 2.

[30] *See, e.g.,* Level 3 Communications, LLC Comments at 16 (''the Commission has no means of monitoring active submarine cable capacity and thus no real way of enforcing submarine cable operator's payment of regulatory fees''); Pacific Crossing Limited and PC Landing Corp. Comments at 3 (''the current methodology has been plagued by rampant undercounting of total activated capacity that has been institutionalized into the methodology over its fourteen year history''); Tata Communications (US) Inc. Comments at 2 (''one way to interpret the * * * fee calculation * * * based on 64 Kb circuits or equivalent (the size of a voice circuit) [is] that this fee only applies to voice circuits.''

[31] *See* AT&T/Verizon Proposal at 4–5.

[32] Section 1 of the Cable Landing License Act prohibits any person from landing or operating in the United States ''any submarine cable directly or indirectly connecting the United States with any foreign country, or connecting one portion of the United States with any other portion thereof, unless a written license to land or operate such cable has been issued by the President of the United States.'' 47 U.S.C. 34. This function was delegated to the Commission in Executive Order No. 10530, May 11, 1954.

submarine cables. These represent both common carriers and non-common carriers that provide service through both large and small submarine cable systems. There is no opposition to the Consensus Proposal on the record. We recognize as well that parties have submitted a number of proposals prior to the Consensus Proposal, and that the methodology we adopt today is the product of considered discussions within the industry and with the Commission.

12. While today we adopt a new methodology for calculating regulatory fees for international submarine cable systems, this Second Report and Order does not amend our licensing rules with respect to submarine cable systems.[33] Nor does this Second Report and Order determine the amount of regulatory fees that should be assessed on submarine cable operators; we are not assessing the FY 2009 revenue requirement or the regulatory fees for submarine cable systems, terrestrial, or satellite facilities in this proceeding. The revenue requirement for this category will vary each year, as it has in the past. The Commission has an ongoing proceeding seeking comment on whether regulatory fee categories bear their fair share of the total cost to the Commission.[34] After the Commission has reviewed the record in that proceeding, it may find that submarine cable systems, along with other categories, may have been allocated too small a revenue requirement in the past or that submarine cable systems have been allocated too a large revenue requirement and that other categories should pay more. In a separate docket, we will continue our usual practice of releasing a Notice of Proposed Rulemaking seeking comment on proposed FY 2009 regulatory fees. At that time, we will seek comment on regulatory fee rates calculated using the methodology adopted herein to recoup the amount set by Congress for FY 2009.

A. New Methodology for Calculating Submarine Cable Regulatory Fees

13. The per cable landing license fee methodology we adopt herein assesses a flat, per cable landing license fee on international submarine cable systems, with a reduced amount for the smaller systems. Specifically, we will first apportion the revenue requirement between (1) terrestrial and satellite facilities and (2) submarine cable.[35] The terrestrial and satellite facilities will be assessed regulatory fees on a per circuit basis, as discussed below.[36] The remaining portion of the revenue requirement will be allocated among the submarine cable systems.

14. Our methodology differs from the Consensus Proposal in one respect. Instead of using kbps,[37] we use gigabits per second (''Gbps''). We find that using Gbps rather than 64 kbps is preferable because 64 kbps is the unit of measurement for voice grade circuits; whereas submarine cables are now largely used for data. In addition, carriers file their applications using Gbps or terabits per second (''Tbps'') and the industry standard is to use Gbps or Tbps. For these reasons, it is administratively easier to use Gbps instead of 64 kbps. Converting from 64 kbps to Gbps does not change the particular fee allocations for FY 2009 that would apply with respect to each individual cable system, as set forth in the Consensus Proposal.

15. The operational submarine cable systems will first be defined as ''large'' submarine cable systems and ''small'' submarine cable systems based on the capacity of each system used for the Commission's annual Circuit Status report.[38] The ''small'' systems will be further subdivided into subcategories, as discussed below. A ''small'' system may, however, move into a different category as it gets larger.[39] Carriers will be required to advise the Commission of a change in category or subcategory for regulatory fee purposes. Based on the number and size of operational submarine cable systems today, there are currently 31 ''large'' cable systems, defined as systems with capacity of 20 Gbps or greater. These large systems will pay one ''payment unit'' each. We emphasize that this calculation is not the regulatory fee assessment for FY 2009, but is an example based on the regulatory fees for FY 2008.

16. There are 11 small submarine cable systems (*i.e.,* smaller than 20 Gbps) operational today using this methodology proposed in the Consensus Proposal. The methodology we adopt assesses different percentages of a ''payment unit'' depending on the size of the submarine cable system. The submarine cable systems with a capacity equal to or greater than 10 Gbps but less than 20 Gbps will pay 50 percent of a payment unit; the systems with a capacity equal to or greater than 5 Gbps but less than 10 Gbps will pay 25 percent of a payment unit; the systems with a capacity equal to or greater than 2.5 Gbps but less 5 Gbps will pay 12.5 percent of a payment unit; and submarine cable systems with a capacity below 2.5 Gbps will pay 6.25 percent of a payment unit. This allocation may change from year to year, depending on the revenue requirement, the submarine cable industry, and other factors. The per system fee for FY 2009 will be determined, if this allocation is not changed, by dividing the revenue requirement for submarine cable systems among the large and small operators in these proportions. We anticipate, however, that each year we will have a different revenue requirement and there will be changes in the submarine cable industry, requiring revision of these allocations in our annual regulatory fee Notice of Proposed Rulemaking.

17. In addition to the benefits discussed above, the new methodology will allow carriers to add incremental capacity to already existing submarine cable systems without paying a higher regulatory fee for each additional ''active'' circuit.[40] The new regulatory fee methodology will effectively eliminate concerns that the regulatory fees discouraged submarine cable operators from increasing capacity on their systems. On the contrary, the regulatory fee would become smaller on a per circuit basis as a cable's capacity is increased. We also anticipate a lower administrative burden on the industry and the Commission. Our rules already require one cable landing license for each submarine cable system. A company seeking to build a submarine cable system is required to obtain a cable landing license; under the rule we adopt today the regulatory fee would

[33] *See* 47 CFR 1.767, 1.768.

[34] *See FY 2008 Report and Order* at para. 25–58; ''*Office of Managing Director Releases Data to Assist Commenters on Issues Presented in Further Notice of Proposed Rulemaking Adopted on August 1, 2008,*'' MD Docket No. 08–65, Public Notice, DA 08–2033, rel. Sept. 3, 2008.

[35] This apportionment will be determined on an annual basis and proposed in our annual regulatory fee Notice of Proposed Rulemaking.

[36] We are not changing the methodology for assessing regulatory fees for terrestrial and satellite facilities, although we are clarifying our rule to some degree, as we discuss below.

[37] *See* Consensus Proposal.

[38] The Commission annually prepares and releases a report on Section 43.82 Circuit Status Data (''Circuit Status Report''). The Circuit Status Report includes a table which lists all of the operational and planned trans-oceanic fiber optic cables, both common carrier and non-common carrier cables, and their capacity. The capacity figures are derived from the cable landing license applications, updated capacity information from the cable operators and other sources.

[39] We anticipate that the subcategories of small systems and the definitions of large and small systems may change as the submarine cable industry changes.

[40] A ''large'' submarine cable system will continue to be assessed one payment unit even as it gets larger. A ''small'' system may, however, move into a different category as it gets larger. Carriers will be required to advise the Commission of a change in category or subcategory for regulatory fee purposes.

not be assessed until the system is operational.[41] A consortium would be considered to have one cable landing license for regulatory fee purposes. The regulatory fee would apply to submarine cable systems in service as of December 31 of each year.

18. We also agree that a lower fee for the smaller cable landing licensees would mitigate concerns that a flat fee may create a barrier to entry for new entrants.[42] We anticipate that over time the categories of small and large systems will change as the smaller systems grow in capacity and new larger systems are built and licensed. The growth of smaller systems may move them into a higher category. The addition of new larger submarine cable systems may require us to move the smaller of the large systems into the small category.

19. Next we address a concern raised by several nonprofit educational end users.[43] Internet2, a National Research and Education Network (''NREN''), that has now settled its differences with the supporters of the Consensus Proposal,[44] contends that IBCs used for the purpose of interconnecting NRENs, which are critical components of the infrastructure that supports scientific research throughout the world, should be exempt from regulatory fees in order to remain competitive.[45] Internet2 argues that carriers should not be permitted to pass-through regulatory fees to NREN end users in order to permit the United States to remain competitive in physics, medicine, computer science, bioinformatics, biodiversity and ecological research, geoscience, astronomy, and space exploration.[46] While we agree that advancement in these scientific fields is an admirable goal, our rules currently exempt certain entities, such as educational institutions, from regulatory fees when the entity itself is the licensee. There is no exemption when the entity is the end-user.[47] Carriers are, of course, not required to pass regulatory fees onto these special end-users. We strongly urge the IBC industry to make competitive rates available to NRENs, in order to support the furtherance of science and education in general.

B. Per Circuit Regulatory Fees

20. We are retaining, with some clarification, our current per circuit regulatory fee for terrestrial and satellite facilities, which do not have cable landing licenses.[48] We clarify the rule as follows:

International Terrestrial and Satellite. Regulatory fees for International Bearer Circuits are to be paid by facilities-based common carriers that have active (used or leased) international bearer circuits as of December 31, of the prior year in any terrestrial or satellite transmission facility for the provision of service to an end user or resale carrier, which includes active circuits to themselves or to their affiliates. In addition, non-common carrier satellite operators must pay a fee for each circuit sold or leased to any customer, including themselves or their affiliates, other than an international common carrier authorized by the Commission to provide U.S. international common carrier services. ''Active circuits'' for these purposes include backup and redundant circuits. In addition, for these purposes, whether circuits are used specifically for voice or data is not relevant in determining that they are active circuits.

21. In this Second Report and Order we are not addressing or deciding the appropriate amount of regulatory fees that should be assessed on submarine cable operators; we are adopting the framework for assessing fees on IBC providers. The revenue requirement for this category will vary each year, as it has in the past. The Commission has an ongoing proceeding seeking comment on whether regulatory fee categories bear their fair share of the total cost to the Commission.[49] After the Commission has reviewed the record in that proceeding, it may find that submarine cable systems, along with other categories, may have been allocated too small a revenue requirement in the past or that submarine cable systems have been allocated a too large revenue requirement and that other categories should pay more.

22. Today we divide the existing IBC regulatory fee category into two new categories, one for terrestrial and satellite facilities and a second for submarine cable operators. This represents a permitted amendment to the regulatory fee schedule under section 9(b)(3) of the Act. Section 9(b)(4)(B) of the Act requires us to notify Congress 90 days before the change may take effect. We will provide Congress notification upon release of this Second Report and Order.

IV. Procedural Matters

A. Final Paperwork Reduction Act of 1995 Analysis

23. This Report and Order contains modified information collection requirements subject to the Paperwork Reduction Act of 1995 (''PRA''), Public Law 104–13. It will be submitted to the Office of Management and Budget (''OMB'') for review under section 3507(d) of the PRA.[50] OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

B. Congressional Review Act Analysis

24. The Commission will send a copy of this Second Report and Order in a report to be sent to Congress and the General Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

[41] *See* 47 CFR 1.767(g)(14).

[42] *See* Telsra Incorporated Reply Comments at 2 (requesting a two-year ramp up period for new systems, with reduced regulatory fees).

[43] *See* Letter from Alan G. Fishel, Arent Fox, to Marlene H. Dortch, Office of the Secretary, FCC, Sept. 23, 2008 (''NREN Letter''). *See also* Letter from Harvey B. Newman, Professor of Physics, California Institute of Technology, to Marlene H. Dortch, Office of the Secretary, FCC, Sept. 24, 2008.

[44] Internet2 and the supporters of the Consensus Proposal reached an agreement that (1) they do not object to the Commission seeking further comment on this issue and (2) Internet2 supports the Consensus Proposal. *See* Letter from Kent D. Bressie, Harris, Wiltshire, and Grannis, *et al.* to Marlene H. Dortch, Office of the Secretary, FCC, Oct. 17, 2008.

[45] NREN Letter at 1.

[46] *Id.* at 1–2. Further, Internet2 has noted that its submarine cable carrier only recently began assessing regulatory fees on the NREN end-users, as a result of this carrier's failure to pay regulatory fees in the past.

[47] The rule change adopted here is a result of a long process, including a Petition for Rulemaking, to change the methodology for assessing regulatory fees for international submarine cable systems. We have not sought comment on the issue of exempting certain end users from regulatory fees; this issue is outside of the scope of this proceeding.

[48] This decision does not change the methodology for calculating IBC regulatory fees for satellite and terrestrial IBCs. The Notice of Proposed Rulemaking in this proceeding was limited to submarine cable IBCs. Further, no satellite or terrestrial international service provider has responded to the Joint Proposal, the Revised Joint Proposal, or the Consensus Proposal. Finally, because satellite and terrestrial IBCs are not licensed in the same manner as submarine cable IBCs, this decision cannot be applied to satellite and terrestrial IBCs. The Commission encourages satellite and terrestrial IBC providers to propose any changes to the regulatory fee methodology that would better serve their interests and the public interest.

[49] *See FY 2008 Report and Order* at para. 25–58; ''*Office of Managing Director Releases Data to Assist Commenters on Issues Presented in Further Notice of Proposed Rulemaking Adopted on August 1, 2008,*'' MD Docket No. 08–65, Public Notice, DA 08–2033, rel. Sept. 3, 2008.

[50] 44 U.S.C. 3507(d).

V. Ordering Clauses

25. Accordingly, *it is ordered* pursuant to sections 4(i) and (j), 9, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 159, and 303(r) that this Second Report and Order *is adopted.*

26. *It is further ordered* that part 1 of the Commission's rules *are amended* as set forth herein, and these rules shall become effective 90 days after Congressional notification.

27. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Second Report and Order, including the Final Regulatory Flexibility Analysis in Appendix B, to the Chief Counsel for Advocacy of the U.S. Small Business Administration.

List of Subjects in 47 CFR Part 1

Administrative practice and procedure.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Appendix A

Final Regulatory Flexibility Analysis

28. As required by the Regulatory Flexibility Act (''RFA''),[51] the Commission prepared an Initial Regulatory Flexibility Analysis (''IRFA'') of the possible significant economic impact on small entities by the policies and rules proposed in the Notice of Proposed Rulemaking.[52] Written public comments were requested on the IRFA. This Final Regulatory Flexibility Analysis (''FRFA'') conforms to the RFA.[53]

I. Need for, and Objectives of, the Proposed Rules

29. We agreed to revise our methodology for calculating regulatory fees for international bearer circuits (''IBCs'') within 60 days of adoption of our FY 2008 Report and Order.[54]

[51] 5 U.S.C. 603. The RFA, 5 U.S.C. 601–612, has been amended by the Contract With America Advancement Act of 1996, Public Law No. 104–121, 110 Stat. 847 (1996) (''CWAAA''). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (''SBREFA'').

[52] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2008,* MD Docket No. 08–65, RM–11312, Notice of Proposed Rulemaking and Order, 23 FCC Rcd 7987 (2008) (''*FY 2008 NPRM*'').

[53] 5 U.S.C. 604.

[54] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2008,* MD Docket No. 08–65, RM–11312, Report and Order and Further Notice of Proposed Rulemaking, __ FCC Rcd ___, para. 24 (2008) (''*FY 2008 Report and Order*'').

II. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

30. No parties have raised significant issues in response to the IRFA.

III. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

31. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted.[55] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.''[56] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[57] 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 SBA.[58]

32. *Small Businesses.* Nationwide, there are a total of 22.4 million small businesses, according to SBA data.[59]

33. *Small Organizations.* Nationwide, there are approximately 1.6 million small organizations.[60]

34. *Small Governmental Jurisdictions.* The term ''small governmental jurisdiction'' is defined generally as ''governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.''[61] Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States.[62] We estimate that, of this total, 84,377 entities were ''small governmental jurisdictions.''[63] Thus, we estimate that most governmental jurisdictions are small.

35. We have included small incumbent local exchange carriers in this present RFA analysis. As noted above, a ''small business'' under the RFA is one that, inter alia, meets the pertinent small business size standard (*e.g.,* a telephone communications business having 1,500 or fewer employees), and ''is not dominant in its field of operation.''[64] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not ''national'' in scope.[65] We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

36. *International Service Providers.* There is no small business size standard developed specifically for providers of international service. The appropriate size standards under SBA rules are for the two broad census categories of ''Satellite Telecommunications'' and ''Other Telecommunications.'' Under both categories, such a business is small if it has $13.5 million or less in average annual receipts.[66]

37. The first category of Satellite Telecommunications ''comprises establishments primarily engaged in providing point-to-point telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.''[67] For this category, Census Bureau data for 2002 show that there were a total of 371 firms

[55] 5 U.S.C. 603(b)(3).

[56] 5 U.S.C. 601(6).

[57] 5 U.S.C. 601(3) (incorporating by reference the definition of ''small-business concern'' in the Small Business Act, 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.''

[58] 15 U.S.C. 632.

[59] *See* SBA, Programs and Services, SBA Pamphlet No. CO–0028, at page 40 (July 2002).

[60] Independent Sector, The New Nonprofit Almanac & Desk Reference (2002).

[61] 5 U.S.C. 601(5).

[62] U.S. Census Bureau, Statistical Abstract of the United States: 2006, Section 8, page 272, Table 415.

[63] We assume that the villages, school districts, and special districts are small and total 48,558. *See* U.S. Census Bureau, Statistical Abstract of the United States: 2006, section 8, page 273, Table 417. For 2002, Census Bureau data indicate that the total number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. *Id.*

[64] 15 U.S.C. 632.

[65] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of ''small-business concern,'' which the RFA incorporates into its own definition of ''small business.'' *See* 15 U.S.C. 632(a) (Small Business Act); 5 U.S.C. 601(3) (RFA). SBA regulations interpret ''small business concern'' to include the concept of dominance on a national basis. *See* 13 CFR 121.102(b).

[66] 13 CFR 121.201, NAICS codes 517410 and 517910.

[67] U.S. Census Bureau, 2002 NAICS Definitions, ''517410 Satellite Telecommunications''; *http://www.census.gov/epcd/naics02/def/NDEF517.HTM.*

that operated for the entire year.[68] Of this total, 307 firms had annual receipts of under $10 million, and 26 firms had receipts of $10 million to $24,999,999.[69] Consequently, we estimate that the majority of Satellite Telecommunications firms are small entities that might be affected by our action.

38. The second category of Other Telecommunications ''comprises establishments primarily engaged in (1) providing specialized telecommunications applications, such as satellite tracking, communications telemetry, and radar station operations; or (2) providing satellite terminal stations and associated facilities operationally connected with one or more terrestrial communications systems and capable of transmitting telecommunications to or receiving telecommunications from satellite systems.'' [70] For this category, Census Bureau data for 2002 show that there were a total of 332 firms that operated for the entire year.[71] Of this total, 259 firms had annual receipts of under $10 million and 15 firms had annual receipts of $10 million to $24,999,999.[72] Consequently, we estimate that the majority of Other Telecommunications firms are small entities that might be affected by our action.

IV. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

39. With certain exceptions, the Commission's Schedule of Regulatory Fees applies to all Commission licensees and regulatees. IBC fees apply to circuits: (1) Used by a facilities-based common carrier to provide service to an end user or resale carrier; (2) used by a non-common carrier submarine cable operator; and (3) sold or leased by a non-common carrier satellite operator, other than an international common carrier.

40. In this Second Report and Order we adopt a flat annual per cable landing license fee for IBCs. We keep a per circuit regulatory fee for terrestrial and satellite facilities. The reporting requirements for terrestrial and satellite facilities would not be changed. We anticipate that the reporting requirements for carriers with IBCs may decrease as a result of the rule adopted herein.

V. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

41. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives: (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[73] In the rule we adopt for IBCs, we are creating a separate category for smaller submarine cable systems, with a lower regulatory fee.

42. *Report to Small Business Administration:* The Commission will send a copy of this Second Report and Order, including a copy of the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. The Second Report and Order and FRFA (or summaries thereof) will also be published in the **Federal Register**.

43. *Report to Congress:* The Commission will send a copy of this FRFA, along with this Second Report and Order, in a report to Congress pursuant to the Congressional Review Act, 5 U.S.C. 801(a)(1)(A).

Appendix B

Final Rule

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR, part 1 as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 47 U.S.C. 151, 154(i), 154(j), 155, 225, 303, 309.

■ 2. Section 1.1156 is revised to read as follows:

§ 1.1156 Schedule of regulatory fees and filing locations for international services.

(a) The following schedule applies for the listed services:

	Fee amount	Address
Radio facilities:		
1. International HF Broadcast	.....	FCC, Int'l, P.O. Box 979084, St. Louis, MO 63197–9000.
2. International Public Fixed	.....	FCC, Int'l, P.O. Box 979084, St. Louis, MO 63197–9000.
Space Stations (Geostationary Orbit)	.....	FCC, Space Stations, P.O. Box 979084, St. Louis, MO 63197–9000.
Space Stations (Non-Geostationary Orbit)	.....	FCC, Space Stations, P.O. Box 979084, St. Louis, MO 63197–9000.
Earth Stations:		
Transmit/Receive & Transmit only (per authorization or registration)	.....	FCC, Earth Station, P.O. Box 979084, St. Louis, MO 63197–9000.

(b) *International Terrestrial and Satellite.* Regulatory fees for International Bearer Circuits are to be paid by facilities-based common carriers that have active (used or leased) international bearer circuits as of December 31, of the prior year in any terrestrial or satellite transmission facility for the provision of service to an end user or resale carrier, which includes active circuits to themselves or to their affiliates. In addition, non-common carrier satellite operators must pay a fee for each circuit sold or leased to any customer, including themselves or their affiliates, other than an international common carrier authorized by the Commission to provide U.S. international common carrier services. ''Active circuits'' for these purposes include backup and

[68] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization),'' Table 4, NAICS code 517410.

[69] *Id.* An additional 38 firms had annual receipts of $25 million or more.

[70] U.S. Census Bureau, 2002 NAICS Definitions, ''517910 Other Telecommunications''; *http://www.census.gov/epcd/naics02/def/NDEF517.HTM.*

[71] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization),'' Table 4, NAICS code 517910.

[72] *Id.* An additional 14 firms had annual receipts of $25 million or more.

[73] 5 U.S.C. 603.

redundant circuits. In addition, whether circuits are used specifically for voice or data is not relevant in determining that they are active circuits.

Note to paragraph (b). The fee amount, per active 64 KB circuit or equivalent will be determined for each fiscal year. Payment, if mailed, shall be sent to: FCC, International, P.O. Box 979084, St. Louis, MO 63197–9000.

(c) *Submarine cable:* Regulatory fees for submarine cable systems will be paid annually, per cable landing license, for all submarine cable systems operating as of December 31 of the prior year. The fee amount will be determined according to following table by the Commission for each fiscal year.

Payment, if mailed, shall be sent to: FCC, International, P.O. Box 979084, St. Louis, MO 63197–9000.

Submarine Cable Systems (capacity as of December 31)	Fee amount	Address FCC, Int'l, P.O. Box 979084, St. Louis, MO 63197–099000
< 2.5 Gbps	6.25% of a payment unit	FCC, Int'l, P.O. Box 979084, St. Louis, MO 63197–9000.
2.5 Gbps or greater, but less than 5 Gbps	12.5% of a payment unit	FCC, Int'l, P.O. Box 979084, St. Louis, MO 63197–9000.
5 Gbps or greater, but less than 10 Gbps	25% of a payment unit	FCC, Int'l, P.O. Box 979084, St. Louis, MO 63197–9000.
10 Gbps or greater, but less than 20 Gbps	50% of a payment unit	FCC, Int'l, P.O. Box 979084, St. Louis, MO 63197–9000.
20 Gbps or greater	One payment unit	FCC, Int'l, P.O. Box 979084, St. Louis, MO 63197–9000.

Note: The following statements will not be incorporated into the Code of Federal Regulations.

Statement of Acting Chairman Michael J. Copps

Re: *Assessment and Collection of Regulatory Fees for Fiscal Year 2008,* MD Docket No. 08–65

I am pleased that the Commission is finally taking action to adopt a new methodology for assessing regulatory fees applicable to submarine cable systems, one that better reflects today's marketplace. Such a revision is well past due. I have long emphasized the importance and desirability of bringing our regulatory fee systems into the modern era.

Great thanks are owed to the many affected stakeholders who joined together, and worked assiduously, to develop an equitable consensus proposal that has assisted the Commission in its work.

Statement of Commissioner Jonathan S. Adelstein

Re: *Assessment and Collection of Regulatory Fees for Fiscal Year 2008,* MD Docket No. 08–65

I enthusiastically approve this item which addresses the concerns raised by international submarine cable operators. They have long argued, with good cause, that the current regulatory fee structure does not allocate costs among service providers in an equitable and neutral manner. I have encouraged the Commission to continue to improve its regulatory fee assessment processes so that in the future we are more able to make adjustments as appropriate. I am happy that today we make long overdue adjustments needed to international bearer circuit fees for submarine cable operators. I also commend the operators who worked diligently over the past several months to put forth a consensus proposal which forms the basis of the new methodology we adopt here.

Statement of Commissioner Robert M. McDowell

Re: *Assessment and Collection of Regulatory Fees for Fiscal Year 2008,* MD Docket No. 08–65

I am pleased to support this order, which the Commission had pledged to complete last fall. In that regard, I thank Acting Chairman Copps for bringing this forward promptly. I also thank the coalition of service providers who worked diligently to develop a thoughtful, equitable proposal. Your efforts have greatly assisted us in crafting a sensible decision that properly reflects and accounts for the incredible expansion of capacity on international submarine cables.

[FR Doc. E9–10987 Filed 5–11–09; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register
Vol. 74, No. 90
Tuesday, May 12, 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 930

[Docket No. AO–370–A8; AMS–FV–06–0213; FV07–930–2]

Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin; Recommended Decision on Proposed Amendment of Marketing Agreement and Order No. 930

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and opportunity to file exceptions.

SUMMARY: This recommended decision invites written exceptions to proposed amendments to Marketing Agreement and Order No. 930 (order), which regulates the handling of tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. Seven amendments were proposed by the Cherry Industry Administrative Board (Board), which is responsible for local administration of the order. These proposed amendments would: Authorize changing the primary reserve capacity associated with the volume control provisions of the order; authorize establishment of a minimum inventory level at which all remaining product held in reserves would be released to handlers for use as free tonnage; establish an age limitation on product placed into reserves; revise the nomination and election process for handler members on the Board; revise Board membership affiliation requirements; and update order language to more accurately reflect grower and handler participation in the nomination and election process in districts with only one Board representative. In addition, the Agricultural Marketing Service (AMS) proposed to make any such changes as may be necessary to the order to conform to any amendment that may result from the hearing.

This decision does not recommend the Board proposal to revise the voting requirements necessary to approve a Board action.

The proposals are designed to provide flexibility in administering the volume control provisions of the order and to update Board nomination, election, and membership requirements. The proposed amendments are intended to improve the operation and administration of the order.

DATES: Written exceptions must be filed by June 11, 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 docket 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 Marc McFetridge, 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: *Martin.Engeler@usda.gov* or *Marc.McFetridge@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@usda.gov*.

SUPPLEMENTARY INFORMATION: Prior document in this proceeding: Notice of Hearing issued on February 5, 2007, and published in the February 7, 2007, issue of the **Federal Register** (72 FR 5646).

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 Order 930 regulating the handling of tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin, 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 *et seq.*), 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 public hearings held February 21 and 22, 2007, in Grand Rapids, Michigan and March 1 and 2, 2007, in Provo, Utah. Notice of this hearing was published in the **Federal Register** on February 7, 2007 (72 FR 5646). The notice of hearing contained proposals submitted by the Board.

The proposed amendments were recommended by the Board and initially submitted to AMS on December 16, 2005. Additional information was submitted in June 2006 at the request of AMS and a determination was subsequently made to schedule this matter for hearing.

The proposed amendments to the order recommended by the Board are summarized below.

1. Amend § 930.50 of the order to authorize changing the primary reserve capacity associated with the volume control provisions of the order.

2. Amend § 930.54 of the order to authorize establishment of a minimum

inventory level at which all remaining product held in reserves would be released to handlers for use as free tonnage.

3. Amend § 930.55 to establish an age limitation on product placed into reserves.

4. Amend § 930.32 to revise the voting requirements necessary to approve a Board action.

5. Amend § 930.23 to revise the nomination and election process for handler members on the Board;

6. Amend § 930.20 to revise Board membership affiliation requirements.

7. Amend § 930.23 to update order language to more accurately reflect grower and handler participation in the nomination and election process in Districts with only one Board representative.

In addition to the proposed amendments to the order, AMS proposes the following:

8. To make any such changes as may be necessary to the order to conform to any amendments that may result from the hearing.

One amendment proposed by the Board is not being recommended for adoption and is discussed in this decision.

Twenty-one industry witnesses testified at the hearing. These witnesses consisted of tart cherry producers and handlers in the production area, and Board staff. The majority of the witnesses testified in favor of the proposed amendments, while some were opposed to various proposals.

At the conclusion of the hearing, the Administrative Law Judge established a deadline of May 30, 2007, for interested persons to file proposed findings and conclusions or written arguments and briefs based on the evidence received at the hearing. Two briefs were filed. One was in support of all the proposed amendments and one was opposed to most of the proposals.

Material Issues

The material issues presented on the record of hearing are as follows:

(1) Whether to amend the order to authorize changing the primary reserve capacity through informal rulemaking;

(2) Whether to amend the order to authorize establishment of a minimum inventory level at which all remaining product held in reserves would be released to handlers for use as free tonnage;

(3) Whether to amend the order to establish an age limitation on product placed into reserves;

(4) Whether to amend the order to revise the voting requirements necessary to approve a Board action;

(5) Whether to amend the order to revise the nomination and election process for handler members on the Board;

(6) Whether to amend the order to revise Board membership affiliation requirements; and

(7) Whether to amend order language regarding the nomination and election process in districts with only one Board representative.

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—Authority to Change the Primary Reserve Capacity

The order should be amended to authorize changing the primary reserve capacity through the informal rulemaking process rather than the formal rulemaking process. Such a change could occur no more than once per crop year, and a recommendation from the Board to USDA to make such a change must be made by September 30 of the preceding crop year. Any change made to the reserve capacity would remain in effect until further modified. Prior to making a recommendation to change the reserve capacity, the Board should consider appropriate factors when making such a recommendation.

Section 930.50 of the order specifies procedures concerning establishment of volume control in the form of free and restricted percentages applied to the cherries handlers acquire from growers in a given crop year. Applying the free percentage to the cherries acquired by handlers results in a quantity of free tonnage cherries, and applying the restricted percentage results in a quantity of restricted cherries applicable to regulated handlers. Free tonnage cherries may be disposed of by handlers in any market outlet. Restricted cherries may be released to handlers for market expansion opportunities or to augment supplies in free market outlets. They may also be disposed of in certain outlets not competitive with normal market outlets, according to procedures specified in the order.

Section 930.50(i) provides for the establishment of a primary reserve and a secondary reserve. The first 50-million pounds of reserve established by applying the reserve percentages to the aggregate quantity of cherries acquired by handlers is placed in a primary reserve. Any reserve cherries in excess of the 50-million-pound limitation, or cap, are placed into a secondary reserve. Product from the secondary reserve cannot be released until all cherries in any primary reserve have been released. Currently, formal rulemaking is required to change the 50-million-pound cap on the primary reserve.

The Board proposed amending the order to authorize changing the 50-million-pound limitation on the primary reserve through the informal rulemaking process rather than through the formal rulemaking process, as is currently required. Under the proposal, a change to the reserve cap could not be made more than once per year, and a recommendation from the Board to make such a change must be made prior to September 30 of the preceding crop year.

Witnesses testified that the proposed amendment is primarily procedural in nature, and would add flexibility to the order. They testified that the current process needed to change the reserve limitation (formal rulemaking) is lengthier than the informal rulemaking process. Witnesses indicated that if this amendment is adopted it would provide a more efficient and timely process for changing the reserve capacity. Witnesses testified that the cap could be either increased or decreased through this process.

Witnesses testified that the topic of reserves is of great importance and interest to the industry, and it is desirable that a full discussion of the issues occur prior to changing the reserve limitation. They further indicated that the informal rulemaking process would provide ample opportunity for a thorough discussion and analysis of the pertinent issues prior to making a recommendation to the USDA for changing the reserve cap. Witnesses further stated that the order's voting requirements for a ''super-majority'' to approve a Board action would ensure that a high level of industry agreement is reached before any recommended change could be made. Witnesses also pointed out that the Board itself cannot implement an informal rulemaking change. Such changes are recommended to the USDA, and are only implemented after informal rulemaking by USDA. Witnesses testified that changes to the primary reserve capacity through informal rulemaking should be made no more than one time per year to prevent any market disruption that could occur by changing it more frequently. The proposed requirement that any change must be recommended no later than September 30 of the prior year would allow all industry participants to be fully aware of the regulation well in advance of its implementation.

Proponents of the proposal presented testimony indicating that changes in the

industry have occurred which may warrant a change in the primary reserve inventory cap in the future. Handlers are obligated to provide cherry products to meet their reserve obligation, and they currently produce a broader spectrum of products than when the order was formulated in 1996. In the past, the primary product produced and sold was frozen cherries; the product mix is now more diverse with increased amounts of products such as dried cherries, frozen concentrate, and single strength juice being marketed. Because there is now a wider variety of cherry products produced, held in inventory, and sold than in the past, it may be necessary at some point to increase the reserve capacity so the industry can adequately supply buyers' needs with reserve product if and when the reserve is released. Witnesses testified that industry production and sales information is more accurate and more readily available now than in the past, which contributes to the need for the marketing order and its rules and regulations to be responsive to changes in a more timely manner.

Additional testimony suggested that it may be desirable to increase the reserve cap in the future due to an anticipated increase in demand and sales. In 2002, the industry experienced an extremely short crop, and sales in subsequent years decreased as buyers sourced product from different suppliers or used substitute products. It is anticipated that the industry will ultimately regain lost sales and eventually increase demand, especially with the support of a new industry-wide promotion program recently implemented. An increase in demand and annual sales could warrant an increase in the reserve capacity at some point in the future. For example, if annual demand increases, and the industry has a short crop like in 2002, it would be in a better position to adequately supply markets if a larger reserve is in place.

Witnesses opposed to the proposal indicated that the current 50-million-pound cap has worked well for the industry. When the order was promulgated, a 50-million-pound reserve was considered to be an appropriate level, and would help prevent a large inventory buildup. A previous tart cherry marketing order in effect from 1971 to 1987 was not as effective as it could have been because there was no cap on the reserve, which led to the buildup of excessively large inventories. This situation ultimately contributed to the demise of that program, according to testimony.

One witness testified that it is good business practice to carry approximately 25 percent of annual sales in inventory. A 50-million-pound reserve is thus appropriate for the industry because annual industry sales have been in the range of 200 million pounds in recent years. If the industry carries too large a reserve, grower returns could be negatively affected because the demand for tart cherries is relatively inelastic, according to the witness.

Another witness testified that current features of the order allow adequate reserve product to be made available to augment market supplies. There is no need to increase the reserve cap for that purpose, according to the witness.

The witness further testified that the 50-million-pound reserve capacity was a core element of the order when it was promulgated, and its intended use was to manage supplies wisely. According to the witness, no evidence was presented at the hearing that warrants a specific change to the reserve capacity. However, the witness stated that if a change in the reserve capacity is appropriate in the future, any change should be subject to specific, measurable criteria for the Board to consider. As discussed below, such consideration should be part of the Board's analysis and recommendation to USDA.

This proposal would not increase the 50-million-pound primary reserve capacity. The amendment, if adopted, would only change the process by which a future revision in the reserve capacity could be effectuated if conditions warrant.

The record shows that industry and market conditions change over time, and there may be circumstances that would warrant a change in the reserve capacity. Allowing such a change to be made through informal rather than formal rulemaking would add flexibility to the order by providing the industry with an additional tool to respond to industry and market conditions in a more timely and efficient manner.

Hearing testimony indicated that it is desirable for the Board to conduct a full and thorough analysis when recommending changes to key elements in marketing order programs, such as volume control provisions. This includes the impacts of any proposed change on producers and handlers. Witnesses testified that it is also desirable to attain a high level of agreement among industry members before regulatory changes are implemented.

There can be benefits in allowing changes to be made to program requirements through informal rulemaking rather than formal rulemaking. As with all recommendations for informal rulemaking, USDA expects the Board to fully consider and analyze pertinent factors when making recommendations to change the reserve capacity.

In consideration of the record, USDA recommends that Section 930.50(i) be revised to authorize changing the reserve capacity from its current 50-million-pound limit through informal rulemaking. Such a change should only occur once per year, and any recommendation for a change should be made by the Board to USDA no later than September 30 of the preceding year. Any change would remain in effect until subsequently modified through informal rulemaking. The requirement to make any such changes no more than one time per year would help to ensure that the industry has sufficient time to plan and respond to the change, and the requirement that any change must be recommended no later that September 30 of the prior year would allow sufficient time to implement the change. In addition, the super-majority voting requirement of the Board will help to ensure that any recommendation for a change to the reserve capacity has a high level of support.

For the above reasons, the proposed amendment to § 930.50(i) is recommended for adoption.

Material Issue Number 2—Authority To Establish a Minimum Inventory Level at Which Reserves Would Be Released

The order should be amended to add the authority for the Board to establish a minimum inventory level at which cherries held in the primary and secondary reserves would be released and made available to handlers as free tonnage. This change would allow the Board to clear out the primary reserve and subsequently the secondary reserve when a specified inventory level of tart cherries is reached. The specified inventory level would be established by the Secretary through informal rulemaking upon recommendation of the Board.

Section 930.54 of the order specifies different uses and conditions for release of cherries placed in inventory reserve. Reserve cherries may be released from the primary or secondary reserve if demand is greater than supply in commercial outlets, if the Board recommends a portion or the entire reserve inventory be released for sale in designated markets, or the cherries are to be used in certain exempt outlets.

Section 930.55 of the order provides authority and establishes parameters for a primary reserve, including a maximum quantity of product that can be held in primary reserve inventories.

Section 930.57 provides authority and parameters for a secondary reserve. Quantities of product in excess of the maximum amount established in the primary reserve may be placed in the secondary reserve.

Section 930.57(d) of the order states, in part, that ''No cherries may be released from the secondary reserve until all cherries in any primary inventory reserve established under § 930.55 have been released.'' Based on the language in § 930.57(d) handlers cannot access the secondary reserve if any cherries remain in the primary reserve. In addition, the current provisions of the order do not allow the Board to require handlers to release all inventory held in their portion of the primary reserve. The proposed amendment would authorize the Secretary, upon recommendation of the Board, to establish a minimum inventory level at which all remaining cherries held in the primary and secondary reserve would be released and made available to handlers as free tonnage.

Witnesses testified that because handlers cannot access the secondary reserve until the primary reserve is completely depleted, minimal amounts left in the primary reserve can create problems for the industry. According to testimony, this may occur when handlers do not take full advantage of opportunities to utilize their portion of the primary reserve and carry minimum inventories in the primary reserve. Therefore, a minimal amount of inventory remaining in the primary reserve of one or a few handlers can prevent the rest of the industry from accessing the secondary reserve. In effect, this can prevent the majority of the industry from clearing out excess reserve inventories.

The record indicates that there should be a way to access the secondary reserve when there is a minimal amount of product remaining in the primary reserve and handlers are not willing or are unable to completely deplete their reserve inventories. The proposed amendment would provide a way to clear out small amounts of primary reserve and provide access to secondary reserve inventories when necessary.

According to the record, implementation of this amendment could also reduce costs associated with administering the reserve program. A significant portion of the Board staff's time is directed at tracking reserve inventory by reviewing reports from handlers and also performing on-site reviews of records and verification of handler inventories. Once the reserve is released, it is no longer necessary for Board staff to track the reserve inventory.

Similar to the Board staff, handlers also incur costs in maintaining reserves. These costs include the cost of storage and the costs associated with tracking inventory levels. If the storage time is reduced, the cost to handlers will also be reduced.

Witnesses stated that when inventory levels reach a minimal amount, the costs of tracking inventory at the Board and handler level, plus storage costs, outweigh any potential benefit from carrying inventory in the primary reserve.

According to witnesses, the intent of this proposal would be to authorize the Board, through informal rulemaking, to establish the inventory level at which the Board could release reserves when levels are minimal.

The proposed amendment, if implemented, has the potential to positively impact the market by allowing for the sale of more tart cherries than the current order provides.

One witness testified against the proposal. The witness stated that no quantification of the potential cost savings was offered by the proponents. The witness suggested as an alternative that the Board propose or recommend a volume level at which the cost of regulation exceeds the benefit. However, no such proposal was offered at the hearing.

The proposed amendment would not establish a specific quantity at which primary reserves would be released. Witnesses testified that the intent of the proposed amendment is for the Secretary to establish the level through informal rulemaking after discussion and recommendation of the Board. Pertinent factors would be considered and analyzed during that process. No proposal to establish a specific level at which the reserve would be released was presented at the hearing. The Board is made up of a diverse industry group that ensures that all issues will be discussed, and with USDA oversight, the appropriate threshold would be established. Establishing the minimum inventory level through informal rulemaking would ensure broad support due to the two-thirds super majority vote needed for Board approval and recommendation to the Secretary. Once the minimum inventory level is established, the Board staff would administer the reserve release.

According to the record, providing authority to establish a minimum inventory level at which reserves would be released through the informal rulemaking process would provide additional flexibility in administering the reserve program. If the Board ultimately recommends a minimum level at which reserves would be released, it would help the industry to access secondary reserves in certain situations. It could also help reduce costs associated with the tracking and storing of minimal amounts of reserve product by handlers and Board staff.

Based on the record evidence, USDA recommends amending the order as proposed by the Board by adding § 930.54(d) to authorize the Secretary, upon recommendation of the Board, to establish a minimum inventory level at which all remaining product held in reserves would be released to handlers for use as free tonnage.

Material Issue Number 3—Establishment of a Minimum Age Limitation on Product Placed Into Reserves

The order should be amended to establish a minimum age limitation on products placed into reserves. Currently, there is no age limitation on products carried in the reserves. Product carried in storage can deteriorate over time and is more difficult to sell than product stored for a shorter period.

Section 930.55 of the order specifies parameters for cherries placed into reserves. Reserve cherries can be in the form of frozen, canned, dried, or concentrated juice.

According to witness testimony, the marketing order and its inventory reserve provisions were crafted with the idea that market forces would generally define the products carried in the reserve. Handlers are given the option of carrying whatever form and whatever type of product they choose in the reserve. There are no quality standards applied to products placed into reserves, nor is there a limitation regarding the age of products that can be carried in the reserve. This has created a situation where handlers can carry product that is several years old in the reserve inventories. Witnesses testified that because product quality deteriorates over time, poor quality product is often carried in reserve inventory.

According to the record, one of the main rationales for the establishment of the reserve program was the concept that the release of reserve inventories in low production years would support the long-term marketing efforts of the industry. This can only be achieved if the reserve products released are acceptable to the market. Establishing a minimum age limitation on reserve product would prevent product that has deteriorated over time from being held in reserve inventories. This would

ultimately aid the industry in its marketing efforts by having better quality products available when reserves are released to the market.

One witness testified that the marketing order currently has authority to regulate the quality of cherries held in reserves. If the Board wants to regulate the quality of reserve product, it should do so through that authority. The witness further testified that the Board's proposal to limit the age of cherries placed in reserve would not prevent handlers from placing low-grade cherries in reserve, and that such cherries can be challenging to sell.

Other witnesses acknowledged that the order contains authority to regulate the quality of cherries held in reserves, and this can be done through establishing minimum grade, quality, and condition requirements. However, witnesses also testified that the industry has chosen not to implement grade and quality standards with respect to products carried in the reserve. According to witness testimony, establishing and complying with minimum grade and quality standards would be expensive to the industry due to inspection costs, inventory management costs, and added costs associated with monitoring and tracking product grade. Witnesses testified that a more practical solution for the industry is to establish an age limitation on reserve products. Since tart cherry products deteriorate over time and generally have a shelf life of up to three years according to testimony, placing an age limitation of three years on reserve product should help to ensure reserve product is of marketable quality.

Based on the record evidence, USDA recommends amending § 930.55(b) as proposed by the Board to require that products placed into reserve inventory must have been produced in the current or preceding two crop years.

Material Issue Number 4—Revise Voting Requirements Necessary To Approve a Board Action

The order should not be amended to revise the number of votes necessary to approve a Board action.

Section 930.32 establishes the quorum requirements for Board meetings and the voting requirements necessary to approve Board actions. This section specifies that two-thirds of the members of the Board, including alternates acting for absent members, shall constitute a quorum. It further specifies that for any action of the Board to pass, two-thirds of the entire Board must vote in favor of such action.

The Board proposed amending the voting requirement in § 930.32 to specify that for any action of the Board to pass, at least two-thirds of those present at the meeting must vote in support of such action. The quorum requirement would not change under the proposal.

Witnesses in favor of this proposal believe the current voting requirement can give members who are not in attendance at meetings an undue influence on the outcome of votable issues. Witnesses believed that because the current requirement for passing a Board action is based on a favorable vote of at least two-thirds of the entire Board membership, any vacant Board position at a meeting results in the equivalent of a ''no'' vote on all votable issues. Witnesses further testified that the current requirement may encourage members to not attend a meeting if they do not want to discuss the merits of an issue, and that their non-attendance has an impact on the outcome of any vote taken at the meeting. The proposed amendment, according to proponents, would encourage members to attend meetings because they would no longer have an impact on the outcome of Board actions by virtue of their absence. If the proposal is implemented, members would have more incentive to attend meetings in order to discuss, vote, and have an impact on Board actions, according to witnesses. Witnesses also testified that improved meeting attendance would lead to increased interaction and discussion of industry issues among Board members.

Witnesses asserted that the current voting requirements are unnecessarily restrictive. The current requirements could allow a small minority of Board members to effectively block an action that may be favored by the majority of the Board. For example, with an 18 or 19-member Board, six members could block an action favored by 13 members. An example cited at the hearing referenced a specific Board meeting where 15 of 19 members were present. The required number of votes to pass a Board action was 13. It was testified that a small minority of three members were not supportive of an issue that the majority of Board members favored, which prevented the Board from taking an action it may have otherwise taken.

Witnesses opposed to this proposed change testified that the proposed change to the voting requirements could create a situation where a minority number of Board members could approve an action. For example, if the Board consisted of 19 members and there were 13 members present at a meeting, an action could be passed by an affirmative vote of nine members. Nine members would represent only 47 percent of the 19 Board members.

Witnesses opposed to the proposal also testified that the proposed change could increase the possibility that members affiliated with a common sales constituency or region could dominate the Board and Board actions. This effect could be amplified if the proposed amendment to § 930.20 (see material issue #6) is adopted. That particular proposal could result in an increase in the number of Board members affiliated with a common sales constituency under certain circumstances.

Witness testimony also contended that there is no evidence that the current voting requirements are ineffective. Lacking any evidence to the contrary, the arguments used in implementing the current voting requirements are as valid now as when they were originally implemented, according to one witness.

The contention that a vacant Board position at a meeting automatically results in a ''no'' vote on all votable issues is not correct. If a Board seat is vacant at a meeting, the vacant seat would not be recorded in vote counts. In contrast however, under the order, voting requirements do not change based on the number of members present at the meeting. It takes a fixed number of votes to pass a Board action, regardless of the number of members in attendance at a meeting. Thus, if a member was absent from a meeting, that member's absence would have the same impact on a vote as if the member was present and voted ''no''.

According to statistics presented at the hearing regarding attendance at past Board meetings, there was non-attendance of members in 20 of the past 40 Board meetings. Of the 20 meetings with members not in attendance, 17 of those meetings had one member absent, two meetings had two absent members, and one meeting had four absences. These statistics indicate that lack of attendance of Board members has not been an overriding problem at Board meetings. In fact, only 3.4% of the available Board seats have been unrepresented in the 40 meetings for which statistics were provided. Further, the statistics do not indicate there is an attendance problem from any particular region or district. Given the size of the Board (18 or 19 members, depending on production levels in the districts), and the geographic disbursement of members and travel involved to attend meetings, the meeting attendance record is very high. On a percentage basis, nearly 97 percent of available Board seats were filled in the 40 meetings for which statistics were provided.

Record testimony indicated that the Board tries to reach consensus on issues coming before it. Most actions taken by the Board are unanimous or very close to unanimous, indicating a high degree of support for Board actions.

The current super-majority voting requirements were intentionally incorporated into the order when it was promulgated and subsequently amended. The requirements were designed to help ensure a high degree of support for issues at the Board level. According to the order's promulgation record, the current voting requirements were incorporated into the order to ensure that the industry majority supports actions of the Board, and that minority interests are addressed. Further, the requirements were intended in part to ensure that a single sales constituency would not have a controlling interest on the Board. The record evidence does not refute that these same issues are valid today. Further, the evidence does not show that the current voting requirements are having an undue impact on Board actions or functions or that lack of attendance has caused an undue influence on the outcome of Board actions.

The record evidence does not support changing the voting requirements under the order. For the reasons discussed herein, USDA recommends that proposed amendment to § 930.32(a) not be adopted.

Material Issue Number 5—Revise Nomination and Election Process for Handler Members on the Board

The order should be amended to require a handler to receive support from handler(s) that handled at least five percent of the average production of tart cherries handled in the applicable district in order to be eligible to participate as a candidate in an election for Board membership. The order should also be amended to require a handler to receive support from handler(s) that handled at least five percent of the average production of tart cherries handled in the applicable district in order to be elected by the industry and recommended to the Secretary for Board membership.

Section 930.23 specifies procedures and criteria for growers and handlers to be nominated as candidates for Board membership. It also specifies procedures and criteria for candidates to be elected by the industry for recommendation to the Secretary for Board membership.

To be nominated as a Board candidate, a handler must be nominated by one or more handlers, other than the nominee, from the applicable district. If there are fewer than two handlers in the district, a handler can nominate him or herself. To be elected by the industry for recommendation to the Secretary, the successful handler candidate is the candidate receiving the most votes. Each eligible handler is entitled to one vote, and there is no weight given to the individual votes based on the volume of cherries handled.

The amendment proposed by the Board would provide additional criteria for being nominated as a handler candidate and being elected by the industry for recommendation for a handler position on the Board. The proposed additional criteria for a person to be nominated as a handler candidate would require the prospective candidate to attain support from another handler or handlers whose combined tonnage handled represents at least five percent of the average production handled in the applicable district. If a handler attained this five percent support, he or she could then be a candidate in the election. A successful candidate would then be required to similarly receive support (through the balloting process) from another handler or handlers whose combined tonnage represented no less than five percent of the average production handled in the applicable district. Of the candidates who received support from handlers representing at least five percent of the average production in the district, the candidate with the most votes would be recommended to the Secretary for Board membership.

Witnesses testified that handler members on the Board should at least have support of a minimum amount of tonnage handled in the applicable district to help ensure they represent the interests of handlers in the district. Obtaining support from handlers representing at least five percent of the volume in the district was considered to be reasonable, and would not be an overly burdensome amount of support to obtain. Witnesses also testified that under the order's current provisions, handlers representing a small amount of volume could attain and potentially control the handler seats on the Board. Witnesses indicated that it would not be equitable to the handlers representing the vast majority of production if this situation was to occur.

Testimony was also provided at the hearing regarding application of this proposed amendment in conjunction with the proposed amendment to § 930.20(g) addressed in material issue number six. It was discussed that if a potential handler candidate for Board membership could not achieve support from handlers handling five percent of the average production in a district, that should not prevent him or her from serving on the Board if it would prevent a sales constituency conflict from occurring as provided in § 930.20(g). (A sales constituency conflict is considered to exist if two persons from the same district are affiliated with the same sales constituency.)

Record testimony supports requiring a minimum level of support for a handler to be elected to the Board. A provision to require members to have support from their peers representing at least five percent of the volume in the district would help to ensure that commercial handler interests in the applicable district are being represented. Such a provision would not preclude a small handler from serving on the Board. It would only require a handler to garner a minimum level of support from industry peers in order to serve on the Board. The provision would establish a minimum threshold of support in terms of volume handled to represent the constituents in the district.

However, testimony also was provided at the hearing regarding application of the proposed amendment in conjunction with the proposed amendment to § 930.20(g) addressed in material issue number six. As discussed in material issue number six, USDA agrees with testimony indicating that if a potential handler candidate for Board membership could not achieve support from handlers handling five percent of the average production in a district, that should not prevent him or her from serving on the Board if it would prevent a sales constituency conflict from occurring as provided in § 930.20(g). (A sales constituency conflict is considered to exist if two persons from the same district are affiliated with the same sales constituency.)

Record evidence supports adopting the Board's proposal by amending § 930.23(b)(2) and § 930.23(c)(3)(ii) of the order to require handler candidates seeking nomination to the Board to receive support from handler(s) that handled at least five percent of the average production of tart cherries handled in the district in which he or she is seeking the position. Record evidence also supports adding provisions to § 930.23(b)(2) and § 930.23(c)(3)(ii) that would conform this section to the proposed amendments to § 930.20(g) regarding sales constituency affiliation. USDA recommends adoption of this amendment as proposed, with changes as noted.

Material Issue Number 6—Revise Board Membership Affiliation Requirements

The order should be amended to revise Board membership affiliation requirements to allow more than one Board member per district from being affiliated with the same sales constituency if it cannot be avoided.

Section 930.20(g) of the order currently provides that no more than one Board member may be from, or affiliated with, a single sales constituency in those districts with more than one seat on the Board. A sales constituency is defined in § 930.16 as ''* * * a common marketing organization or brokerage firm or individual representing a group of handlers or growers * * *.'' The purpose of this provision is to achieve a fair and balanced representation on the Board and to prevent any one sales constituency from gaining control of the Board.

The proposed amendment would add a proviso to the prohibition limiting the number of Board members from a sales constituency in districts with more than one member. The proviso states that the sales constituency prohibition shall not apply in a district where such a conflict cannot be avoided.

Witnesses supporting this proposed amendment testified that the current order provisions recently prevented District 7, the State of Utah, from attaining its full complement of positions on the Board. Section 930.20(b) provides that districts with greater than 10 million pounds of production and less than 40 million pounds are entitled to two seats on the Board. Based on this provision, the State of Utah is entitled to two positions on the Board. However, a situation occurred in recent years where there were no eligible persons willing to serve on the Board from Utah who were affiliated with a different sales constituency than the existing Board member, as required by Section 930.30(g). Witnesses testified that despite extensive outreach efforts, they were only able to locate one eligible candidate from a different sales constituency, but that person had no interest in serving on the Board. Because of this situation, there was one vacant Utah seat on the Board. Utah was unable to achieve its full complement of positions on the Board pursuant to § 930.20(b) of the order. Witnesses believed that a fair and equitable process was not being well served in this situation, and that a conflict exists between sections 930.20(b), which allocates Utah two positions on the Board, and 930.20(g), which prevents two members from the same sales constituency in the same district from serving on the Board.

The proposed amendment is intended to prevent this type of situation from occurring. Witnesses testified that a district's right to representation on the Board is more important than the requirement that Board members from the same District not be affiliated with the same sales constituency.

One witness expressed reservations about the proposed amendment. He indicated that a potential increase in the number of Board members affiliated with the same sales constituency may not promote diversity of views on the Board. The witness also stated that this proposal would not be desirable if the proposed change to the voting requirements is adopted. The witness suggested an alternative idea would be to divide the State of Utah into two districts for Board representation purposes. However, the witness did not present a specific alternative proposal or any information or analysis demonstrating how this would address the problem.

The record indicates that the Board's proposal would address the issue of ensuring that the various districts under the order would be able to maintain their share of representation on the Board.

The provisions of the proposed amendment would allow two Board members from a district to be affiliated with the same sales constituency if it cannot be avoided. An example given at the hearing regarding when a sales constituency conflict could not be avoided was if there were no other persons willing and able to serve on the Board from a particular district from a different sales constituency. Witnesses were questioned about the possible implementation of this proposed amendment and the proposed amendment under material issue number five that would require a handler Board member candidate to achieve support from handlers representing at least five percent of the production in the District in order to run for a position and be elected to the Board. Some witnesses testified that if the only qualified candidate in a particular district that was not affiliated with the same sales constituency as the other Board member from that district could not achieve the five percent support, then that person should be able to serve on the Board to avoid having two members from the same district affiliated with the same sales constituency. Other witnesses testified that if such a situation occurred, the candidate should not be allowed to serve on the Board, and if another qualified candidate from the same sales constituency as the existing member was available and met the five percent criteria, that candidate should be able to serve.

The record is clear that if there are no willing and eligible candidates available to serve on the Board from a different sales constituency than the existing member(s), then it should be permissible to allow two members from the same sales constituency to serve so that each district achieves its share of representation. In order to appropriately address the issue that generated this proposal while avoiding two members on the Board from the same sales constituency, USDA concludes that it is reasonable to not apply the five percent requirements discussed in material issue number five in these circumstances. Accordingly, as provided in material issue number five, language is added to conform and clarify the two sections of the order.

Record evidence supports amending § 930.20(g) to revise Board membership affiliation requirements to allow more than one Board member per district from being affiliated with the same sales constituency if such a conflict cannot be avoided. USDA recommends adoption of this amendment as proposed.

Material Issue Number 7—Update Order Language

Section 930.23 of the order should be revised to update order language to more accurately reflect grower and handler participation in the nomination and election process in districts with only one Board representative. Section 930.20 establishes the calculations for the number of representatives on the Board to which each district is entitled. Based on the calculations established in § 930.20, the number of Board representatives can vary from year to year due to shifts in production levels in various districts.

Sections 930.23(b)(5) and (c)(4) specifically reference Districts 5, 6, 8 and 9 in regard to the nomination and election process. Those were the districts entitled to one Board seat when the order was initially promulgated. However, districts that are entitled to one Board seat have changed over time due to shifts in production. Amending § 930.23(b)(5) and (c)(4) by removing the specific references to Districts 5, 6, 8 and 9 and replacing it with generic language to cover any district that is entitled to only one Board representative based on the representation calculation established in § 930.20 would update order language to accommodate changes in production

patterns in the tart cherry industry. This amendment is intended to simply update language rather than alter the meaning of order provisions in any way. Witnesses supported this proposed amendment at the hearing and there was no opposition expressed.

The record evidence supports amending § 930.23(b)(5) and (c)(4) as proposed.

Conforming Changes

The Agricultural Marketing Service also proposed to make such changes as may be necessary to the order to conform to any amendment that may result from the hearing. Except as previously discussed, the Department has identified no additional conforming changes.

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 producers have been defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than $750,000. Small agricultural service firms, which include handlers regulated under the order, are defined as those with annual receipts of less than $6,500,000.

There are approximately 40 handlers of tart cherries subject to regulation under the order and approximately 900 producers of tart cherries in the regulated area. A majority of the producers and handlers are considered small entities according to the SBA's definition.

The geographic region regulated under the order covers the states of Michigan, New York, Oregon, Pennsylvania, Utah, Washington, and Wisconsin. Acreage devoted to tart cherry production in the regulated area has declined in recent years. According to data presented at the hearing, bearing acreage in 1987–88 totaled 50,050 acres; by 2006–2007 it had declined to 37,200 acres. Michigan accounts for 74 percent of total U.S. bearing acreage with 27,700 bearing acres. Utah is second, with a reported 2,800 acres, or approximately eight percent of the total. The remaining states' acreage ranges from 700 to 2,000 acres.

Production of tart cherries can fluctuate widely from year to year. The magnitude of these fluctuations is one of the most pronounced for any agricultural commodity in the United States, and is due in large part to weather related conditions during the bloom and growing seasons. This fluctuation in supplies presents a marketing challenge for the tart cherry industry because demand for the product is relatively static. In addition, the demand for tart cherries is inelastic, which means a change in the supply has a proportionately larger change in the price level.

Authorities under the order include volume regulation, promotion and research, and grade and quality standards. Volume regulation is used under the order to augment supplies during short supply years with product placed in reserves during large supply years. This practice is intended to reduce the annual fluctuations in supplies and corresponding fluctuations in prices.

The Board is comprised of representatives from all producing areas based on the volume of cherries produced in those areas. The Board consists of a mix of handler and grower members, and a member that represents the public. Board meetings where regulatory recommendations and other decisions are made are open to the public. All members are able to participate in Board deliberations, and each Board member has an equal vote. Others in attendance at meetings are also allowed to express their views.

The Board appointed a subcommittee to consider amendments to the marketing order. The subcommittee met several times for this purpose, and ultimately recommended several amendments to the order. The Board subsequently requested that USDA conduct a hearing to consider the proposed amendments. The views of all participants were considered throughout this process.

In addition, the hearing to receive evidence on the proposed amendments was open to the public and all interested parties were invited and encouraged to participate and express their views.

The proposed amendments are intended to provide additional flexibility in administering the volume control provisions of the order, and to update Board nomination, election, and membership requirements. The amendments are intended to improve the operation and administration of the order. Record evidence indicates the proposals are intended to benefit all producers and handlers under the order, regardless of size.

Proposal 1—Adding the Authority To Change the Primary Reserve Capacity

The proposal described in Material Issue No. 1 of this recommended decision would amend § 930.50 of the order to authorize changing the primary reserve capacity associated with the volume provisions of the order through informal rulemaking. Changing the reserve capacity currently requires amendment of the order through the formal rulemaking process.

The order establishes a fixed quantity of 50-million pounds of tart cherries and tart cherry products that can be held in the primary reserve. Any reserve product in excess of the 50-million-pound limitation must be placed in the secondary reserve.

Free tonnage product can be sold to any market outlet, but most shipments are sold domestically, which is considered the primary market. Reserve product can be used only in specific outlets which are considered secondary markets. These secondary markets include development of export markets, new product development, new markets, and government purchases.

When the order was promulgated, a 50-million-pound limitation was placed on the capacity of the primary reserve. Proponents of the current order proposed a limitation on the quantity of product that could be placed into the primary reserve. That limitation was incorporated into the order, and can only be changed through the formal rulemaking process.

Economic data presented when the order was promulgated indicated that a reserve program could benefit the industry by managing fluctuating supplies. Witnesses at the February and March 2007 hearing indicated the order has been successful in this regard. However, the record indicated that the order could be more flexible in allowing modifications to the 50-million-pound limitation should conditions warrant such a change in the future.

If the reserve capacity was changed, costs associated with storing product in reserves could also change. In addition, to the extent such a change could affect supplies in the marketplace; returns to both growers and handlers could also be affected.

Any Board recommendation to change the reserve capacity would be required to be implemented through the informal rulemaking process. As part of the informal rulemaking process, USDA expects that any Board recommendation

would include an analysis of the pertinent factors and issues, including the impact of a proposed regulation on producers and handlers. Any change to the reserve capacity would be implemented only with analysis of the expected economic impact on the affected entities.

Proposal 2—Adding the Authority To Establish a Minimum Inventory Level at Which Reserves Would Be Released

The proposal described in Material Issue No. 2 would amend § 930.54 of the order to provide the Board with the authority to establish a minimum inventory level at which reserves would be released and made available to handlers as free tonnage. If implemented, the proposed amendment would allow the Board to clear out the primary reserve and subsequently the secondary reserve when a specified minimum inventory level of tart cherries is reached. The specified minimum level would be established through the informal rulemaking process.

Under current order provisions, handlers cannot access the secondary reserve until the primary reserve is empty. Based on current language of the order, one handler who has not completely disposed of or otherwise fulfilled its reserve obligation can prevent access to the secondary reserve.

The proposed amendment would allow the Board to clear out the primary reserve when inventory levels are at a minimum level in order to provide the industry access to secondary reserve inventories.

If the amendment were implemented, costs to both handlers and the Board could be reduced. Handlers incur costs in maintaining reserves. According to the record, these costs include the cost of storage, which can be in the range of $.01 per pound per month. Handlers also incur costs associated with tracking their own inventory levels. Witnesses stated that when inventory levels reach a minimal amount the costs of tracking inventory outweighs the benefit from carrying inventory in the primary reserve.

A significant portion of the Board staff's time is directed at tracking reserve inventory maintained at handlers' facilities. Hearing witnesses testified that while it is difficult to quantify the exact value of the Board staff's time to conduct these activities, the time could be better spent on other industry issues, and it is unnecessary to track minimal levels of inventory.

The proposed amendment, if implemented, could have a positive impact on the market. As inventories are released from the reserves, products could be sold, generating revenue for the industry. This proposed amendment, if implemented, is expected to reduce costs to handlers and the Board, thus having a positive economic impact.

Proposal 3—Establishing an Age Limitation on Products Placed Into Reserves

The proposal described in Material Issue No. 3 would amend § 930.55 to require that products placed in reserves must have been produced in the current or immediately preceding two crop years. If implemented, this proposed amendment would allow the Board to place an age limit on products carried in the reserve. The purpose of the amendment would be to help ensure that products of saleable quality are maintained in reserve inventories.

Witnesses supported the proposed amendment by stating that it would add credibility to product quality for all products carried in the reserve. Currently, handlers can carry products they have no intention of selling just to meet their reserve obligation. This amendment would require handlers to rotate product in their reserve inventory, thus preventing them from maintaining the same product in the reserve year after year. Product held in inventory tends to deteriorate over time. When reserve product is ultimately released for sale to meet market demand, this proposed amendment would help ensure the reserve product available is in saleable condition and can satisfy the market's needs. Assuring product is available to satisfy the market helps to foster long term market stability.

In terms of costs, handlers may experience some minimal costs associated with periodically rotating product through their reserve inventory. It would be difficult to estimate such costs because they would vary depending upon each handler's operation. To the extent costs would be increased, they would be proportionate to each handler's share of the entire industry's reserve inventory. Each handler's reserve inventory obligation is based on the handler's share of the total crop handled. Thus, small handlers would not be disproportionately burdened.

It is anticipated that the benefits of providing a good quality product in reserves to ultimately supply markets when needed would outweigh any costs associated with implementation of this amendment.

Proposal 4—Revision of Voting Requirements To Approve Board Actions

The proposal submitted by the Board in Material Issue No. 4 would revise voting requirements under § 930.32 of the order. Current requirements provide that any action of the Board requires a two-thirds vote of the entire Board. The proposal would allow passage of a Board action with a two-thirds vote of those present at a meeting. USDA denied this proposal and will not change the voting requirements for reasons specified earlier in this recommended decision.

Proposal 5—Revision of Nomination and Election Process for Handler Members on the Board

The proposal submitted by the Board in Material Issue No. 5 relates to nomination and election of Board members under § 930.23 of the order. It would require a handler to receive support from handlers that handled at least five percent of the average production of tart cherries in the applicable district in order to be a candidate and to be elected by the industry and recommended to the Secretary for Board membership.

Under the current order, there is no accounting for handler volume in the nomination and balloting process. Each handler is entitled to one equal vote. This proposal would continue to allow each handler to have one vote, but would also require handler candidates to be supported by handlers representing at least five percent of the average production in the applicable district to be eligible to run for a Board position and to be elected by the industry for recommendation to the Secretary. This would help to ensure that handler members on the Board represent the interests of handlers in their district that account for at least a minimal percentage of the volume in the district.

This proposed amendment is not anticipated to have a significant economic impact on small businesses. It only affects the nomination and election criteria for membership on the Board by adding volume as an element of support to help ensure that Board membership reflects the interests of its constituency. All handlers, regardless of size, will continue to be able to participate in the nomination and election process. The process would continue to allow for both small and large handlers to be represented on the Board.

Proposal 6—Revision of Board Membership Affiliation Requirements

The Board's proposal discussed in Material Issue No. 6 would amend § 930.20 to allow more than one Board member to be affiliated with the same sales constituency from the same district, if such a conflict cannot be avoided.

Currently, § 930.20 does not allow more than one Board member to be affiliated with the same sales constituency from the same district under any circumstances. The purpose of this provision is to prevent any one sales constituency from having a controlling influence on Board issues and actions. However, a situation occurred in District 7, Utah, where this particular provision of the order did not allow the district from having two representatives on the Board, as it was entitled to under section 930.20(b) of the order. In that situation, the only candidates willing to serve on the Board from Utah were affiliated with the same sales constituency. Thus Utah was only able, under the marketing order rules, to seat one of the two Board representatives it was entitled to.

The proposed amendment is designed to prevent this problem from occurring in the future by allowing more than one Board member affiliated with the same sales constituency to represent a district, if such a sales constituency conflict cannot be avoided. The hearing record is clear that the sales constituency provision should not prevent a district from having its allocated number of seats on the board if there are eligible candidates willing to serve on the Board.

This amendment is not expected to have an economic impact on growers or handlers. It relates to representation on the Board, and is intended to help ensure each area covered under the order has the opportunity to achieve its allocated representation on the Board.

Proposal 7—Update Order Language to Accurately Reflect Grower and Handler Participation in the Nomination and Election Process in Districts With Only One Board Representative

The proposal described in Material Issue No. 7 would amend § 930.23 to revise and update order language to more accurately reflect grower and handler participation in the nomination and election process in districts with only one Board representative.

Sections 930.23(b)(5) and (c)(4) specifically reference Districts 5, 6, 8 and 9 in regard to the nomination and election process. Those were the districts entitled to one Board seat when the order was initially promulgated. However, districts that are entitled to one Board seat have changed over time due to shifts in production. Amending § 930.23(b)(5) and (c)(4) by removing the specific references to Districts 5, 6, 8 and 9 and replacing it with generic language to cover any district that is entitled to only one Board representative based on the representative calculation established in § 930.20 would update order language to better reflect the constantly changing tart cherry industry.

This amendment updates order language to remove incorrect references to district representation in the event production shifts occur. It has no economic impact on handlers, growers, or any other entities.

Interested persons were invited to present evidence at the hearing on the probable regulatory and informational impacts of the proposed amendments to the order on small entities. The record evidence is that some of the proposed amendments may result in some minimal cost increases while others will result in cost decreases. To the extent there are any cost increases, the benefits of the proposed changes are expected to outweigh the costs. In addition, changes in costs as a result of these amendments would be proportional to the size of businesses involved and would not unduly or disproportionately impact small entities. The informational impact of proposed amendments is addressed in the Paperwork Reduction Act discussion that follows.

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule. These amendments are intended to improve the operation and administration of the order to the benefit of the industry.

Board meetings regarding these proposals as well as the hearing date and location were widely publicized throughout the tart cherry industry, and all interested persons were invited to attend the meetings and the hearing, and to participate in Board deliberations on all issues. All Board meetings and the hearing were public forums and all entities, both large and small, were able to express views on these issues. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

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 the Board and industry would like to avail themselves of the opportunity to to implement the changes 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.

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.

Paperwork Reduction Act

Information collection requirements for Part 930 are currently approved by the Office of Management and Budget (OMB), under OMB Number 0581–0177, Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. Implementation of these proposed amendments would not trigger any changes to those requirements. It is possible that a change to the reporting requirements may occur in the future if the Board believes it would be necessary to assist in program compliance efforts. Should any such changes become necessary in the future, they would be submitted to OMB for approval.

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.

Civil Justice Reform

The amendments to Marketing Order 930 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 agreement and 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, regulate the handling of tart cherries grown in the production area (the States of Michigan, New York, Oregon, Pennsylvania, Utah, Washington, and Wisconsin) in the same manner as, and are applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing agreement and order upon which a hearing has been held;

(3) The marketing agreement and order, as amended, and as hereby proposed to be further amended, are limited in their 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, prescribe, 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 tart cherries grown in the production area; and

(5) All handling of tart cherries 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 930

Marketing agreements, Reporting and recordkeeping requirements, Tart cherries.

For the reasons set forth in the preamble, 7 CFR Part 930 is proposed to be amended as follows:

PART 930—TART CHERRIES GROWN IN THE STATES OF MICHIGAN, NEW YORK, PENNSYLVANIA, OREGON, UTAH, WASHINGTON, AND WISCONSIN

1. The authority citation for 7 CFR part 930 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Revise paragraph (g) of § 930.20 to read as follows:

§ 930.20 Establishment and membership.

* * * * *

(g) In order to achieve a fair and balanced representation on the Board, and to prevent any one sales constituency from gaining control of the Board, not more than one Board member may be from, or affiliated with, a single sales constituency in those districts having more than one seat on the Board; Provided, That this prohibition shall not apply in a district where such a conflict cannot be avoided. There is no prohibition on the number of Board members from differing districts that may be elected from a single sales constituency which may have operations in more than one district. However, as provided in § 930.23, a handler or grower may only nominate Board members and vote in one district.

* * * * *

3. Revise paragraphs (b)(2) and (b)(5), redesignate paragraph (c)(3) as paragraph (c)(3)(i), add a new paragraph (c)(3)(ii), and revise paragraph (c)(4) of § 930.23 to read as follows:

§ 930.23 Nomination and Election.

* * * * *

(b) * * *

(2) In order for the name of a handler nominee to appear on an election ballot, the nominee's name must be submitted with a petition form, to be supplied by the Secretary or the Board, which contains the signature of one or more handler(s), other than the nominee, from the nominee's district who is or are eligible to vote in the election and that handle(s) a combined total of no less than five percent (5%) of the average production, as that term is used § 930.20, handled in the district. *Provided,* that this requirement shall not apply if its application would result in a sales constituency conflict as provided in § 930.20(g). The requirement that the petition form be signed by a handler other than the nominee shall not apply in any district where fewer than two handlers are eligible to vote.

* * * * *

(5) In districts entitled to only one Board member, both growers and handlers may be nominated for the district's Board seat. Grower and handler nominations must follow the petition procedures outlined in paragraphs (b)(1) and (b)(2) of this section.

* * * * *

(c) * * *

(3) * * *

(ii) To be seated as a handler representative in any district, the successful candidate must receive the support of handler(s) that handled a combined total of no less than five percent (5%), of the average production, as that term is used in § 930.20, handled in the district; *Provided,* that this paragraph shall not apply if its application would result in a sales constituency conflict as provided in § 930.20(g).

(4) In districts entitled to only one Board member, growers and handlers may vote for either the grower or handler nominee(s) for the single seat allocated to those districts.

* * * * *

4. Revise paragraph (i) of § 930.50 to read as follows:

§ 930.50 Marketing policy.

* * * * *

(i) *Restricted Percentages.* Restricted percentage requirements established under paragraphs (b), (c), or (d) of this section may be fulfilled by handlers by either establishing an inventory reserve in accordance with § 930.55 or § 930.57 or by diversion of product in accordance with § 930.59. In years where required, the Board shall establish a maximum percentage of the restricted quantity which may be established as a primary

inventory reserve such that the total primary inventory reserve does not exceed 50-million pounds; *Provided,* That such 50-million-pound quantity may be changed upon recommendation of the Board and approval of the Secretary. Any such change shall be recommended by the Board on or before September 30 of any crop year to become effective for the following crop year, and the quantity may be changed no more than one time per crop year. Handlers will be permitted to divert (at plant or with grower diversion certificates) as much of the restricted percentage requirement as they deem appropriate, but may not establish a primary inventory reserve in excess of the percentage established by the Board for restricted cherries. In the event handlers wish to establish inventory reserve in excess of this amount, they may do so, in which case it will be classified as a secondary inventory reserve and will be regulated accordingly.

* * * * *

5. Add a new paragraph (d) to § 930.54 to read as follows:

§ 930.54 Prohibition on the use or disposition of inventory reserve cherries.

* * * * *

(d) Should the volume of cherries held in the primary inventory reserves and, subsequently, the secondary inventory reserves reach a minimum amount, which level will be established by the Secretary upon recommendation from the Board, the products held in the respective reserves shall be released from the reserves and made available to the handlers as free tonnage.

6. Revise paragraph (b) of § 930.55 to read as follows:

§ 930.55 Primary inventory reserves.

* * * * *

(b) The form of the cherries, frozen, canned in any form, dried, or concentrated juice, placed in the primary inventory reserve is at the option of the handler. The product(s) placed by the handler in the primary inventory reserve must have been produced in either the current or the preceding two crop years. Except as may be limited by § 930.50(i) or as may be permitted pursuant to §§ 930.59 and 930.62, such inventory reserve portion shall be equal to the sum of the products obtained by multiplying the weight or volume of the cherries in each lot of cherries acquired during the fiscal period by the then effective restricted percentage fixed by the Secretary; Provided, That in converting cherries in each lot to the form chosen by the handler, the inventory reserve obligations shall be adjusted in accordance with uniform rules adopted by the Board in terms of raw fruit equivalent.

* * * * *

Dated: May 7, 2009.

Craig Morris,

Acting Associate Administrator.

[FR Doc. E9–11052 Filed 5–11–09; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–0436; Directorate Identifier 2009–NM–005–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier Model CL–600–2C10 (Regional Jet Series 700 and 701) Airplanes and CL–600–2D24 (Regional Jet Series 900) 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: Frost, snow, slush or ice on the wing leading edges and upper wing surfaces may change the stall speeds, stall characteristics and the protection provided by the stall protection system, which could result in reduced controllability of the aircraft. 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 11, 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 Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; e-mail *thd.crj@aero.bombardier.com*; Internet *http://www.bombardier.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: Bruce Valentine, Aerospace Engineer, Systems and Flight Test Branch, ANE–172, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7328; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2009–0436; Directorate Identifier 2009–NM–005–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

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2005–02, dated February 2, 2005 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> Frost, snow, slush or ice on the wing leading edges and upper wing surfaces may change the stall speeds, stall characteristics and the protection provided by the stall protection system, which could result in reduced controllability of the aircraft.
>
> Transport Canada has * * * approved temporary revisions to the Aircraft Flight Manuals (AFM), which emphasize the cold weather operational requirements to ensure that the wing leading edges and upper wing surfaces are free from frost, snow, slush or ice.

The corrective action is revising the AFMs to introduce procedures for cold weather operations. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Bombardier has issued Temporary Revision RJ 900/48–3, dated August 19, 2008, to the Canadair Regional Jet Series 900 Airplane Flight Manual (AFM), CSP C–012; and Temporary Revision RJ 700/87–3, dated August 19, 2008, to the Canadair Regional Jet Series 700 and 701 AFM, CSP B–012. 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 about 336 products of U.S. registry. We also estimate that it would take about 1 work-hour 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 $26,880, or $80 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:

Bombardier, Inc. (Formerly Canadair): Docket No. FAA–2009–0436; Directorate Identifier 2009–NM–005–AD.

Comments Due Date

(a) We must receive comments by June 11, 2009.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all Bombardier Model CL–600–2C10 (Regional Jet Series 700 and 701) airplanes and CL–600–2D24 (Regional Jet Series 900) airplanes, certificated in any category.

Subject

(d) Air Transport Association (ATA) of America Code 57: Wings.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states: Frost, snow, slush or ice on the wing leading edges and upper wing surfaces may change the stall speeds, stall characteristics and the protection provided by the stall protection system, which could result in reduced controllability of the aircraft.

Transport Canada has * * * approved temporary revisions to the Aircraft Flight Manuals (AFM), which emphasize the cold weather operational requirements to ensure that the wing leading edges and upper wing surfaces are free from frost, snow, slush or ice.

The corrective action is revising the AFMs to introduce procedures for cold weather operations.

Actions and Compliance

(f) Unless already done, within 14 days after the effective date of this AD, revise the Limitations—Operating Limitations sections

of the Canadair Regional Jet Series 900 Airplane Flight Manual (AFM), CSP C–012, and the Canadair Regional Jet Series 700 and 701 AFM, CSP B–012, to include the information in Bombardier Temporary Revision (TR) RJ 900/48–3, dated August 19, 2008, and TR RJ 700/87–3, dated August 19, 2008, as specified in the TRs, as applicable. These TRs introduce procedures for cold weather operations to ensure that the wing leading edges and upper wing surfaces are free from frost, snow, slush or ice. Operate the airplane according to the limitations and procedures in the TRs.

Note 1: This may be done by inserting copies of Bombardier TR RJ 700/87–3 and TR RJ 900/48–3 into the applicable AFM. When these TRs have been included in general revisions of the applicable AFM, the general revisions may be inserted into the AFM, provided the relevant information in the general revision is identical to the applicable AFM.

FAA AD Differences

Note 2: 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, New York Aircraft Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Bruce Valentine, Aerospace Engineer, Systems and Flight Test Branch, ANE–172, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7328; fax (516) 794–5531. 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.

(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 Canadian Airworthiness Directive CF–2005–02 dated February 2, 2005; Bombardier TR RJ 700/87–3, dated August 19, 2008; and Bombardier TR RJ 900/48–3, dated August 19, 2008; for related information.

Issued in Renton, Washington, on May 1, 2009.

Stephen P. Boyd,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–10992 Filed 5–11–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2006–26234; Directorate Identifier 2006–CE–064–AD]

RIN 2120–AA64

Airworthiness Directives; SOCATA Model TBM 700 Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above that would revise an existing AD. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

This Airworthiness Directive (AD) was prompted by reports of loose rivets on frames C18 BIS and C19, which could result in a reduced structural integrity of the tail area.

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 11, 2009.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Albert Mercado, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; *telephone:* (816) 329–4119; *fax:* (816) 329–4090.

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–2006–26234; Directorate Identifier 2006–CE–064–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

On March 15, 2007, we issued AD 2007–03–17, Amendment 39–14928 (72 FR 5923, February 8, 2007). That AD required actions intended to address an unsafe condition on the products listed above.

Since we issued AD 2007–03–17, EADS SOCATA revised the service bulletin used in the AD to change the applicability.

The Direction Générale de l'aviation Civile (DGAC), which is the aviation authority for France, has issued French AD No F–2005–132, dated August 3, 2005, (referred to after this as ''the MCAI'') to correct an unsafe condition for the specified products. The MCAI states:

This Airworthiness Directive (AD) was prompted by reports of loose rivets on frames C18 BIS and C19, which could result in a reduced structural integrity of the tail area.

This MCAI requires you to inspect the rivets on frames C18 BIS and C19, and, if necessary, apply corrective actions. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

SOCATA has issued SOCATA TBM Aircraft Mandatory Service Bulletin SB 70–129, dated June 2005; and SOCATA TBM Aircraft Mandatory Service Bulletin SB 70–129, AMENDMENT 1, dated February 2009. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of the Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with this State of Design Authority, they have notified us of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all information and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This Proposed AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a Note within the proposed AD.

Costs of Compliance

We estimate that this proposed AD will affect 272 products of U.S. registry. We also estimate that it would take about 3 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $80 per work-hour. Required parts would cost about $300 per product.

Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $146,880, or $540 per product.

In addition, we estimate that any necessary follow-on actions would take about 15 work-hours and require parts costing $2,000 for a cost of $3,200 per product. We have no way of determining the number of products that may need these actions.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing Amendment 39–14928 (72 FR 5923, February 8, 2007), and adding the following new AD:

SOCATA: Docket No. FAA–2006–26234; Directorate Identifier 2006–CE–064–AD.

Comments Due Date

(a) We must receive comments by June 11, 2009.

Affected ADs

(b) This AD revises AD 2007–03–17, Amendment 39–14928 (72 FR 5923, February 8, 2007).

Applicability

(c) This AD applies to TBM 700 airplanes, serial numbers 1 through 345, certificated in any category.

Subject

(d) Air Transport Association of America (ATA) Code 53: Fuselage.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states: This Airworthiness Directive (AD) was prompted by reports of loose rivets on frames C18 BIS and C19, which could result in a reduced structural integrity of the tail area.

This MCAI requires you to inspect the rivets on frames C18 BIS and C19, and, if necessary, apply corrective actions. You may obtain further information by examining the MCAI in the AD docket.

Actions and Compliance

(f) Unless already done, within the next 100 hours time-in-service (TIS) after the effective date of this AD or within the next 12 months after the effective date of this AD, whichever occurs later, and thereafter at intervals not to exceed 100 hours TIS, accomplish a detailed inspection of the area and apply corrective actions as necessary by doing all the applicable actions in accordance with the accomplishment instructions of either SOCATA TBM Aircraft Mandatory Service Bulletin SB 70–129, dated June 2005 or SOCATA TBM Aircraft Mandatory Service Bulletin SB 70–129, AMENDMENT 1, dated February 2009.

FAA AD Differences

NOTE: This AD differs from the MCAI and/or service information as follows: SOCATA revised the service bulletin used in AD 2007–03–17, Amendment 39–14928 (72 FR 5923, February 8, 2007). The revised service bulletin changes the applicability of the airplanes from what was in the original service bulletin. The MCAI has not been

revised and allows the use of ''Any subsequent approved revision of this document is acceptable'' for service bulletin revisions. The FAA AD does not have a similar provision. This proposed revised AD will change the Applicability section based on the revised service bulletin.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Albert Mercado, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; *telephone:* (816) 329–4119; *fax:* (816) 329–4090. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to MCAI Direction Générale de l'aviation Civile Airworthiness Directive No F–2005–132, dated August 3, 2005; SOCATA TBM Aircraft Mandatory Service Bulletin SB 70–129, dated June 2005; and SOCATA TBM Aircraft Mandatory Service Bulletin SB 70–129, AMENDMENT 1, dated February 2009 for related information.

Issued in Kansas City, Missouri, on May 6, 2009.

Scott A. Horn,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–11022 Filed 5–11–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–0446; Directorate Identifier 2009–CE–024–AD]

RIN 2120–AA64

Airworthiness Directives; EADS–PZL ''Warszawa-Okęcie'' S.A. Model PZL–104 WILGA 80 Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above that would supersede an existing AD. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

An inspection of a PZL–104 aeroplane that had a relatively long operational background revealed a severe corrosion of the steel front fuselage structural elements.

It is likely that such corrosion can also be present on other aeroplanes of similar design and operational history.

If left uncorrected, this condition could lead to loss of strength of the structural front posts elements and consequent reduction of the structural strength of the aeroplane.

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 11, 2009.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; *telephone:* (816) 329–4059; *fax:* (816) 329–4090.

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–2009–0446; Directorate Identifier 2009–CE–024–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://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 European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued AD No.: 2009–0072, dated March 31, 2009 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

An inspection of a PZL–104 aeroplane that had a relatively long operational background revealed a severe corrosion of the steel front fuselage structural elements.

It is likely that such corrosion can also be present on other aeroplanes of similar design and operational history.

If left uncorrected, this condition could lead to loss of strength of the structural front posts elements and consequent reduction of the structural strength of the aeroplane.

For the reason stated above, this Airworthiness Directive (AD) mandates inspecting the fuselage front posts, repairing any corrosion found and replacing pads made of foam rubber by pads made of Neoprene to prevent water ingression.

You may obtain further information by examining the MCAI in the AD docket.

On April 15, 2009, we issued AD 2009–09–04, Amendment 39–15890 (74 FR 18979; April 27, 2009). That AD required actions intended to address an unsafe condition on the products listed above.

The Administrative Procedure Act does not permit the FAA to ''bootstrap'' a long-term requirement into an urgent safety of flight action where the rule becomes effective at the same time the public has the opportunity to comment. The short-term action and the long-term action were analyzed separately for justification to bypass prior public notice.

We are issuing this proposed AD to address the mandatory long-term action of repetitively inspecting the fuselage front posts through a revision to the airplane maintenance program.

Relevant Service Information

EADS PZL ''Warszawa-Okęcie'' S.A. has issued:

- Mandatory Bulletin (MB) No. 10409036, dated March 18, 2009; and
- PZL–104 Wilga 80 Maintenance Manual, pages 5–4 and 25–10, dated April 7, 2009.

The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of the Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with this State of Design Authority, they have notified us of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all information and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This Proposed AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a Note within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD will affect 26 products of U.S. registry. We also estimate that it would take about 50 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $80 per work-hour. Required parts would cost about $150 per product.

Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $107,900, or $4,150 per product.

In addition, we estimate that any necessary follow-on actions would take about 10 work-hours and require parts costing $0, for a cost of $800 per product. We have no way of determining the number of products that may need these actions.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing Amendment 39–15890 (74 FR 18979; April 27, 2009), and adding the following new AD:

EADS–PZL ''Warszawa-Okęcie'' S.A.: Docket No. FAA–2009–0446; Directorate Identifier 2009–CE–024–AD.

Comments Due Date

(a) We must receive comments by June 11, 2009.

Affected ADs

(b) This AD supersedes AD 2009–09–04, Amendment 39–15890.

Applicability

(c) This AD applies to Model PZL–104 WILGA 80 airplanes, all serial numbers, certificated in any category.

Subject

(d) Air Transport Association of America (ATA) Code 53: Fuselage.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

An inspection of a PZL–104 aeroplane that had a relatively long operational background revealed a severe corrosion of the steel front fuselage structural elements.

It is likely that such corrosion can also be present on other aeroplanes of similar design and operational history.

If left uncorrected, this condition could lead to loss of strength of the structural front posts elements and consequent reduction of the structural strength of the aeroplane.

For the reason stated above, this Airworthiness Directive (AD) mandates

inspecting the fuselage front posts, repairing any corrosion found and replacing pads made of foam rubber by pads made of Neoprene to prevent water ingression.

Actions and Compliance

(f) Unless already done, do the following actions:

(1) Within 12 years from date of manufacture or within the next 2 months after May 18, 2009 (the effective date of AD 2009–09–04), whichever occurs later, inspect the fuselage front posts for signs of corrosion following paragraph 6.A. of EADS PZL ''Warszawa-Okęcie'' S.A. Mandatory Bulletin No. 10409036, dated March 18, 2009.

(2) If corrosion or any corrosion damage is found during the inspection required in paragraph (f)(1) of this AD, before further flight, repair or replace any parts where corrosion or corrosion damage was found in accordance with an FAA-approved repair solution obtained from EADS–PZL ''Warszawa-Okęcie'' S.A., Aleja Krakowska 110/114, 00–971 Warszawa, Poland; *telephone:* +48 22 577 22 11; *fax:* +48 22 577 22 03; *e-mail: eadsplz@plz.eads.net.*

(3) Within 12 years from date of manufacture or within the next 2 months after May 18, 2009 (the effective date of AD 2009–09–04), whichever occurs later, replace the rear glass padding following paragraph 6.C. of EADS PZL ''Warszawa-Okęcie'' S.A. Mandatory Bulletin No. 10409036, dated March 18, 2009.

(4) Within 2 months after the effective date of this AD, amend the approved operator's airplane maintenance program to incorporate the applicable tasks as described in PZL–104 Wilga 80 Maintenance Manual, pages 5–4 and 25–10, dated April 7, 2009.

FAA AD Differences

Note: 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, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested, using the procedures found in 14 CFR 39.19. Send information to *Attn:* Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; *telephone:* (816) 329–4059; *fax:* (816) 329–4090. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) MCAI European Aviation Safety Agency (EASA) AD No.: 2009–0072, dated March 31, 2009, EADS PZL ''Warszawa-Okęcie'' S.A. Mandatory Bulletin No. 10409036, dated March 18, 2009; and PZL–104 Wilga 80 Maintenance Manual, pages 5–4 and 25–10, dated April 7, 2009, for related information.

Issued in Kansas City, Missouri, on May 6, 2009.

Scott A. Horn,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–11028 Filed 5–11–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

31 CFR Part 103

RIN 1506–AA97

Financial Crimes Enforcement Network; Amendment to the Bank Secrecy Act Regulations—Definitions and Other Regulations Relating to Money Services Businesses

AGENCY: Financial Crimes Enforcement Network (FinCEN), Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Financial Crimes Enforcement Network (''FinCEN''), a bureau of the Department of the Treasury (''Treasury''), is proposing to revise the regulations implementing the Bank Secrecy Act (''BSA'') regarding money services businesses (''MSBs'') to clarify which entities are covered by the definitions. Specifically, we are reviewing the MSB regulatory framework with a focus on providing efficient and effective regulation for the industry, as well as improving the ability of regulators, law enforcement, and FinCEN to safeguard the U.S. financial system from the abuses of terrorist financing, money laundering, and other financial crime.

The proposed changes are intended to more clearly delineate the scope of entities regulated as MSBs, so that determining which entities are obligated to comply will be more straightforward and predictable. This rulemaking proposes to amend the current MSB regulations in the following ways: By ensuring that certain foreign-located MSBs with a U.S. presence are subject to the BSA rules; by updating the MSB definitions to reflect past guidance and rulings, current business operations, evolving technologies, and merging lines of business; and by combining all of stored value into one category, without substantively changing the existing definition, so that issuers of stored value and sellers or redeemers of stored value are in the same category. In addition, this rulemaking solicits comments on stored value to assist FinCEN with a future rulemaking proposing a revised definition of stored value and revising related regulations.

DATES: Written comments on the notice of proposed rulemaking must be submitted on or before September 9, 2009.

ADDRESSES: You may submit comments, identified by RIN 1506–AA97, by any of the following methods:

- *Federal e-rulemaking portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Refer to Docket number TREAS–FinCen–2009–0002.
- *Mail:* FinCEN, P.O. Box 39, Vienna, VA 22183. Include RIN 1506–AA97 in the body of the text.

Inspection of comments: Comments may be inspected, between 10 a.m. and 4 p.m., in the FinCEN reading room in Vienna, VA. Persons wishing to inspect the comments submitted must request an appointment with the Disclosure Officer by telephoning (703) 905–5034 (Not a toll free call).

FOR FURTHER INFORMATION CONTACT: Regulatory Policy and Programs Division, FinCEN (800) 949–2732 and select option 1.

SUPPLEMENTARY INFORMATION:

I. Introduction

The term MSB, as currently defined in the BSA regulations, refers to each of the following distinct categories of financial service providers: (1) Currency dealer or exchanger, (2) check casher, (3) issuer of traveler's checks, money orders, or stored value, (4) seller or redeemer of traveler's checks, money orders, or stored value, (5) money transmitter, and (6) the United States Postal Service.[1]

MSBs play a critical role in providing financial services to, among others, a segment of the population that generally does not maintain bank accounts. Law enforcement, FinCEN, and other federal regulators have repeatedly stressed the need to prevent transactions that typically flow through these businesses from going underground, which would diminish transparency with respect to these transactions. Because MSBs

[1] 31 CFR 103.11(uu)(1)–(6).

provide needed financial services to numerous communities throughout the country and often facilitate the transmission of money to those in foreign countries, they are vital to both domestic and foreign economies.

In drafting this rulemaking, FinCEN reviewed past industry survey studies that were conducted to gain perspective on the size, revenue, geographic distribution, and other characteristics of the various service sectors of MSBs. The industry has grown in size and operational complexity since FinCEN first proposed MSB regulations in 1997.

A 1997 study estimated that the MSB industry population (both principals and agents) was around 158,000, and provided approximately $200 billion annually in financial services.[2] The study estimated that fewer than ten large businesses accounted for the bulk of MSB activity (involving money transmissions, money orders, traveler's checks, and check cashing and currency exchange) conducted within the United States. The financial services were provided primarily through systems of agents.

In 2005, FinCEN again studied the MSB population and services provided and determined that the industry had grown to approximately $284 to $305 billion annually in financial services.[3] The increase reflected a growth rate for the MSB industry of about 50% over the previous decade. The study found that approximately 50% of all MSBs offered both check cashing and money order services.

This rulemaking proposes to amend 31 CFR 103.11(uu) by revising the MSB definitions. In addition to discussing our rationale for such revisions, we have asked questions of the general public to assist us with understanding the impact that the proposed changes may have on the affected businesses, as well as on law enforcement and regulatory efforts. These questions are asked both throughout the document and again in section IV with additional specific requests for comments.

In drafting this rulemaking, we have proposed folding all of stored value into one category so that *issuers* of stored value and *sellers or redeemers* of stored value are in the same category, without making any substantive changes to the definition of this category. We have determined that a separate, comprehensive proposal is warranted for stored value and will make such a proposal at a later date. To facilitate this process, we urge interested parties to respond to the requests for comments about stored value that we have included within this rulemaking.[4]

II. Background

A. Statutory and Regulatory Background

The BSA, Titles I and II of Public Law 91–508, as amended, codified at 12 U.S.C. 1829b, 18 U.S.C. 1951–1959, and 31 U.S.C. 5311–5314 and 5316–5332, authorizes the Secretary of the Treasury (the ''Secretary'') to issue regulations requiring financial institutions to keep records and file reports that the Secretary determines ''have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence matters, including analysis, to protect against international terrorism.'' [5] The Secretary's authority to administer the BSA and its implementing regulations has been delegated to the Director of FinCEN.[6] FinCEN has interpreted the BSA through implementing regulations (''BSA regulations'' or ''BSA rules'') that appear at 31 CFR Part 103.

The BSA defines the term ''financial institution'' to include, in part: A currency exchange; an issuer, redeemer, or casher of travelers' checks, checks, money orders, or similar instruments; the United States Postal Service; a person involved in the transmission of funds; and any business or agency which engages in any activity which is determined by regulation to be an activity which is similar to, related to, or a substitute for these activities.[7]

The Director of FinCEN, through delegated authority, has implemented regulations under the BSA interpreting the recordkeeping, reporting, and other requirements of the BSA. Like other financial institutions under the BSA, MSBs must implement anti-money laundering (AML) programs, make certain reports to FinCEN, and maintain certain records to facilitate financial transparency. MSBs are required to: (1) Establish written AML programs that are reasonably designed to prevent the MSB from being used to facilitate money laundering and the financing of terrorist activities; [8] (2) file Currency Transaction Reports (CTRs) [9] and Suspicious Activity Reports (SARs) [10] and (3) maintain certain records, including those relating to the purchase of certain monetary instruments with currency; [11] relating to transactions by currency dealers or exchangers; [12] and relating to certain transmittals of funds.[13] Most types of MSBs are required to register with FinCEN [14] and all are subject to examination for BSA compliance by the Internal Revenue Service (IRS).[15]

B. Past Public MSB Meetings

In 1997, FinCEN held public meetings to give members of the financial services industry an opportunity to discuss the proposed MSB regulations and any impact they might have on operations.[16] In drafting the final rules defining the MSB categories,[17] FinCEN relied on the contributions from these public forums.

On March 8, 2005, FinCEN held a fact-finding meeting in Washington, DC on the provision of banking services to MSBs.[18] MSBs recounted their challenges in obtaining and maintaining banking services due to the perception that their businesses posed a high risk of money laundering and terrorist financing. In 2006, FinCEN issued an advance notice of proposed rulemaking seeking input on how to address these challenges,[19] and received 142 comments in response, which have informed this rulemaking.[20]

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[2] Coopers and Lybrand LLP, ''Non-Bank Financial Institutions: A Study of Five Sectors'' (Feb. 28, 1997).

[3] KPMG 2005 Money Services Business Industry Survey Study (Sept. 26, 2005), available on FinCEN's Web site, *http://www.fincen.gov.*

[4] *See* Section IV, below.

[5] 31 U.S.C. 5311.

[6] *See* Treasury Order 180–01 (Sept. 26, 2002).

[7] 31 U.S.C. 5312(a)(2)(J), (K), (R), (V), and (Y).

[8] *See* 31 CFR 103.125.

[9] *See* 31 CFR 103.22.

[10] *See* 31 CFR 103.20. Check cashers and transactions solely involving the issuance, sale or redemption of stored value are not covered by the SAR requirement. *See* 31 CFR § 103.20(a)(1), (5).

[11] *See* 31 CFR 103.29.

[12] *See* 31 CFR 103.37.

[13] *See* 31 CFR 103.33(f)–(g).

[14] *See* 31 CFR 103.41.

[15] 31 CFR 103.56(b)(8).

[16] These public meetings were held in Vienna, Virginia, on July 22, 1997; New York, New York, on July 28, 1997; San Jose, California, on August 1, 1997; Chicago, Illinois, on August 15, 1997; and Vienna, Virginia, on September 3, 1997. The discussions focused on how businesses operate and how best to regulate them. Discussion regarding whether a definitional threshold was warranted and if so, how to arrive at one, provided invaluable information to FinCEN.

[17] Definitions Relating to, and Registration of, Money Services Businesses, 64 FR 45438 (Aug. 20, 1999) (''1999 Rulemaking'').

[18] FinCEN conducted the meeting through the Non-bank Financial Institutions and the Examination Subcommittees of the Bank Secrecy Act Advisory Group (''BSAAG''). BSAAG is an advisory group created by Congress consisting of industry, regulatory, and law enforcement participants for the purpose of engaging in open dialogue related to the protection of the U.S. financial system from money laundering, terrorist financing, and other abuses. BSAAG uses a variety of permanent and ad hoc subcommittees to identify and analyze relevant issues.

[19] Provision of Banking Services to Money Services Businesses, 71 FR 12308 (March 10, 2006).

[20] These comments are available in files dated March 10 and May 15, 2006 at *http://www.fincen.gov/statutes_regs/frn/reg_proposal_comments.html.*

C. The Term ''Money Services Businesses''

In 1999, FinCEN added ''money services business'' to the definition of ''financial institution'' in the BSA regulation.[21] The term MSB was created to: (1) clarify statutory language in a way that effectively captured industry operations and (2) refine a subset of non-bank financial institutions that are not subject to federal functional regulation at the federal level. We substituted the term ''money services business'' for the statutory term ''money transmitting business'' to avoid using a general term that could too easily be confused with ''money transmitter,'' which was being proposed as a specific category of MSB.[22]

Over the years, MSBs have asserted that using a single term to identify actors engaging in particular diverse activities is inadequate for assessing money laundering and terrorist financing risks. Furthermore, industry has argued that the use of the term MSB has adversely affected their access to banking services. For these reasons, industry has asked us to eliminate the term ''money services business'' to describe this particular group of non-bank financial institutions and describe the businesses as ''non-bank financial institutions.''

It would be ineffective and confusing to use the broader term ''non-bank financial institution'' to describe the subset of ''MSBs.'' Even in the late 1990s, the term ''non-bank financial institutions'' encompassed broker-dealers in securities and casinos, as well as those businesses currently incorporated within the term MSB. The term is even less helpful now, as there are more types of non-bank financial institutions subject to BSA regulations, such as mutual funds, insurance companies, credit card system operators, dealers in precious metals, stones, and jewels, and futures commission merchants.

Despite the diverse risks posed across and even within MSB industries,[23] MSBs share certain qualities. In particular, these businesses offer financial services that Congress grouped together in the BSA.[24] MSBs provide a range of financial services to many people without bank accounts similar to those services offered by banks to their customers. FinCEN therefore sees the continuing utility in the general term ''MSB'' as a concise way to refer to certain non-bank financial institutions that are without a federal functional regulator;[25] that offer specific services (often in combination), and that have similar BSA requirements.

D. Genesis of the Proposed Revisions

In June 2007, FinCEN adopted its BSA efficiency and effectiveness initiative, which includes as one of its initial provisions, clarifying the scope of the MSB definitions. The initiative makes it a priority for FinCEN to review, and revise if appropriate, the MSB definitions in light of the money laundering risks posed.

We believe the current MSB regulatory definitions should be revised to describe with greater particularity the types of activity that would subject a business to the BSA rules.[26] For example, under the current regulations, to be deemed a check casher, a business only has to cash checks in amounts greater than the definitional threshold. The regulatory language does not provide insight, for instance, into the types of instruments a check casher may accept and does not detail what may be redeemed and whether it could be a combination of items (e.g., currency, another instrument, or a combination of instruments). The intent in clarifying the definitions is to resolve such ambiguities in the regulations so that the rules can be applied with more certainty by potential MSBs, the banks who maintain accounts for them, law enforcement, and regulators. The rationale for our proposed changes is provided in the section-by-section analysis below.

E. Need for Review and Updates

Nearly ten years have passed since FinCEN issued the BSA regulations defining the categories of MSBs.[27] Since that time, FinCEN has received numerous requests to clarify the application of the MSB regulations to particular businesses. Over one-third of these requests came from persons inquiring whether or not they were an MSB.[28] Some of these requests for guidance reflect significant technological advances such as the online provision of financial services, as well as new financial products developed after the publication of our current rules such as stored value products and electronic currency. All of these developments have changed the nature of the MSB industry. Where possible, we have provided guidance to the industry on how to interpret and apply the regulations.

With respect to check cashers and money transmitters in particular, we have developed a large body of guidance in the years since the issuance of the final MSB regulations. For check cashers, FinCEN's guidance and rulings provide several examples of activities that do not meet the regulatory definition of a check casher, though they may involve check activity in amounts exceeding the regulatory threshold. Examples of businesses that are *not* check cashers include: (1) A payday lender that holds checks as collateral for repayment of the loan by the customer and does not deposit or negotiate the checks;[29] (2) a business cashing its employees' payroll checks;[30] (3) a business cashing its own checks issued as payment for goods or services provided by non-employees;[31] (4) a tax preparer cashing its own refund anticipation loan checks for taxpayers for whom it has prepared tax returns;[32] and (5) a consumer finance company cashing its own loan checks to borrowers.[33]

Similarly, over the years, FinCEN has issued guidance and administrative rulings that provide examples of

[21] 1999 Rulemaking, supra note 17, at 45438.

[22] *See Definition and Registration of Money Services Businesses,* 62 FR 27890, 27890 (May 21, 1997) (''1997 Proposal'').

[23] FinCEN has expressed its view that not all MSBs pose the same level of risk and will not require the same level of due diligence. *See, e.g.,* FFIEC Manual (2007) at 277 (Non-bank Financial Institutions—Overview—Providing Banking Services to Money Services Businesses) and ''Interagency Interpretive Guidance on Providing Banking Services to Money Services Businesses Operating in the United States'' (April 26, 2005) (''[t]he range of products and services offered, and the customer bases served by money services businesses, are equally diverse * * * while they all fall under the definition of a money services business, the types of businesses are quite distinct''). We also have communicated this message at compliance schools for banking examiners, on public panels, and at other speaking engagements.

[24] *See* 31 U.S.C. 5330(d)(1).

[25] The Internal Revenue Service examines these businesses only for compliance with the BSA. It is not a ''functional'' regulator of MSBs.

[26] The 1997 open forums on MSBs included discussions on whether to create definitions based on the type of institution involved or instead based on the activity or function performed by an entity regardless of the type of institution. Ultimately, FinCEN determined that changes in the industry over time may make relying on the type of institution problematic while creating definitions based on the underlying activity would enable the regulations to account for new technologies, services, and products.

[27] 1999 Rulemaking, 64 FR 45438 (Aug. 20, 1999).

[28] This statistic comes from a review of requests for guidance from our Regulatory Helpline.

[29] FinCEN Ruling 2002–2 (Definition of Check Casher (Payday Lenders)), (Feb. 5, 2002).

[30] FinCEN Guidance 2006–G005 (Frequently Asked Questions—Businesses Cashing Their Own Checks) (March 31, 2006).

[31] *Id.*

[32] *Id.*

[33] FinCEN Ruling 2007–R001 (Whether a Publicly Traded Company that Cashes its own Checks Issued to Loan Customers is a Money Services Business) (Jan. 8, 2008).

activities that do not meet the regulatory definition of a money transmitter, even though entities engaged in such activities may be involved in accepting and transmitting funds, such as: (1) Payment processing businesses that only provide merchants with a portal to financial institutions with access to the ACH system for the receipt of payments for goods and services already provided;[34] (2) debt management companies, with respect to their submission of payments to creditors on behalf of debtors in conjunction with a debt management plan;[35] (3) merchants and ATMs associated with a network of banks that accept and transmit funds that will become stored value used through the network, but that do so only as a conduit between individual banks and their customers;[36] and (4) businesses that only accept payments on behalf of the utilities with which they have contracted, and that decline to accept and transmit funds for any other purpose.[37]

Given the nature and scope of these important interpretative rulings, we think it is appropriate to update, streamline, and clarify the MSB regulations by incorporating these interpretations into the proposed regulatory revisions and extending them where appropriate. The proposed regulations also reflect proposed policy changes, on which we also seek comment.

III. Section-by-Section Analysis

Pursuant to FinCEN's authority to interpret the provisions of 31 U.S.C. 5312, this document proposes to amend 31 CFR Part 103, primarily by revising the definitions of ''money services business.'' These proposed changes would affect multiple categories of MSBs by: (1) Removing the ''doing business'' language in the definition of MSB merely for purposes of removing unclear language without broadening the application of the regulation beyond its present scope and (2) revising the general language to ensure that activity within the United States that does not involve the physical presence in the United States of an MSB's agent, agency, branch or office is directly regulated. The proposed changes are more fully discussed below.

A. Meaning of the Term ''Money Services Business''

In issuing the current MSB regulations in 1999, FinCEN was responding to a growing need to apply effective BSA regulation to a relatively little known or little understood part of the financial sector in the United States.[38] FinCEN's regulations established broad definitions for each enumerated MSB activity. This had the effect of capturing national and multinational MSB operations as well as the small enterprises that competed with them. It also captured businesses that exclusively provided MSB services as well as businesses that provided both financial services and unrelated products or services.[39]

Since the issuance of these regulations, FinCEN has continued to seek input on defining the categories of MSBs appropriately and establishing appropriate dollar thresholds for activity with the goal of covering those businesses that are significantly engaged in providing products and services that are legitimate subjects of regulatory interest. FinCEN is now in a position to tailor the 1999 definition in a number of ways.

Doing Business

The current regulatory definition of MSB includes ''[e]ach agent, agency, branch, or office within the United States of any person *doing business,* whether or not on a regular basis or as an organized business concern, in one or more of the capacities listed in paragraphs (uu)(1) through (uu)(6) of this section.''[40] Banks and persons registered with, and regulated or examined by, the Securities and Exchange Commission or the Commodity Futures Trading Commission have been excluded from the MSB definitions.[41]

Whether a person is *doing business* as an MSB depends on all of the facts and circumstances. We use the term ''doing business'' to mean the activity in which the person is engaged, rather than any status that the entity has either taken on itself or been assigned, such as a business licensed by a state. In this proposed rulemaking, FinCEN continues to regulate an MSB by its *activity* and the context in which the activity occurs and not simply its *status.* Whether a person is a business in any formal sense should not be determinative of whether it is subject to the MSB definitions, absent statutory requirements to the contrary.

To avoid confusion that might result from the focus on the status of an entity and not its activity and the context in which the activity occurs, we have revised the language in the MSB definition in section 103.11(uu) by deleting the ''doing business'' language and replacing it with ''engaged in activities * * *'' ''Doing business'' had caused uncertainty which we expect will be alleviated with this change. By removing the phrase ''doing business,'' however, we do not intend to broaden the application of the regulation beyond its present scope. To the extent that a person engages in one or more of the enumerated activities listed in the definition, it is an MSB; to the extent that a person does not engage in such activities, it is not.

Dollar Threshold

The regulation currently includes an activity threshold of $1,000 for any person in any one day. This threshold applies to all MSB categories, except money transmitters which do not have any activity threshold, and was established to exclude certain activities under that dollar amount from the BSA requirements.[42]

The issue of a dollar threshold was discussed at FinCEN's publicly-held meetings in 1997 with the industry to vet issues arising from the originally proposed rules. During the meetings, various methods of arriving at a dollar threshold were discussed. Certain members of the industry proposed a threshold based on total gross fee income. FinCEN did not favor that approach because it allowed for potential manipulation on the part of a business seeking to avoid the registration requirement by not collecting a fee and obtaining payment for the service in some other way. Some participants also recommended tying the threshold to an economic indicator, like the minimum for social security payments or the federal minimum wage, which was ultimately rejected. In the final rule, FinCEN doubled the originally proposed threshold of $500 in part based on input received from the industry.[43]

[34] FinCEN Ruling 2003–8 (Definition of Money Transmitter (Merchant Payment Processor)) (Nov. 19, 2003).

[35] FinCEN Ruling 2004–4 (Definition of Money Services Businesses (Debt Management Company)) (Nov. 24, 2004).

[36] FinCEN Ruling 2008–R005 (Whether Certain Reloadable Card Operations are Money Services Businesses) (March 10, 2008) (Merchants and ATMs associated with a network of banks were not deemed money transmitters).

[37] FinCEN Ruling 2008–R006 (Whether an Authorized Agent for the Receipt of Utility Payments is a Money Transmitter) (May 21, 2008).

[38] *See* 1999 Rulemaking, 64 FR 45439.

[39] *Id.*

[40] 31 CFR 103.11(uu) (emphasis added).

[41] *Id.*

[42] *See* 1999 Rulemaking, 64 FR at 45446 (the threshold attempts to eliminate treating certain businesses as MSBs, like grocery stores and hotels, which cash checks and exchange currency as an accommodation to customers otherwise buying goods and services).

[43] The final rule also indicated that many MSB transactions regularly occur in amounts greater than

Although FinCEN does not propose amending the current threshold in this rulemaking, we are considering the need for a separate rulemaking to make possible adjustments to the threshold. A lower threshold may increase the amount of information available to law enforcement by expanding the scope of entities subject to BSA requirements, but would also add additional entities that conduct incidental and low-value MSB activities in which the benefits of regulation many not outweigh the costs. Moreover, the effect on the clients whom these MSBs serve would need to be carefully studied. Conversely, a higher threshold may remove from the scope of the BSA entities that conduct incidental and low-value MSB activities in which the benefits of regulation many not outweigh the costs.

Questions for Comment

- We seek information on the average daily transaction amount for the different MSB services offered: check cashing; money orders; money transmission; foreign exchange; stored value; and traveler's checks.
- We specifically seek comment from law enforcement on how adjusting the threshold higher or lower would impact their investigations and prosecutions.
- We specifically seek comment from community groups on how adjusting the threshold higher or lower would impact the clients who utilize MSB firms.

Foreign-Located MSBs

The BSA authorizes us to define a domestic financial institution without reference to its physical presence in the United States. 31 U.S.C. 5312(b)(1) states that the term ''domestic financial institution'' applies to *an action in the United States,* not to the physical location of the financial agency or institution taking the action. Thus, it is within FinCEN's authority to write regulations establishing that a foreign-located business that meets the definition of a ''financial institution'' and is conducting business in the United States in such a capacity is a ''domestic financial institution.''

We propose to use this authority to amend the regulatory language implementing 31 U.S.C. 5312(a)(2)(J), (K), and (R)—the provisions on which our regulatory definition of MSBs is based—to ensure that certain foreign-located entities engaging in MSB activities in the United States are subject to the requirements of the BSA. We propose to do this by revising our MSB definition to state that an entity is defined as an MSB by the activity it conducts within the United States, and not exclusively by the physical presence of one or more of the entity's agents, agencies, branches or offices within the United States. Accordingly, we propose the following text: ''The term ''money services business'' shall include a person wherever located engaged in the activities that take place wholly or in substantial part within the United States, in one or more of the capacities listed in paragraphs (uu)(1) through (uu)(6) of this section, whether or not on a regular basis or as an organized business concern. This includes but is not limited to maintenance of any agent, agency, branch, or office within the United States.''

Technological advances make it increasingly possible for MSBs to offer financial services through mechanisms other than ''brick and mortar'' locations. Foreign entities can and do offer services in the U.S. through other instrumentalities, such as the Internet or a U.S.-based bank account. Under this rulemaking, we seek to ensure that a foreign-located entity engaging in activities in the United States in one of the capacities listed in 31 CFR 103.11(uu)(1)–(5) is regulated as an MSB. We intend to include an entity that has a presence in the U.S. by means of the internet or similar mechanism, or by means of an account with a U.S. financial institution and who, for instance, is transmitting money through the account with U.S. customers or recipients. Establishing the degree to which the activities of a foreign-located MSB occurs within the United States depends on all the facts and circumstances and whether U.S. customers or recipients are involved in the activities.[44] If a foreign-located business is an MSB according to our regulations, then it will have the same reporting and recordkeeping and other requirements as an MSB with a physical presence in the United States, with respect to its U.S. activities.[45]

FinCEN seeks to ensure that our AML regulations apply equally to all persons engaging in activities in the United States as MSBs. The U.S. system is not fully protected when some MSB transactions are covered and others are not. We are concerned that mechanisms such as the Internet increasingly can be used to conduct business within the United States from a foreign jurisdiction. Use of such mechanisms may avoid both our regulations and the regulations of the foreign jurisdiction. This undermines the legitimate interest of the United States in protecting its own financial system from abuse.

Effectively regulating the use of the U.S. financial system by all actors, both domestic and foreign, is consistent with the efforts to establish an international community designed to help countries and other jurisdictions work in concert to protect the inextricably intertwined global financial system. These efforts in turn help support the efforts of individual countries to prevent their financial systems from being used as conduits for financial crimes.

We seek comment on the effectiveness of the proposed text changes regarding the application of the MSB definition to certain foreign-located MSBs. In addition, we request input on the effectiveness of examining and enforcing such entities' compliance with BSA requirements, such as the requirement that a foreign-located MSB maintain registration records in the United States that are readily available at the request of FinCEN or any appropriate law enforcement agency.[46] Moreover, we seek comment on the implications of requiring a foreign-located MSB to file SARs with respect to transactions taking place within the United States and the ability to enforce the confidentiality and safe harbor provisions of the SAR,[47] or to enforce the issuance of a civil money penalty[48] on such an MSB.[49] We seek comment

the originally proposed definitional threshold of $500. *See* 1999 Rulemaking, 64 FR at 45446.

[44] *See* FinCEN Ruling 2004–1 (March 29, 2004). Guidance (Definition of Money Services Business) (Foreign-Located Currency Exchanger With U.S. Bank Account) (A foreign-located currency exchanger whose only presence in the U.S. was a bank account was not deemed an MSB when the currency exchange transactions occurred solely in a foreign country for foreign-located customers and the use of the U.S. bank account was limited to issuing and clearing dollar-denominated monetary instruments.)

[45] *See* Section II.A of this rulemaking above for MSB compliance obligations.

[46] *See* 1999 Rulemaking, 64 FR at 45441 (''A money services business is not required to keep records required by section § 103.41 in a centralized location so long as the records are maintained in the United States'').

[47] 31 CFR 103.20(d). *See also* FinCEN Form 107 (Registration of Money Services Business) (Jan. 2005), which allows for the registration of a foreign located MSB in Part III.

[48] 31 CFR 103.56–103.57.

[49] The practical issues that may arise in enforcing these requirements are distinct from the legal issues as to whether FinCEN has the authority to impose these requirements on foreign-located MSBs, and whether federal courts have the authority to impose sanctions for the failure of a foreign-located MSB to comply with these requirements. MSB activity wholly or substantially within the United States is an economic activity substantially affecting interstate commerce, and it is therefore clearly amenable to federal regulation. *See United States* v. *Morrison,* 529 U.S. 598, 609–610, 120 S.Ct. 1740, 1749–1750 (2000). As noted, the BSA authorizes FinCEN to regulate action within the United States without reference to the actor's physical presence in the United States. *See* 31 U.S.C. § 5312(b)(1). Finally, the nature of MSB activity is such that a

Continued

from law enforcement on how such changes may impact their work if certain foreign businesses were regulated as MSBs. Alternatively, we solicit comment on whether we should expand the definition of ''foreign financial institution'' [50] in the foreign correspondent account rule to include check cashers and issuers and/or sellers of traveler's checks and/or money orders.

B. Meaning of the Term ''Dealer in Foreign Exchange''

Pursuant to FinCEN's authority to interpret the provisions of 31 U.S.C. 5312, this section proposes to amend 31 CFR Part 103 by amending the regulation implementing 31 U.S.C. 5312(a)(2)(J), which defines ''a currency exchange'' as a financial institution and 31 U.S.C. 5312(a)(2)(Y) and (Z), which permit the Secretary to designate as a financial institution ''any business * * * which engages in any activity * * * which is similar to, related to, or a substitute for any activity in which any business [defined to be a financial institution] is authorized to engage [or] any other business whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters.''

Currently, 31 CFR 103.11(uu)(1) defines a ''currency dealer or exchanger,'' as ''[a] currency dealer or exchanger (other than a person who does not exchange currency in an amount greater than $1,000 in currency or monetary or other instruments for any person on any day in one or more transactions).'' The proposed changes would revise 31 CFR 103.11(uu)(1) to state: ''*Dealer in Foreign Exchange.* A person who accepts the currency, or other monetary instruments, funds, or other instruments denominated in the currency, of one or more countries in exchange for the currency, or other monetary instruments, funds, or other instruments denominated in the currency, of one or more other countries in an amount greater than $1,000 for any other person on any day in one or more transactions, whether or not for same-day delivery.''

The term ''dealer in foreign exchange'' can be found in the first BSA regulations published in 1972.[51] Although the term later was deleted from the regulations, the deletion and subsequent changes were not intended to change the meaning of the category.[52] The use of the word ''dealer'' in the proposed definition is intended to include both dealers (persons taking one side of a position and seeking to earn a spread) and brokers (persons bringing the buyers and sellers together for a commission and who, like a dealer, will conduct the transaction on its books and through its accounts). ''Dealer'' is intended to include all persons who are in the business of engaging in transactions involving the current or future acquisition or disposition of funds denominated in a particular currency by exchanging them for funds denominated in another currency.

We have removed the word ''currency'' from the name of the category to make clear that businesses that meet this definition may be exchanging not only currency, but also other monetary instruments, funds, or other instruments that are denominated in currency. Although the statute uses the language ''*currency* exchange,'' [53] we believe the language was intended to capture the underlying activity involved in foreign exchange services and that our interpretation is consistent with the original intent and current industry practices. We seek comment on the name change of this category of MSB and whether the revision is consistent with current practices.

The insertion of the word ''foreign'' clarifies our consistent position that any exchange that occurs in the United States could be covered by this definition, even if it does not involve U.S. dollars. Therefore, if all other requirements are fulfilled, and a business exchanges currency, other monetary instruments, funds or other instruments denominated in a currency other than U.S. dollars for currency, other monetary instruments, funds or other instruments denominated either in dollars or in another non-U.S. currency, we would consider the business a dealer in foreign exchange for purposes of our rules. Though such a transaction may not involve U.S. dollars, the potential use of a dealer in foreign exchange to launder money, finance terrorism, or carry out other illicit activity nevertheless would impact the U.S. financial system and should be subject to regulation.

This proposed clarification also reflects the reality of the international nature of money laundering and terrorist financing as well as the jurisdictional responsibility of the U.S. Government to safeguard the financial system against those risks. Although U.S. dollars are considered an attractive medium for money laundering and terrorist financing because of the worldwide acceptance of the dollar as a means of payment, failing to capture exchanges within the United States of two foreign (non-U.S. dollar) currencies or of payment instruments denominated in two foreign currencies would leave a significant class of potentially vulnerable transactions that occur within the United States unregulated.

The proposed definition also clarifies that dealing in foreign exchange is not limited to the physical exchange of the currency of one country for the currency of another country. The phrase ''currency, or other monetary instruments, funds, or other instruments'' clarifies which mediums of exchange are included under the current rule's phrasing ''currency or monetary or other instruments.'' Our current rules and existing body of administrative rulings make clear our determination that a person that

foreign-located MSB engaging in such activity wholly or substantially within the United States is making a conscious decision to do so and is aware of where the activity is taking place. It should therefore be possible to identify a federal judicial district with which the foreign-located MSB has sufficient minimum contacts that the maintenance of a suit against the foreign-located MSB does not offend due process or traditional notions of fair play and substantial justice, *see International Shoe Co.* v. *Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 158 (1945), either because the suit arises out of the MSB's specific contacts with the district and the MSB has purposefully directed its efforts towards residents of the district, *see Burger King* v. *Rudzewicz,* 471 U.S. 462, 476, 105 S.Ct. 2174, 2184 (1985), or because the MSB has maintained continuous and systematic general business contacts with the district, *see Helicopteros Nacionales de Colombia* v. *Hall*, 466 U.S. 408, 416, 104 S.Ct. 1868, 1873 (1984). It should therefore be possible for a federal court to assert personal jurisdiction over the MSB on either a general jurisdiction or specific jurisdiction theory, notwithstanding the MSB's lack of physical presence in the United States. *See Gator.com Corp.* v. *L.L. Bean, Inc.,* 341 F.3d 1072, 1079 (9th Cir. 2003) (federal district court has personal jurisdiction over defendant lacking physical presence in district because defendant's ''highly interactive'' website operates as ''virtual store'' in district), *Gorman* v. *Ameritrade Holding Corp.,* 293 F.3d 506, 512–513 (D.C.Cir. 2002) (federal district court may have personal jurisdiction over defendant lacking physical presence in district because residents of district ''use its website to engage in electronic transactions with the firm''); *see also Glencore Grain Rotterdam B.V.* v. *Shivnath Rai Harnarain Co.,* 284 F.3d 1114, 1123–1126 (9th Cir. 2002) (federal district court may have personal jurisdiction over defendant notwithstanding defendant's lack of physical presence in the United States), *United States* v. *Swiss American Bank, Ltd.,* 274 F.3d 610, 619–625 (1st Cir. 2001) (same).

[50] 31 CFR 103.175(h).

[51] *See* 37 FR 6912 (April 5, 1972) (defining ''financial institution'' to include ''a person who engages as a business in dealing in or exchanging currency as, for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks'').

[52] *See* 51 FR 30233, 30234 (Aug. 25, 1986) (proposing to define ''financial institution'' to include ''a currency dealer or exchanger, including a check casher,'' with no notice that this change in language would constitute a change in the scope of the definition); 52 FR 11436, 11439–11440 (Apr. 8, 1987) (adopting the proposed language changes).

[53] 31 U.S.C. 5312(a)(2).

converts funds denominated in the currency of one country to funds denominated in the currency of another country is a currency dealer or exchanger.[54] ''Other instruments'' is intended to capture those types of payment instruments that do not fall precisely into one of the other categories, but nevertheless are readily recognizable as payment instruments.

The addition of the phrase ''of one or more other countries'' [55] to the text of the definition signals a proposed policy clarification, which we believe better comports with a more common understanding of the business of exchanging currency. This phrase indicates that a person would no longer be considered a dealer in foreign exchange when converting currency, other monetary instruments, funds or other instruments denominated in U.S. currency for currency, other monetary instruments, funds or other instruments also denominated in U.S. currency. Similarly, if a person were to accept currency, other monetary instruments, funds or other instruments denominated in a particular foreign currency in exchange for currency, other monetary instruments, funds or other instruments denominated in that same foreign currency, that person would not be considered an MSB. By way of example, a person accepting a traveler's check denominated in Mexican pesos in exchange for Mexican pesos in currency form would not be considered a dealer in foreign exchange.

The proposed language ''for any other person'' was inserted into the definition to explicitly reflect the interpretation that a person is not a dealer in foreign exchange ''[t]o the extent that [he is] exchanging * * * and transporting [his] own money on behalf of [him]self.'' [56]

We added the phrase ''whether or not for same-day delivery'' to account for the potential time difference between the date on which the exchange rate is agreed and the date of the exchange. Common settlement terms in foreign exchange markets include: (1) Same-day or cash—where the parties both agree to an exchange of currency and conclude the exchange on the same working day; (2) spot—where the parties agree to an exchange of currency on one date, with the exchange taking place two working days thereafter; (3) cash forward—where the parties agree to an exchange of currency on one date, with the exchange of currency deferred until an agreed-upon date in the future; and (4) future—where the parties agree to an exchange of currency on one date, with settlement to occur in an agreed upon delivery period in the future typically by payment of an amount reflecting the change in the foreign currency rate between the time of the agreement and delivery. A contract for future delivery of currency may also be settled with the delivery of currency, resulting in the exchange of the currencies underlying the futures contract.

The subject definition would apply only to exchanges of currency in the over-the-counter markets.[57] Exchange-traded contracts and the persons who intermediate them are regulated by the Commodity Futures Trading Commission, and therefore are excluded from the definition of dealer in foreign exchange.[58] However, currency is an ''excluded commodity'' under the Commodity Exchange Act,[59] and foreign exchange futures may be traded over-the-counter in limited circumstances, Consequently, this discrete category of futures contracts would fall within this definition.

Requests for Comment

- Does limiting this definition to only dealers in *foreign* exchange increase the risk for money laundering? How? We especially seek input from law enforcement.
- Does the definition appropriately include the mediums of exchange that are used to effect these transactions?
- Should all categories of MSB be required to maintain and retain additional records on customers similar to those of currency dealers and exchangers in 31 CFR § 103.37?

C. Meaning of the Term ''Check Casher''

Currently, under 31 CFR § 103.11(uu)(2), a check casher is defined as ''a person engaged in the business of a check casher (other than a person who does not cash checks in an amount greater than $1,000 in currency or monetary or other instruments for any person on any day in one or more transactions).'' FinCEN is proposing to amend 31 CFR 103.11(uu)(2) to clarify the meaning of the term ''check cashing'' by splitting the existing regulatory definition into two subsections—one defining check cashing activity and one excluding certain activity from that definition.

The proposed revision would change the definition of check cashier to state (in part): ''A person who accepts checks (as defined in the Uniform Commercial Code [U.C.C. Article 3—Negotiable Instruments § 3–104]) or monetary instruments (as defined in § 103.11(u)(1)(ii), (iii), (iv) and (v)) in return for currency or a combination of currency and other monetary instruments or other instruments in an amount greater than $1,000.''

''In return'' has been added to the definition to more accurately describe the activity that occurs when cashing a check or redeeming a monetary instrument. The Uniform Commercial Code reference has been added in order to provide a clear definition of ''check.'' A reference to the definition of ''monetary instruments'' has also been provided. ''Other instruments'' is intended to capture those types of payment instruments that do not fall precisely into one of the other categories. The term is meant to capture those instruments that are readily recognizable as payment instruments—an instrument such as a stored value card that is treated in commerce as a cash equivalent—without capturing goods or services that may be purchased with a check or monetary instrument.

For the sake of efficiency, this proposed definition would also incorporate the redeeming of monetary instruments into the definition of check casher. Given its similarity to check cashing, we believe it is unnecessary to treat this activity separately from check cashing.[60] Accordingly, under this proposal, a person engaged in redeeming monetary instruments (including traveler's checks and money orders) would be a check casher if it redeemed checks for currency or a combination of currency and monetary or other instruments. Our intent in this revision is not to capture activity that is tantamount to merely exchanging one

[54] *See* FinCEN Ruling 2008–R003 (Whether a Person That is Engaged in the Business of Foreign Exchange Risk Management is a Currency Dealer or Exchanger or Money Transmitter) (May 9, 2008); FinCEN Ruling 2008–R002 (Whether a Foreign Exchange Dealer is a Currency Dealer or Exchanger or Money Transmitter) (May 9, 2008); and 31 CFR 103.37(b)(6).

[55] The addition of ''one or more other countries'' is intended to capture the fact that some foreign currencies are used by multiple countries. For instance, the Euro is used by the member states of the European Union. Accordingly, a dealer in foreign exchange may accept funds of one or more other *countries* in exchange for funds of one or more other countries.

[56] *See, e.g.,* FinCEN Ruling 2003–9, (Definition of Money Services Business (Money Transmitter/Currency Dealer or Exchanger)) (October 20, 2003). *See also,* FinCEN Ruling 2004–3, (Definition of Money Services Business (Money Transmitter/Currency Dealer or Exchanger)) (Aug, 17, 2004).

[57] The terms of a spot, forward, or futures contract typically will permit either delivery of the underlying foreign currency or settlement of the contract in the local currency. As the option of delivering the foreign currency always exists, these contracts cause the contracting parties to fall under the dealer in foreign exchange definition.

[58] 31 CFR 103.11(uu).

[59] 7 U.S.C. 1a(13).

[60] FinCEN does not interpret ''redeem'' to include payment instruments or mechanisms taken in exchange for goods or services. *See* 1999 Rulemaking, 64 FR at 45441–45443.

monetary instrument for another monetary or other instrument and accordingly, the proposed rule would require currency to be included in the redeeming.

The proposed revision also would clarify what activities would *not* be subject to the check casher definition. The proposed definition also would include the following: ''Whether a person is a check casher as described in this section is a matter of facts and circumstances. The term 'check casher' shall not include: a person that sells closed loop stored value [61] purchased with a check, monetary instrument or other instruments as referenced above in this definition; a person that redeems its own checks; [62] or a person that only holds a customer's check as collateral for repayment by the customer of a loan.[63] These businesses are being excluded from the definition of check casher because of their limited purpose and low risk.''

Finally, under the current regulations, redeemers of traveler's checks and money orders currently have SAR obligations while check cashers do not. As we are proposing to combine these two current categories of MSB, we seek comment on whether FinCEN should amend its regulations in a future rulemaking to require check cashers to report suspicious activity to FinCEN under the BSA. Would such a requirement be necessary, considering, for example, that issuers of traveler's checks and money orders will continue to have SAR reporting requirements with respect to the instruments that they issue?

Requests for Comment

- Should there be an exemption or other relief for certain types of lower risk checks (e.g., federal, state, or local government entitlement checks)?
- Should check cashers be subject to a SAR requirement?
- Should there be any other exceptions or limitations on the check casher definition?
- FinCEN invites comment on the impact of the proposed changes, if any, on current business practices.
- We specifically seek comment from law enforcement on how the proposed changes may affect their investigations and prosecutions.

D. Meaning of the Term ''Issuer or Seller of Traveler's Checks or Money Orders''

FinCEN proposes to replace existing sections 103.11(uu)(3), ''issuer of traveler's checks, money orders, or stored value'' and 103.11(uu)(4), ''seller or redeemer of travelers checks, money orders, or stored value'' with new section 103.11(uu)(3), ''issuer or seller of traveler's checks or money orders.'' This proposed new section defines an issuer or seller of traveler's checks or money orders as ''[a] person that (i) issues traveler's checks or money orders that are sold in an amount greater than $1,000 for any person on any day in one or more transactions or (ii) sells traveler's checks or money orders in an amount greater than $1,000 for any person on any day in one or more transactions.''

The proposed rule eliminates the ''redeemer'' language that is contained in our current definitions. Although the current rules include those who ''redeem'' traveler's checks and money orders, traveler's checks typically are redeemed by their issuers, making a separate redemption category redundant in such circumstances. Moreover, redeeming a traveler's check or money order by a non-issuer is close enough to the activity of a check casher that we think it can be incorporated into that definition with little difficulty.[64] Accordingly, we are removing the ''redeemer'' provision from the proposed rule.

The proposed rule defines an issuer by virtue of the amount at which its monetary instruments or travelers checks are sold, as opposed to the amounts at which they are issued. For example, we contemplate the amount of the sale including the face value of the monetary instruments plus any fees. Because money orders are not issued in round dollar increments like traveler's checks, but are rather sold either directly by the issuer or by its agent to a customer who specifies the exact amount, a business must look at this activity to determine whether its transactions exceed the definitional threshold per person per day. Similarly, although traveler's checks are usually issued in large round amounts (e.g., $20, $50, or $100), the definition is linked to the aggregate amount at which those checks are sold, either directly by the issuer or at the agent level, to a customer in a single day.

Requests for Comment

- Is it appropriate to link the definitional threshold for an issuer to the value at which the money orders and traveler's checks are sold?
- In light of the proposed definition of a check casher, is the ''redeemer'' provision no longer necessary for traveler's checks and money orders?

E. Meaning of the Term ''Stored Value''

Under the current rules, FinCEN addresses traveler's checks, money orders, and stored value under two separate definitions: issuers and sellers or redeemers of those products. FinCEN proposes to group issuers, sellers, and redeemers of stored value together. Our intent in the proposed new section is not to change the regulatory definitions regarding issuers, sellers, or redeemers of stored value in this rulemaking but simply to group such providers of stored value together in one category. Accordingly, the new section would be revised as follows: ''A person who (1) issues stored value (other than a person who does not issue such stored value in an amount greater than $1,000 to any person on any day in one or more transactions) or (2) sells or redeems stored value (other than a person who does not sell or redeem such stored value for an amount greater than $1,000 from any person on any day in one or more transactions).''

Although FinCEN does not intend to substantively amend the category of issuers, sellers, or redeemers of stored value in this rulemaking, we are reviewing the current status of the stored value regulatory regime, and we are considering possible future revisions. In 1999, FinCEN issued a final rulemaking deferring certain requirements for the stored value industry based on the complexity of the industry and the desire to avoid unintended consequences with respect to an industry then in its infancy. Mindful of these continuing issues, FinCEN is deferring the proposal of a new rulemaking regarding issuers, sellers, and redeemers of stored value at the present time. FinCEN will continue to study the nature and the risks of this emerging industry before proposing a separate future rulemaking. At this point, FinCEN is not proposing to revise the definition of stored value found at 31 CFR 103.11(vv).

[61] We are proposing to define closed-loop stored value as stored value that is limited to a defined merchant or location (or set of locations), such as a specific retailer or retail chain, a college campus, or a subway system. *Cf.,* Federal Reserve Board, *A Summary of the Roundtable Discussion on Stored-Value Cards and Other Prepaid Products* (Nov. 12, 2004) available at *http://www.federalreserve.gov/paymentsystems/storedvalue/.*

[62] *See* FinCEN Guidance FIN–2006–G005 (Frequently Asked Questions—Businesses Cashing Their Own Checks) (March 31, 2006).

[63] FinCEN Ruling 2002–2 (Definition of Check Casher (Payday Lenders)), (Feb. 5, 2002).

[64] FinCEN has never held that a business that provides goods or services in exchange for payment in the form of money orders or traveler's checks is an MSB. *See* 1999 Rulemaking, 64 FR at 45447. Accordingly, only a business that redeems these instruments for currency, or exchanges them for a combination of currency and monetary or other instruments would be considered an MSB, specifically a check casher, under the proposed rule.

F. Meaning of the Term ''Money Transmitter''

We propose to revise the regulation interpreting 31 U.S.C. 5312(a)(2)(R), which defines funds transmission under the BSA as ''a licensed sender of money or any other person who engages as a business in the transmission of funds, including any person who engages as a business in an informal money transfer system or any network of people who engage as a business in facilitating the transfer of money domestically or internationally outside of the conventional financial institutions system.''

The implementing regulation, 31 CFR 103.11(uu)(5), currently defines a money transmitter as ''Any person, whether or not licensed or required to be licensed, who engages as a business in accepting currency, or funds denominated in currency, and transmits the currency or funds, or the value of the currency or funds, by any means through a financial agency or institution, a Federal Reserve Bank or other facility of one or more Federal Reserve Banks, the Board of Governors of the Federal Reserve System, or both, or an electronic funds transfer network; or any other person engaged as a business in the transfer of funds.''

The proposed definition of money transmitter would read in part, ''a person who provides money transmission services. The term ''money transmission services'' means the acceptance of currency, funds, or other value that substitutes for currency from one person AND the transmission of such currency, funds, or the value to another location or person by any means. ''Any means'' includes through a financial agency or institution; a Federal Reserve Bank or other facility of one or more Federal Reserve Banks, the Board of Governors of the Federal Reserve System, or both; or an electronic funds transfer network.''

The current regulation additionally contains a facts and circumstances limitation that excludes from the money transmitter definition persons that are engaged in the business of money transmission as an integral part of the execution and settlement of the transaction. Integral includes entities that could not engage in their businesses without engaging in the transmission of funds. In retrospect, it has been difficult for potential money transmitters to apply this exemption. We are proposing to clarify the limitations to the definition by using concise exceptions and by removing phrases that have been difficult to interpret.

The proposed definition of money transmitter is ''a person who provides money transmission services.'' This language is consistent with existing language in the BSA.[65] The proposed definition removes the phrase ''engages as a business'' as FinCEN continues to regulate an MSB by its activity and the context in which the activity occurs and not by its status. The removal of ''engages as a business'' is not intended to broaden the regulation beyond its present scope.

The proposed definition also removes the phrase ''whether or not licensed or required to be licensed.'' While this phrase reflects language in 31 U.S.C. 5312, we find the phrase to be unnecessary because it does not add substantive value to the meaning of money transmitter.

Consistent with the current definition of money transmitter, the proposed language defines ''money transmission services [as] the acceptance of currency, funds, or other value that substitutes for currency from one person AND the transmission of such currency, funds, or the value to another location or person by any means.'' The proposed regulatory definition of money transmission services includes the phrase ''or other value that substitutes for currency'' to state that businesses that accept stored value or other currency equivalents as a funding source and transmit that value are providing money transmission services.[66]

By including the transmission of value, the current and proposed regulatory definitions of money transmitter are worded to include informal value transfer systems, including hawalas.[67] Such activity is money transmission, and the providers are money transmitters subject to the requirements of the BSA.[68]

The proposed regulatory definition of money transmission services also adds the phrase ''to another location or person.'' Although this phrase is not in the statutory definition of money transmitting service, it is implicit in the statutory definition's use of the word ''transmitting.'' Transactions involving the acceptance of currency from one person at one location and the return of that currency to that same person at the same location would not be considered a money transmission service. The addition of the phrase ''to another location or person,'' will explicitly convey our interpretation.

The phrase ''any means'' is defined in the old rule to include transmission ''through a financial agency or institution; a Federal Reserve Bank or other facility of one or more Federal Reserve Banks, the Board of Governors of the Federal Reserve System, or both; or an electronic funds transfer network.'' We moved the phrase ''any means'' to a different part of the definition only to increase reader comprehension, and the change in placement of the phrase has no substantive effect on the meaning of the definition.

The current regulations also include in the definition, ''Any other person engaged as a business in the transfer of funds.''[69] This phrase has led to confusion making it difficult for a person to assure themselves that they do not fall under the definition. Therefore, we have removed the phrase from the proposed definition to minimize confusion. As noted above, our intention is that hawalas be covered by other language in this definition. The deletion of this language is not intended in any way to lessen the applicability of our definition of ''money transmitter'' to hawalas.

As mentioned above, the current regulation provides for facts and circumstances, or limitations regarding the definition of a money transmitter, and states ''whether a person 'engages as a business' in the activities described in paragraph (uu)(5)(i) of this section is a matter of facts and circumstances. Generally, the acceptance and transmission of funds as an integral part of the execution and settlement of a transaction other than the funds transmission itself (for example, in connection with a bona fide sale of securities or other property), will not cause a person to be a money transmitter within the meaning of paragraph (uu)(5)(i) of this section.''[70]

The proposed regulation also has a facts and circumstances limitation that incorporates existing interpretations of the current limitation by adding explicit language reflecting policy developed through administrative ruling letters

[65] 31 U.S.C. 5330 uses the language ''any business that provides * * * money transmitting or remittance services.''

[66] This proposed rulemaking largely reserves the discussion of stored value for a future date. As previously stated, FinCEN intends to issue a separate rulemaking proposing a revised definition of stored value and revising related regulations.

[67] ''An 'informal value transfer system' refers to any system, mechanism, or network of people that receives money for the purpose of making the funds or an equivalent value payable to a third party in another geographic location, whether or not in the same form.'' FinCEN Advisory Issue 33 (Informal Value Transfer Systems) (March 2003). Hawala is an alternative remittance system that operates outside of, or parallel to, ''traditional'' banking or financial channels.

[68] Id.

[69] 31 CFR 103.11(uu)(i)(b).

[70] 31 CFR 103.11(uu)(5)(ii).

and guidance. The proposed limitation language reads, ''whether a person is a money transmitter as described in this section is a matter of facts and circumstances. The term 'money transmitter' shall not include a person that only * * *'' engages in the following activity:

''Provides the delivery, communication, or network access services used by a money transmitter to support money transmission services. * * *'' We find that institutions that are used by money transmitters solely for the purpose of providing a medium of communication or transportation of information between money services businesses and their agents, financial institutions, or service providers should not fall under the definition of money transmitter.

''Acts as a payment processor to facilitate the purchase or payment of a bill for a good or service through a clearance and settlement system by agreement with the creditor or seller * * *.'' Although payment processors may provide a money transmission service, the service is ancillary to their primary business of coordinating payments either from a debtor to a creditor or, if operating at the point-of-sale, from a purchaser to a merchant.[71] A payment processor could not provide the primary service of coordination without providing ancillary money transmission services, but because the money transmission services are ancillary, and because they are generally low risk, we think it appropriate for entities engaged in this activity to be excluded from the definition. Note, however, that this limitation only applies to transmission services by payment processors on behalf of the creditor or seller and not the debtor or buyer. We believe that a contractual agreement for transmission services between the creditor or seller and the money transmitter is a relatively controlled flow of money that poses little money laundering risk, provided that the funds are transmitted only to the creditor or seller with whom the payment processor has contracted and not to another location or person.

''Operates a clearance and settlement system or otherwise acts as an intermediary solely between BSA regulated institutions. This includes but would not be limited to the Fedwire system, electronic funds transfer networks, certain registered clearing agencies regulated by the SEC, and derivatives clearing organizations, or other clearinghouse arrangements established by a financial agency or institution. * * *'' We view persons who solely provide a clearance and settlement system or act as intermediaries between BSA regulated institutions and do not provide other types of money transmission services as mere instrumentalities that the financial institutions use to process their transfers. Therefore, these instrumentalities should not be included in the definition of money transmitter.

''Provides closed loop stored value.'' We also are proposing to exclude a person who provides closed loop stored value from the definition of money transmitter. Generally, a closed loop system refers to stored value that is limited to a defined merchant or location or set of locations.[72]

We do not want the language of the proposed money transmitter definition to be so broad as to include a person that issues a closed loop stored value card, such as most gift cards. For example, we do not want a department store that sells gift cards that only may be used at that department store, or a mall operator who sells gift cards that may only be used within the confines of the mall operator's locations, to be subject to the MSB rules as a money transmitter.

In addition to not being a money transmitter under this proposed rule, FinCEN previously determined that a person solely issuing, selling, or redeeming closed loop stored value is not an ''issuer, seller or redeemer of stored value'' and is therefore not subject to BSA regulation as an MSB under that MSB category either.[73] The fact of this exclusion, however, should not be read to imply that all persons who provide open loop stored value are money transmitters. In part, this is because a significant amount of the open loop stored value issued within the U.S. is issued by or through a depository institution, a category of financial institution that expressly is excluded from the definition of MSB by statute and regulation. [74] Further discussion of open loop stored value will be included in a forthcoming rulemaking.

''Physically transports currency, other monetary instruments, other commercial paper, or other value that substitutes for currency as a person engaged in such business from one person to the same person at another location or to an account belonging to the same person at a financial institution, provided that the person engaged in physical transportation has no more than a custodial interest in the currency, other monetary instruments, other commercial papers, or other value at any point during the transportation;''

This limitation encompasses past armored car rulings. We previously ruled that although armored car services may fall within the definition of a money transmitter, to the extent that they deliver currency on behalf of BSA regulated institutions, they should not be treated as money transmitters when they cannot be viewed as participating, or having a stake in the financial transaction that they are conducting on behalf of the BSA regulated institution.[75] We additionally determined that an armored car is not a money transmitter when it moves currency on behalf of a private party to an account or another location of the same party without taking a financial stake in the transaction.[76]

In this proposed exclusion, the person engaged in physical transportation cannot have more than a custodial interest in what is being moved at any point during the transportation.[77] Thus, the limitation would not apply to such a person if it deposited currency or monetary instruments that it was transporting into its own operating account at a bank, regardless of the identity of the ultimate recipient of the funds represented by the currency or monetary instruments. The limitation would also not apply to such a person if it actually purchased a monetary instrument, and then transported the monetary instrument. We solicit comment on whether our use of the phrase ''no more than a custodial interest'' adequately encapsulates a meaningful distinction between a person that merely transports items of monetary value on behalf of another and a person that takes title or ownership.

This proposed exclusion would apply to transport initiated by any person, not only to transport initiated by a BSA-regulated institution. Additionally, when transport is initiated by a bank, a broker-dealer or other SEC-regulated

[71] FinCEN Ruling 2003–R008 (Definition of Money Transmitter) (Nov. 19, 2003).

[72] See *supra* note 63.

[73] *See* FinCEN Ruling 2003–R004 (Definition of Money Transmitter/Stored Value (Gift Certificates/Gift Cards)) (Aug. 15, 2003) (FinCEN does not currently interpret the definition of stored value to include closed system products such as a mall-wide gift card program).

[74] *See* 31 U.S.C. 5330(d)(1)(C), 31 CFR 103.11(uu).

[75] FinCEN Ruling 2004–R003 (Definition of Money Services Business) (Aug. 17, 2004). *See also* FinCEN 2003–R007 (Definition of Money Transmitter) (Oct. 28, 2003).

[76] *Id.* In such instance, the armored car is merely a conduit or vehicle and has no control over the financial transaction.

[77] The ''custodial'' language is intended to replace the language from past rulings ''stake in the transaction'' for purposes of clarifying the armored car limitation.

financial institution, or a futures commission merchant or other CFTC-regulated institution, a transport business such as an armored car would not be a money transmitter, regardless of whether the transport is to another location or person. In such circumstances, when the transport business does not take title or ownership or the items do not in any manner convert, the transport business merely is acting as an extension of the bank or the SEC- or CFTC-regulated financial institution, all of which are exempt from the proposed definition of money services business at paragraph (uu)(7). We solicit comment on the use of ''custodial'' language to convey that title or ownership or items do not convert during physical transport like armored car services.

''Accepts and transmits funds only integral to the sale of goods or the provision of services, other than money transmission services, by the person who is accepting and transmitting the funds.''

Similar to circumstance (B), we view persons that sell goods or provide services other than money transmission services, and only transmit funds as an integral part of that sale of goods or provision of services, not to be money transmitters. For example, brokering the sale of securities, commodity contracts, or similar instruments is not money transmission notwithstanding the fact that the person brokering the sale may move funds back and forth between the buyer and seller to effect the transaction. The person who is accepting and transmitting the funds simply offers a service other than money transmission services. Also, this limitation would include a debt management company that, unlike in circumstance (B), contracted with a debtor as a medium to provide payment to its creditors.[78] This circumstance is similar to circumstance (B), but uses broader language to encompass those persons who operate under facts and circumstances similar to those stated herein.

Requests for Comments

- Should intermediaries of money transmission services acting between two BSA regulated entities be removed from the definition of money transmitter?

Related Regulations—

G. Service of Legal Process

There currently is no provision within 31 CFR part 103 that requires foreign-located MSBs to designate an agent to accept service of legal process in the United States. In order to enhance the ability of U.S. law enforcement and regulatory agencies to reach these MSB registrants, we are proposing the following additional language to 31 CFR § 103.41: ''Each foreign-located person engaged in activities in the United States as a money services business shall designate the name and address of a person who resides in the United States and is authorized, and has agreed to be an agent, to accept service of legal process with respect to compliance with this part, and shall identify the address of the location within the United States for records pertaining to (b)(1)(iii) of this section.''

IV. Request for Comments

FinCEN invites comments on all aspects of the proposal to revise the MSB definitions and related regulations. If you are currently an MSB, please indicate in your response which MSB service(s) you offer and whether you offer the services in an agent capacity. We specifically invite comment on the above-referenced Request for Comments, as well as the following:

Funds—Is there a need to define the term ''funds'' for purposes of the BSA? We use ''funds'' to refer to money held in bank accounts and ''value of funds'' to denote something different from money actually held in a bank account, such as the value reflected on a stored value card in a chip-based product.

MSB Regulations—

- *Aggregating MSB Services.* Should transactions involving multiple MSB services be aggregated for purposes of determining whether definitional thresholds have been met?
- *Stored Value.* FinCEN intends to issue a separate rulemaking proposing a revised definition of stored value and revising related regulations. However, we seek your input on stored value generally, and specifically on the following:
  - *Definition of stored value:* We seek input on refining the current definition of ''stored value'' in 31 CFR 103.11(v). In doing so, we would like your comment on the appropriateness of a definition that would be based upon the following principles:
    - Definition should be technologically neutral and consistent with actual use of stored value within the economy.
    - Definition should be neutral in regards to the type of entity that provides/issues the stored value.

For purposes of this request for comment, please provide your comments and suggestions on how to better define the term ''stored value'' given the following two existing legal definitions:

- Current definition in 31 CFR 103.11 (vv). ''Funds or monetary value represented in digital electronics format (whether or not specially encrypted) and stored or capable of storage on electronic media in such a way as to be retrievable and transferable electronically.''
- Uniform Money Services Act definition of stored value as ''monetary value that is evidenced by an electronic record'' where ''record'' is ''information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form'' and ''monetary value'' is ''a medium of exchange, whether or not redeemable in money'' and ''money'' is ''a medium of exchange that is authorized or adopted by the United States or a foreign government. The term includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more governments.''
- Alternatively, we seek comment on this potential definition: ''electronic monetary value that is generally accepted as a medium of exchange, whether or not redeemable for currency or funds.''
  - *Treatment of stored value as money transmission.* Some states already have started to include stored value within their money transmission laws. We have recognized, moreover, that some stored value is a subset of our definition of money transmitter.[79] For purposes of this request for comment, we would request input on the following:
    - How would treating all forms of stored value as a form of money transmission impact the needs of industry, law enforcement, or regulators?
    - Should open loop stored value be regulated differently from closed loop? If so, how?
    - Should only certain uses or types of value transfers involving stored value be considered money transmission? If so, please describe or explain.
    - If stored value were excluded completely from being considered a

[78] FinCEN Ruling 2004–R004 (Definition of Money Services Business) (Nov. 24, 2004).

[79] *See* 1997 Proposed Rule, 62 FR at 27893. (The Department of the Treasury stated that businesses that operate systems that permit the transmission of stored value are within the statutory definition of money transmitting services and specifically within the regulatory definition of money transmitter.) *See also*, 1999 Rulemaking, 64 FR at 45446. (FinCEN determined not to exclude ''stored value'' from the definition of ''money transmitter'' but rather treated it as a subclass so that it could be excluded from the operation of certain substantive rules, in particular MSB registration and suspicious activity reporting requirements).

form of money transmission, how would that affect the industry, law enforcement, or regulators?

○ *Treatment of stored value players and products*

• Should we regulate only issuers of stored value or also sellers and redeemers as well? Why? How should we define them? Should there be a threshold for determining whether an entity is an issuer, seller, or redeemer of stored value? What should the threshold be? Should the definitional threshold be consistent with the other categories of MSBs that are subject to thresholds?

• Should regulatory requirements vary depending on whether the stored value product is in bearer form or not? Should regulatory requirements vary depending on whether the stored value product is anonymous versus tied to an identifiable account holder?

• Should memory chip products be regulated differently from magnetic stripe products?

• Are the distinctions between open and closed loop stored value systems still meaningful? FinCEN recognizes that modern closed loop stored value systems operate internationally. As a result, these international closed-loop systems may pose additional money laundering risks when compared with the shopping mall-wide stored value systems that we have previously determined are not stored value for purposes of the BSA rules.

• What other issues or questions should be considered in developing the appropriate regulatory framework for stored value in light of the actual risks of money laundering and terrorist financing associated with these systems?

• *Foreign-located MSBs*

○ Should foreign MSB principals engaged in MSB activities with U.S. persons or residents through U.S. agents or through a U.S. bank account, be subject to the BSA rules?

○ Would adding check-cashers and issuers, sellers or redeemers of money orders and/or traveler's checks to 31 CFR 103.175(h), making them each *foreign financial institutions* that are subject to special due diligence by banks, broker-dealers, and other financial institutions that are obligated to comply with our rule implementing the correspondent account provisions of the USA PATRIOT Act, be a sufficient alternative? What would the consequences be?

○ Would U.S.-based MSBs move offshore if foreign MSBs are excluded?

○ How should domestic agents of foreign-located principals be treated if foreign-located principals are excluded from registration?

• *Thresholds*

○ For ease of compliance, should the regulatory threshold remain uniform for the categories of MSBs that have a threshold or should the threshold differ among the types of businesses to distinguish between the risks of certain types of activities? How would this affect the operations of businesses providing multiple MSB services?

V. Proposed Location in Chapter X

As per the **Federal Register** Notice of November 7, 2008, FinCEN is separately proposing to remove Part 103 of Chapter I of Title 31, Code of Federal Regulations, and add Chapter 1000 to 1099 (Chapter X). As such and if finalized, the proposed changes herein would be reorganized according to the changes proposed in the Notice of Proposed Rulemaking (NPRM) for Chapter X. The planned reorganization will have no substantive affect on the proposed regulatory changes herein. The proposed regulatory changes of this specific NPRM would be renumbered according to the proposed Chapter X as follows:

(a) 103.11(h) would be moved to 1010.100(m).

(b) 103.11(uu) and its parts would be moved to 1010.100(gg)

(c) 103.41(a)(2) would be moved to 1022.380(a)(2). Current sections 103.41(a)(2) and (a)(3), proposed to be redesignated, would be renumbered therein as 1022.380(a)(3) and (a)(4) respectively.

(d) 103.175(h)(3) would be moved to 1010.605(f)(3).

VI. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), FinCEN certifies that these proposed regulation revisions will not have a significant economic impact on a substantial number of small entities. This rulemaking imposes no new recordkeeping or reporting requirements on the MSB. In large part, the proposed rule updates the MSB definitions to integrate past guidance and rulings into the regulatory text. Incorporating existing interpretations into the regulatory text would have no impact on small entities that have been aware of these interpretations for years. In addition, the proposal combines all of stored value into one category, without substantively changing the existing definition, so that *issuers* of stored value and *sellers or redeemers* of stored value are in the same category. This structural proposal would not impact small entities. Accordingly, a regulatory flexibility analysis is not required.

VII. Paperwork Reduction Act Notices

The reduction of the recordkeeping requirement contained in this proposed rule is being submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Since we are making requirements clearer for foreign entities, there is a potential that certain foreign-located MSBs conducting business in the United States may see an increase in the collection and reporting of information. However, any such potential may likely be offset by the corresponding exceptions we have made explicit regarding the type of business activity that would make a business an MSB. Comments on the issue of possible foreign reporting and other questions should be sent to the Desk Officer for the Department of Treasury, Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction Project (1506), Washington, DC 20503 with a copy to the Financial Crimes Enforcement Network by mail or comments may also be submitted by e-mail to *oira_submission@omb.eop.gov* with a copy to *regcomments@fincen.gov.* Please submit comments by one method only. Comments are welcome and must be received by September 9, 2009.

This proposed rulemaking does not impose any new reporting or recordkeeping requirements. Instead, it seeks to clarify the scope of the existing MSB definitions and related rules. To the extent that we have eliminated any uncertainty or ambiguities with this proposal and to the extent that we narrow the scope of businesses subject to reporting or recordkeeping requirements, we will have reduced regulatory obligations.[80]

Amendment to the Bank Secrecy Act Regulations—Definitions and Other Regulations Relating to Money Services Businesses

In accordance with requirements of the Paperwork Reduction Act of 1995, 44 U.S.C. § 3506(c)(2)(A), and its implementing regulations, 5 CFR 1320, the following information concerning the collection of information of the *Amendment to the Bank Secrecy Act Regulations—Definitions and Other Regulations Relating to Money Services Businesses* is presented to assist those persons wishing to comment on the information collection.

[80] This amendment to 31 CFR 103.11 and 103.41 makes explicit that certain foreign MSBs that conduct operations in the U.S. must register with FinCEN as an MSB and will be subject to certain BSA recordkeeping and reporting requirements.

FinCEN anticipates that this proposed rule, if enacted as proposed, would result in no additional forms to be filed annually.[81] This is an estimate, based on a projection of the size and volume of the industry.

Description of Affected Financial Institutions: Money Services Businesses as defined in 31 CFR 103.11(uu).

Estimate Number of Affected Financial Institutions: 42,000.

Estimate Average Annual Burden Hours per Affected Financial Institution: The estimated average decrease in burden associated with the recordkeeping requirements in this proposed rule is one hour per affected financial institution.

Estimated Total Annual Burden: minus 42,000 hours. FinCEN specifically invites comment on the accuracy of FinCEN's estimate of the reduction in burden on respondents and any other aspects of our PRA estimates.

Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of FinCEN, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced; and

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology.

VIII. Executive Order 12866

It has been determined that this proposed rule is not a significant regulatory action for purposes of Executive Order 12866.

IX. Unfunded Mandates Act of 1995 Statement

Section 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), Public Law 104–4 (March 22, 1995), requires that an agency prepare a budgetary impact statement before promulgating a rule that may result in expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 202 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. FinCEN has determined that it is not required to prepare a written statement under section 202 and has concluded that on balance the proposals in the Notice of Proposed Rulemaking provide the most cost-effective and least burdensome alternative to achieve the objectives of the rule.

[81] *Id.*

List of Subjects in 31 CFR Part 103

Authority delegations (government agencies), Banks and banking, Currency, Investigations, Law enforcement, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 31 CFR part 103 is proposed to be amended as follows:

PART 103—FINANCIAL RECORDKEEPING AND REPORTING OF CURRENCY AND FINANCIAL TRANSACTIONS

1. The authority citation for part 10 is revised to read as follows:

Authority: 12 U.S.C. 1829b and 1951–1959; 31 U.S.C. 5311–5314, 5316–5332; title III, secs. 311, 312, 313, 314, 319, 326, 352, Public Law 107–56, 115 Stat. 307.

2. Section 103.11 is amended as follows:

a. Adding paragraph (i);
b. Revising paragraph (uu) introductory text;
c. Revising paragraph (uu)(1);
d. Revising paragraph (uu)(2);
e. Revising paragraph (uu)(3);
f. Revising paragraph (uu)(4);
g. Revising paragraph (uu)(5);
h. Adding paragraph (uu)(7).

§ 103.11 Meaning of terms.

* * * * *

(i) *Closed loop stored value.* Stored value that is limited to a defined merchant or location (or set of locations), such as a specific retailer or retail chain, a college campus, or a subway system.

* * * * *

(uu) *Money services business.* The term ''money services business'' shall include a person wherever located engaged in activities that take place wholly or in substantial part within the United States, in one or more of the capacities listed in paragraphs (uu)(1) through (uu)(6) of this section, whether or not on a regular basis or as an organized business concern. This includes but is not limited to maintenance of any agent, agency, branch, or office within the United States.

(1) *Dealer in foreign exchange.* A person who accepts the currency, or other monetary instruments, funds, or other instruments denominated in the currency, of one or more countries in exchange for the currency, or other monetary instruments, funds, or other instruments denominated in the currency, of one or more other countries in an amount greater than $1,000 for any other person on any day in one or more transactions, whether or not for same-day delivery.

(2) *Check casher*—(i) *In general.* A person that accepts checks (as defined in the Uniform Commercial Code [U.C.C. Article 3—Negotiable Instruments § 3–104]), or monetary instruments (as defined at § 103.11(u)(1)(ii), (iii), (iv), and (v)) in return for currency or a combination of currency and other monetary instruments or other instruments, in an amount greater than $1,000.

(ii) *Facts and circumstances; Limitations.* Whether a person is a check casher as described in this section is a matter of facts and circumstances. The term ''check casher'' shall not include:

(A) A person that sells closed loop stored value purchased with a check, monetary instrument or other instruments as referenced above in this definition;

(B) A person that solely accepts monetary instruments as payment for goods or services other than check cashing services;

(C) A person that engages in check cashing for the verified maker of the check who is a customer otherwise buying goods and services;

(D) A person that redeems its own checks; or

(E) A person that only holds a customer's check as collateral for repayment by the customer of a loan.

(3) *Issuers and sellers of traveler's checks or money orders.* A person that:

(i) Issues traveler's checks or money orders that are sold in an amount greater than $1,000 for any person on any day in one or more transactions; or

(ii) Sells traveler's checks or money orders in an amount greater than $1,000 for any person on any day in one or more transactions.

(4) *Issuer, seller, or redeemer of stored value.* A person that:

(i) Issues stored value (other than a person that does not issue such stored value in an amount greater than $1,000 to any person on any day in one or more transactions); or

(ii) Sells or redeems stored value (other than a person that does not sell or redeem such stored value for an amount greater than $1,000 from any person on any day in one or more transactions).

(5) *Money transmitter*—(i) *In general.* A person that provides money transmission services. The term ''money transmission services'' means the acceptance of currency, funds, or other value that substitutes for currency from one person AND the transmission of such currency, funds, or the value to another location or person by any means. ''Any means'' includes through a financial agency or institution; a Federal Reserve Bank or other facility of one or more Federal Reserve Banks, the Board of Governors of the Federal Reserve System, or both; or an electronic funds transfer network.

(ii) *Facts and circumstances; Limitations.* Whether a person is a money transmitter as described in this section is a matter of facts and circumstances. The term ''money transmitter'' shall not include a person that only:

(A) Provides the delivery, communication, or network access services used by a money transmitter to support money transmission services;

(B) Acts as a payment processor to facilitate the purchase or payment of a bill for a good or service through a clearance and settlement system by agreement with the creditor or seller;

(C) Operates a clearance and settlement system or otherwise acts as an intermediary solely between BSA regulated institutions. This includes but would not be limited to the Fedwire system, electronic funds transfer networks, certain registered clearing agencies regulated by the SEC, and derivatives clearing organizations, or other clearinghouse arrangements established by a financial agency or institution;

(D) Provides closed loop stored value;

(E) Physically transports currency, other monetary instruments, other commercial paper, or other value that substitutes for currency as a person engaged in such business from one person to the same person at another location or to an account belonging to the same person at a financial institution, provided that the person engaged in physical transportation has no more than a custodial interest in the currency, other monetary instruments, other commercial papers, or other value at any point during the transportation; or

(F) Accepts and transmits funds only integral to the sale of goods or the provision of services, other than money transmission services, by the person who is accepting and transmitting the funds.

* * * * *

(7) *Limitation.* For the purposes of this section, the term ''money services business'' shall not include:

(i) A bank;

(ii) A person registered with, and functionally regulated or examined by, the Securities and Exchange Commission or the Commodity Futures Trading Commission.

* * * * *

3. Section 103.41 is amended by redesignating paragraphs (a)(2) and (a)(3) as paragraphs (a)(3) and (a)(4) respectively, and adding new paragraph (a)(2) to read as follows:

§ 103.41 Registration of money services businesses.

(a) * * *

(2) *Foreign-located money services business.* Each foreign-located person engaged in activities in the United States as a money services business shall designate the name and address of a person who resides in the United States and is authorized, and has agreed to be an agent to accept service of legal process with respect to compliance with this part and shall identify the address of the location within the United States for records pertaining to paragraph (b)(1)(iii) of this section.

* * * * *

Dated: May 5, 2009.

James H. Freis, Jr.,

Director, Financial Crimes Enforcement Network.

[FR Doc. E9–10864 Filed 5–11–09; 8:45 am]

BILLING CODE 4810–02–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2009–0252]

RIN 1625–AA08

Special Local Regulation for Marine Event; Temporary Change of Dates for Recurring Marine Event in the Fifth Coast Guard District

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to temporarily change the enforcement period of special local regulations for a recurring marine event in the Fifth Coast Guard District. These regulations apply to only one recurring marine event that conducts ''workboat races''. Special local regulations are necessary to provide for the safety of life on navigable waters during the event. This action is intended to restrict vessel traffic in a portion of the York River, VA, during the event.

DATES: Comments and related material must be received by the Coast Guard on or before June 11, 2009.

ADDRESSES: You may submit comments identified by docket number USCG–2009–0252 using any one of the following methods:

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

(2) *Fax:* 202–493–2251.

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

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call Dennis Sens, Project Manager, Fifth Coast Guard District, Prevention Division, at 757–398–6204 or e-mail at *Dennis.M.Sens@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

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

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2009–0252), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online (via *http://www.regulations.gov*) or by fax, mail, or hand delivery, but please use only one of these means. If you submit a

comment online via *http://www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand delivery, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an e-mail address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* select the Advanced Docket Search option on the right side of the screen, insert ''USCG–2009–0252'' in the Docket ID box, press Enter, and then click on the balloon shape in the Actions column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* select the Advanced Docket Search option on the right side of the screen, insert USCG–2009–0252 in the Docket ID box, press Enter, and then click on the item in the Docket ID column. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Privacy Act

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

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one using one of the four methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

Marine events are frequently held on the navigable waters within the boundary of the Fifth Coast Guard District. The on water activities that typically comprise marine events include sailing regattas, power boat races, swim races and holiday parades. For a description of the geographical area of each Coast Guard Sector—Captain of the Port Zone, please see 33 CFR 3.25.

This regulation proposes to temporarily change the enforcement period of special local regulations for a recurring marine event within the Fifth Coast Guard District. This proposed regulation applies to one marine event in 33 CFR 100.501, Table to § 100.501.

On July 12, 2009, the Watermen's Museum of Yorktown, Virginia will sponsor the ''Watermen's Heritage Festival Workboat Races'', on the waters of the York River near Yorktown, Virginia. The regulation at 33 CFR 100.501 is effective annually for this river boat race marine event. The event will consist of approximately 40 traditional Chesapeake Bay deadrise workboats racing along a marked straight line race course in heats of 2 to 4 boats for a distance of approximately 1,000 yards. A fleet of spectator vessels is anticipated to gather nearby to view the competition. Due to the need for vessel control during the event, the Coast Guard will temporarily restrict vessel traffic in the event area to provide for the safety of participants, spectators and other transiting vessels. The regulation at 33 CFR 100.501 would be enforced for the duration of the event. Under provisions of 33 CFR 100.501, from 9 a.m. to 5:30 p.m. on July 12, 2009, vessels may not enter the regulated area unless they receive permission from the Coast Guard Patrol Commander.

Discussion of Proposed Rule

The Coast Guard proposes to temporarily suspend the regulations at 33 CFR 100.501 by changing the date of enforcement in the table to § 100.501. The Coast Guard proposes to temporarily change the enforcement period of special local regulations for recurring marine events within the Fifth Coast Guard District. This regulation applies to only one marine event listed as number 41 in the Table to § 100.501.

York River, Yorktown, VA.

The Table to § 100.501, event No. 41 establishes the enforcement date for the ''Watermen's Heritage Festival Workboat Races''. This regulation proposes to temporarily change the enforcement date from ''July—3rd Sunday'' to the second Sunday in July, holding the marine event on July 12, 2009. The temporary special local regulations will be enforced from 9 a.m. to 5:30 p.m. on July 12, 2009, and will restrict general navigation in the regulated area during the event. The Watermen's Museum of Yorktown, VA, which is the sponsor for this event, intends to hold this event annually; however, they have changed the date of the event for 2009 so that it is outside the scope of the existing enforcement period. Except for participants and vessels authorized by the Coast Guard Patrol Commander, no person or vessel will be allowed to enter or remain in the regulated area. These regulations are needed to control vessel traffic during the event to enhance the safety of participants, spectators and transiting vessels.

Regulatory Analyses

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

Regulatory Planning and Review

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

Although this proposed rule prevents traffic from transiting a portion of the York River during specified events, the effect of this regulation will not be significant due to the limited duration that the regulated area will be in effect and the extensive advance notifications that will be made to the maritime community via marine information broadcasts, local radio stations and area newspapers so mariners can adjust their plans accordingly. Additionally, this rulemaking does not change the permanent regulated areas that have been published in 33 CFR 100.501,

Table to § 100.501. In some cases vessel traffic may be able to transit the regulated area when the Coast Guard Patrol Commander deems it is safe to do so.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. This rule would affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit or anchor in the York River where marine events are being held. This regulation will not have a significant impact on a substantial number of small entities because it will be enforced only during marine events that have been permitted by the Coast Guard Captain of the Port. The Captain of the Port will ensure that small entities are able to operate in the areas where events are occurring when it is safe to do so. In some cases, vessels will be able to safely transit around the regulated area at various times, and, with the permission of the Patrol Commander, vessels may transit through the regulated area. Before the enforcement period, the Coast Guard will issue maritime advisories so mariners can adjust their plans accordingly.

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

Assistance for Small Entities

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

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 0023.1 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 made a preliminary determination that this action is one of a category of actions which do not individually or cumulatively have a significant effect on

the human environment. This rule involves implementation of regulations within 33 CFR Part 100 that apply to organized marine events on the navigable waters of the United States that may have potential for negative impact on the safety or other interest of waterway users and shore side activities in the event area. The category of water activities includes but is not limited to sail boat regattas, boat parades, power boat racing, swimming events, crew racing, and sail board racing. Under figure 2–1, paragraph (34)(h), of the Instruction, an ''Environmental Analysis Check List'' and a ''Categorical Exclusion Determination'' are not required for this rule. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 100

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

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233.

2. In the Table to § 100.501, suspend line No. 41 from July 1, 2009 to July 31, 2009; and

a. From 9 a.m. to 5:30 p.m., on July 12, 2009, add line No. 63.

The addition reads as follows:

§ 100.501–T05–0252 Special Local Regulations; Recurring Marine Event in the Fifth Coast Guard District.

* * * * *

Table To § 100.501.—All coordinates listed in the Table to § 100.501 reference Datum NAD 1983.

COAST GUARD SECTOR HAMPTON ROADS—COTP ZONE

Number	Date	Event	Sponsor	Location
*	*	*	*	*
63	July 12, 2009	Watermen's Heritage Festival Workboat Races.	Watermen's Museum of Yorktown, VA.	The waters of the York River, Yorktown, Virginia, bounded on the west by a line drawn along longitude 076°31′25″ W, bounded on the east by a line drawn along longitude 076°30′55″ W, bounded on the south by the shoreline and bounded on the north by a line drawn parallel and 400 yards north of the southern shoreline.

* * * * *

Dated: April 27, 2009.

Fred M. Rosa, Jr.

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

[FR Doc. E9–10973 Filed 5–11–09; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 36

RIN 2900–AN26

Loan Guaranty: Assistance to Eligible Individuals in Acquiring Specially Adapted Housing; Cost-of-Construction Index

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Department of Veterans Affairs' (VA's) Loan Guaranty regulations concerning assistance to eligible individuals in acquiring specially adapted housing. The proposed change would implement provisions of the Housing and Economic Recovery Act of 2008, which authorized VA to provide for automatic annual increases in the dollar amounts available to certain Specially Adapted Housing grant recipients.

DATES: Comments must be received on or before June 11, 2009.

ADDRESSES: Written comments may be submitted through *http://www.Regulations.gov*; by mail or hand-delivery to Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Comments should indicate that they are submitted in response to ''RIN 2900–AN26—Loan Guaranty: Assistance to Eligible Individuals in Acquiring Specially Adapted Housing; Cost-of-Construction Index.'' Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 (this is not a toll-free number) for an appointment. In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Katherine Faliski, Assistant Director for Loan Policy and Valuation, Loan Guaranty Service (26), Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–9527. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION: The Housing and Economic Recovery Act of 2008, Public Law 110–289, directed the Secretary of Veterans Affairs to establish a residential home cost-of-construction index for the purpose of increasing certain Specially Adapted Housing (SAH) grant amounts. The law left it to the Secretary's discretion to determine whether to develop a new index or to select one from the private sector. It required that any index selected, however, must reflect a uniform, national average change in the cost of residential home construction, determined on a calendar-year basis. This proposed rule identifies the index the Secretary plans to select, explains how the increase would be calculated, and requires the Secretary to publish annually in the **Federal Register** the aggregate amounts of assistance available.

Selection of a Cost-of-Construction Index

The Department of Veterans Affairs (VA) believes that an existing private sector index is appropriate for the purposes of 38 U.S.C. 2102(d). VA

believes this is preferable to establishing a VA-specific index because VA does not have the necessary resources and expertise to continuously monitor the costs of construction nationwide.

This proposed rule identifies the Turner Building Cost Index (TBCI) as the index the Secretary plans to adopt. The TBCI has been prepared for more than 80 years. It tracks building costs and price trends nationwide. The factors considered in calculating the index include labor rates, productivity, material prices, and market conditions. As a result of TBCI's emphasis on the costs of labor and materials, rather than property values or sales prices, it is best suited to reflect the cost of acquiring the adaptations needed by the veterans and servicemembers served by the SAH program.

VA considered a number of alternatives to the TBCI. These alternatives included three indices computed by the United States Census Bureau: (1) The Laspeyres Price Index, which tracks increases in the sales price of homes while keeping housing quality constant; (2) the Paasche Index, which also measures changes in sales prices over time; and (3) the Fisher Ideal Index, which is a geometric average of the Laspeyres and Paasche Indices. Because all three Census Bureau indices track home sales prices, rather than construction costs, VA does not believe that they are as well suited for use with the SAH program as the TBCI. Home sales prices have little bearing on the cost of making adaptations to an eligible individual's home. Although SAH grants may be used to acquire a suitably adapted home, they are more often used to adapt an existing home.

VA also considered the Residential Cost Index published by Whitestone Research. The Whitestone Research Residential Cost Index (WRRCI) is based on multiple cost factors. Because the WRRCI tracks many cost factors that are not related to the labor and materials costs of making adaptations to an eligible individual's home, VA does not believe the WRRCI is as well suited to the SAH program as the TBCI.

Calculating the Aggregate Amounts of Assistance Available

On October 1 of each year, beginning with 2009, the Secretary must increase the aggregate amounts of assistance available for SAH grants authorized under 38 U.S.C. 2101(a) and (b). In accordance with 38 U.S.C. 2101(e), the increase will equal the percentage by which the cost-of-construction index increased between the two preceding calendar years. In other words, for the adjustment effective October 1, 2009, the Secretary must calculate the percentage by which the TBCI increased between calendar years 2007 and 2008. On October 1, the Secretary must increase the grant amounts by that amount. If, in any given calendar year, the TBCI remains flat or decreases, the aggregate amounts of assistance available will not change.

Publication in the Federal Register

Section 2102(e) of title 38, U.S.C., requires that the annual increase in the aggregate amounts of assistance available occur on October 1 of each year. The proposed rule would require that the Secretary publish the resulting figures in the **Federal Register** by September 30. VA believes that this would provide adequate notice to the public of the new aggregate amounts of assistance available each year. (**Note:** After publication, the figures also would be available on the Loan Guaranty Web site at *http://www.homeloans.va.gov/sah.htm.*)

Administrative Procedure Act

The Secretary has determined that there is good cause to limit the public comment period on this rule to 30 days. This proposed rule is necessary to implement Congress' directive to establish a cost-of-construction index to implement statutorily mandated increases by October 1, 2009. Therefore, in order to comply with this statute, the Secretary has provided a 30-day comment period for this rule.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

This document contains no provisions constituting collections of information.

Executive Order 12866

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

The economic, interagency, budgetary, legal, and policy implications of this proposed rule have been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866.

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* This proposed rule will directly affect only individuals and will not directly affect small entities. Therefore, pursuant to 5 U.S.C. 605(b), this proposed rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.106, Specially Adapted Housing for Disabled Veterans; and 64.118, Veterans Housing—Direct Loans for Certain Disabled Veterans.

Lists of Subjects in 38 CFR Part 36

Condominiums, Housing, Indians, Individuals with disabilities, Loan programs—housing and community development, Loan programs—Indians, Loan programs—veterans, Manufactured homes, Mortgage insurance, Reporting and recordkeeping requirements, Veterans.

Approved: April 17, 2009.

John R. Gingrich,

Chief of Staff, Department of Veterans Affairs.

For the reasons set out in the preamble, VA proposes to amend 38 CFR part 36 (Subpart C) as set forth below.

PART 36—LOAN GUARANTY

Subpart C—Assistance to Certain Disabled Veterans in Acquiring Specially Adapted Housing

1. The authority citation for part 36 continues to read as follows:

Authority: 38 U.S.C. 501 and as otherwise noted.

2. Add § 36.4412 to read as follows:

§ 36.4412 Annual adjustments to the aggregate amount of assistance available.

(a) On October 1 of each year, the Secretary will increase the aggregate amounts of assistance available for grants authorized under 38 U.S.C. 2101(a) and 2101(b). Such increase will be equal to the percentage by which the Turner Building Cost Index for the most recent calendar year exceeds that of the next preceding calendar year.

(b) Notwithstanding paragraph (a) of this section, if the Turner Building Cost Index for the most recent full calendar year is equal to or less than the next preceding calendar year, the percentage increase will be zero.

(c) No later than September 30 of each year, the Secretary will publish in the **Federal Register** the aggregate amounts of assistance available for the upcoming fiscal year.

(Authority: 38 U.S.C. 2102(e))

[FR Doc. E9–11079 Filed 5–11–09; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

[EPA–HQ–OAR–2009–0021; FRL–8766–3]

Stay of Clean Air Interstate Rule for Minnesota; Stay of Federal Implementation Plan To Reduce Interstate Transport of Fine Particulate Matter and Ozone for Minnesota

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to stay the effectiveness, in the State of Minnesota only, of two final rules issued under section 110 of the Clean Air Act (CAA) related to the interstate transport of pollutants. On May 12, 2005, EPA issued the Clean Air Interstate Rule (CAIR). In CAIR, EPA required Minnesota and other states to submit State Implementation Plan (SIP) revisions to limit nitrogen oxides (NO_X) and sulfur dioxide (SO_2) emissions for the purpose of reducing the contributions these emissions make to particulate matter and ozone transport across state boundaries in the eastern half of the U.S. On April 28, 2006, EPA published Federal Implementation Plans (CAIR FIPs) containing requirements to serve as a backstop until replaced by an approved SIP.

Subsequently, the U.S. Court of Appeals for the D.C. Circuit held that EPA had not properly addressed possible errors in the analysis supporting EPA's decision that Minnesota should be included in the CAIR region for fine particulate matter ($PM_{2.5}$). EPA is proposing to stay the effectiveness of CAIR and the CAIR FIP with respect to sources in Minnesota only, while EPA conducts a notice-and-comment rulemaking addressing this issue and its impact on the inclusion of Minnesota in CAIR.

DATES: Comments must be received on or before June 11, 2009. If anyone contacts us requesting a public hearing by May 22, 2009, we will hold a public hearing approximately 30 days after publication in the **Federal Register**. Additional information about the hearing would be published in a subsequent **Federal Register** notice.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2009–0021, by one of the following methods:

- *www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-docket@epa.gov.* Attention Docket ID No. EPA–HQ–OAR–2009–0021.
- *Fax:* (202) 566–9744. Attention Docket ID No. EPA–HQ–OAR–2009–0021.
- *Mail:* EPA Docket Center, EPA West (Air Docket), Attention Docket ID No. EPA–HQ–OAR–2009–0021, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.
- *Hand Delivery:* EPA Docket Center (Air Docket), Attention Docket ID No. EPA–HQ–OAR–2009–0021, Environmental Protection Agency, 1301 Constitution Avenue, NW., Room 3334; Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2009–0021. 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 and any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the EPA Docket Center EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Tim Smith, Air Quality Planning Division,

Office of Air Quality Planning and Standards, Mail Code C539–04, Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: 919–541–4718; fax number: 919–541–0824; e-mail address: *smith.tim@epa.gov.*

To request a public hearing, please contact Pam Long, Air Quality Planning Division, Office of Air Quality Planning and Standards, Mail Code C504–03, Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: 919–541–0641; fax number: 919–541–5509 no later than May 22, 2009 to request a hearing.

SUPPLEMENTARY INFORMATION:

Outline

I. Background
II. What is the Scope of this Proposal?
III. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act (RFA)
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer Advancement Act
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

I. Background

On May 12, 2005, EPA issued the CAIR. (70 FR 25162; May 12, 2005). In this rule, EPA found that 28 states and DC contribute significantly to nonattainment of the national ambient air quality standards (NAAQS) for fine particles and/or ozone in downwind states. The CAIR rule required these upwind states to revise their SIPs to include control measures to reduce emissions of SO_2 and/or NO_X. One of the states included in the CAIR region for fine particles was the State of Minnesota. Minnesota was thus required to reduce annual SO_2 and annual NO_X emissions in accordance with the requirements of the rule. Minnesota was not included in the CAIR ozone region.

On April 28, 2006, EPA issued the CAIR FIP rule. (71 FR 25330; April 28 2006). In this rule, EPA promulgated FIPs to implement the emission reduction requirements of the CAIR in all states covered by CAIR. The Agency issued the FIP requirements to provide a federal backstop for CAIR during the time period necessary for states to develop SIPs. EPA decided to adopt, as the FIP for each state in the CAIR region (including Minnesota), the SIP model trading programs in the final CAIR, modified slightly to allow for federal instead of state implementation.

A number of petitioners brought legal challenges to various aspects of the CAIR, and of the CAIR FIP rule, in the U.S. Court of Appeals for the D.C. Circuit. Among the parties challenging the rule was Minnesota Power, an electric utility operating in Minnesota, who argued that EPA erred in including the State of Minnesota in the CAIR region for $PM_{2.5}$. On July 11, 2008, in *North Carolina* v. *EPA, 531 F.3d 896, 926–30 (D .C . Cir. 2008),* the Court ruled on these challenges. The Court granted Minnesota Power's petition because it concluded that EPA had failed to fully address alleged errors in its analysis for the State of Minnesota. The Court also noted that in EPA's CAIR analysis, Minnesota's contribution to $PM_{2.5}$ was 0.20 $\mu g/m^3$, the exact minimum level for inclusion.

On September 24, 2008, EPA filed a petition for rehearing with the D.C. Circuit. This petition sought rehearing of a number of the Court's findings, but did not seek rehearing of the findings regarding Minnesota. On October 31, 2008, EPA sent a letter to Minnesota Power indicating its intent to stay the effectiveness of CAIR with respect to sources located in the State of Minnesota. This letter was also submitted to the Court during briefing on the petitions for rehearing.

On December 23, 2008, the D.C. Circuit granted EPA's petition for rehearing only to the extent it remanded the case without vacatur. This decision will allow CAIR to remain in effect until EPA develops a replacement rule consistent with the July 11, 2008 opinion.

II. What is the Scope of this Proposal?

EPA intends to conduct further rulemaking[s] in response to the DC Circuit Court's remand of the CAIR rule. As part of that process, the Agency will evaluate the claimed errors in its contribution analysis for the State of Minnesota, and will provide notice-and-comment opportunity to the general public on our evaluation. Accordingly, in this action, EPA is proposing to stay the effectiveness of CAIR and the CAIR FIP with respect to the State of Minnesota and sources in the State of Minnesota only, during the pendency of the notice-and-comment rulemaking proceedings that will address whether Minnesota should be included in the CAIR region for $PM_{2.5}$.

EPA notes that allocations of CAIR NO_X allowances for existing Minnesota sources for 2009 have already been recorded in the allowance tracking system under the annual NO_X trading program in the CAIR FIP. EPA believes that, if the effectiveness of CAIR and the CAIR FIP were stayed as proposed with respect to Minnesota and sources in Minnesota, then all allowance allocations already recorded for Minnesota sources in order to implement the CAIR FIP should be removed from the annual NO_X trading program.

Under the proposed stay, Minnesota sources would not need to use their recorded allowance allocations to authorize their annual NO_X emissions. Unless these allowances were removed from the trading program, the full amount of these allowances could be traded for use by non-Minnesota sources to authorize their own annual NO_X emissions. This would increase the total amount of allowances available for use by sources in the states that, under the proposed stay, would continue to be subject to CAIR and/or the CAIR FIP (i.e., the CAIR region except Minnesota). As a result, the total amount of allowances available for sources in these states would exceed the sum of the annual NO_X trading budgets under CAIR and the CAIR FIP for these states.

In order to preserve, under the proposed stay, the annual NO_X emission reductions that were intended to be achieved under CAIR and the CAIR FIP and were reflected in the state annual NO_X trading budgets under those rules, EPA proposes to require each Minnesota source with recorded allowance allocations under the annual NO_X trading program to hold an amount of allowances issued for the same year as the recorded allowances (e.g., 2009) equal to the amount of the recorded allocations. EPA also proposes that the Administrator deduct, and thereby retire, these required allowance holdings and that no additional allowance allocations from the state annual NO_x trading budget for Minnesota be recorded.

EPA understands that at least one Minnesota source has traded some of its recorded allowance allocations. However, EPA believes that the most reasonable approach for removing Minnesota sources' recorded allowance allocations from the trading program is to require these sources to provide to the Administrator for deduction the allowances that must be removed. Each Minnesota source would accomplish this by continuing to hold allocated

allowances and, to the extent necessary to replace allocated allowances that it traded, obtaining other allowances issued for the same year as its traded allowances. Because all CAIR NO_X allowances issued for a given year (e.g., 2009) under the annual NO_X trading program in CAIR and the CAIR FIP are fungible, deduction of the proper amount of CAIR NO_X allowances issued for that year has the desired effect whether the deducted allowances are Minnesota sources' originally allocated allowances or allowances that were obtained from other sources. EPA believes that a deadline of June 30, 2009 for Minnesota sources to hold the required allowances for deduction would provide sufficient time for Minnesota sources to obtain the proper amount of CAIR NO_X allowances. While EPA's preference is to remove these allowances from the trading program as quickly as possible, the Agency will consider a later deadline if public comments indicate that an earlier deadline places an unreasonable burden on Minnesota sources who must re-acquire traded allowances.

III. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

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

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320(b). This action does not impose any new obligations or enforceable duties on any state, local or tribal governments or the private sector. Therefore, it does not impose an information collection burden.

C. Regulatory Flexibility Act

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

For purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This proposed rule will not impose any requirements on small entities.

We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (URMA), 2 U.S.C. 1531–1538 for state, local, or tribal governments or the private sector. This action imposes no enforceable duty on any State local or tribal governments or the private sector. This action simply does not impose any new obligations or enforceable duties on any state, local or tribal governments or the private sector. Therefore, this action is not subject to the requirements of sections 202 and 205 of the UMRA.

This action is also not subject to the requirements of section 203 of URMA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This action does not impose any new obligations or enforceable duties on any small governments.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the states, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This rule does not impose any new obligations or enforceable duties on any state, local or tribal governments or the private sector. Thus, Executive Order 13132 does not apply to this rule.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and state and local governments, EPA specifically solicits comment on this proposed rule from state and local officials.

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

This action does not have Tribal implications as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). It will not have substantial direct effects on Tribal governments, on the relationship between the Federal government and Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes, as specified in Executive Order 13175. This action does not significantly or uniquely affect the communities of Indian Tribal governments. As discussed above, this action imposes no new requirements that would impose compliance burdens. Thus, Executive Order 13175 does not apply to this action.

EPA specifically solicits additional comment on this proposed action from Tribal officials.

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

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it imposes no new requirements.

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

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

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

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

The EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not impose any regulatory requirements.

List of Subjects

40 CFR Part 51

Administrative practice and procedure, Air pollution control, Environmental protection, Intergovernmental relations, Nitrogen oxides, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur dioxide.

40 CFR Part 52

Administrative practice and procedure, Air pollution control, Environmental protection, Intergovernmental relations, Nitrogen oxides, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur dioxide.

Dated: May 6, 2009.

Lisa P. Jackson,

Administrator.

For the reasons set forth in the preamble, parts 51 and 52 of chapter I of title 40 of the Code of Federal Regulations are proposed to be amended as follows:

PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS

1. The authority citation for part 51 continues to read as follows:

Authority: 23 U.S.C. 101; 42 U.S.C. 7401–7671q.

2. Section 51.123 is amended by adding a new paragraph (a)(3) as follows:

§ 51.123 Findings and requirements for submission of State implementation plan revisions relating to emissions of oxides of nitrogen pursuant to the Clean Air Interstate Rule.

(a)(1) * * *

(3) Notwithstanding the other provisions of this section, the effectiveness of such provisions as they relate to the State of Minnesota is stayed as of [the effective date of the final rule].

* * * * *

3. Section 51.124 is amended by:

a. Redesignating paragraph (a) as paragraph (a)(1); and

b. Adding a new paragraph (a)(2) as follows:

§ 51.124 Findings and requirements for submission of State implementation plan revisions relating to emissions of sulfur dioxide pursuant to the Clean Air Interstate Rule.

(a)(1) * * *

(2) Notwithstanding the other provisions of this section, the effectiveness of such provisions as they relate to the State of Minnesota is stayed as of [the effective date of the final rule].

* * * * *

4. Section 51.125 is amended by adding a new paragraph (a)(3) as follows:

§ 51.125 Emissions reporting requirements for SIP revisions relating to budgets for SO_2 and NO_X emissions.

(a) * * *

(3) Notwithstanding the other provisions of this section, the effectiveness of such provisions as they relate to the State of Minnesota is stayed as of [the effective date of the final rule].

* * * * *

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

5. The authority citation for part 52 continues to read as follows:

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

6. Section 52.35 is amended by adding a new paragraph (e) as follows:

§ 52.35 What are the requirements of the Federal Implementation Plans (FIPs) for the Clean Air Interstate Rule (CAIR) relating to emissions of nitrogen oxides?

* * * * *

(e) Notwithstanding paragraphs (a) and (b) of this section, the effectiveness of such paragraph as it relates to sources in the State of Minnesota is stayed as of [the effective date of the final rule], except as provided in § 52.1240(b)(1).

7. Section 52.36 is amended by adding a new paragraph (d) as follows:

§ 52.36 What are the requirements of the Federal Implementation Plans (FIPs) for the Clean Air Interstate Rule (CAIR) relating to emissions of sulfur dioxide?

* * * * *

(d) Notwithstanding paragraph (a) of this section, the effectiveness of such paragraph as it relates to sources in the State of Minnesota is stayed as of [the effective date of the final rule].

8. Section 52.1240 is amended by adding a new paragraph (b) as follows:

§ 52.1240 Interstate pollutant transport provisions; What are the FIP requirements for decreases in emissions of nitrogen oxides?

* * * * *

(b) Notwithstanding paragraph (a) of this section,

(1) The effectiveness of such paragraph as it relates to sources in the State of Minnesota is stayed as of [the effective date of the final rule], except that the owner and operator of each such source in whose compliance account any allocation of CAIR NO_X allowances was recorded under the Federal CAIR NO_X Annual Trading Program in part 97 of this chapter shall hold in that compliance account, as of June 30, 2009 and with regard to each such recorded allocation, CAIR NO_X allowances that are usable in such trading program, issued for the same year as the recorded allocation, and in the same amount as the recorded allocation. The owner and operator shall hold such allowances for the purpose of deduction by the Administrator under paragraph (b)(2) of this section;

(2) After June 30, 2009, the Administrator will deduct from the compliance account of each source in the State of Minnesota any CAIR NO_X allowances required to be held in that

compliance account under paragraph (b)(1) of this section.

(3) Starting no later than [the effective date of the final rule], the Administrator will not record any allocation of CAIR NO_X allowances in the State trading budget for Minnesota for any year.

9. Section 52.1241 is amended by:

a. Redesignating the introductory text as paragraph (a); and

b. Adding a new paragraph (b) as follows:

§ 52.1241 Interstate pollutant transport provisions; What are the FIP requirements for decreases in emissions of sulfur dioxide?

* * * * *

(b) Notwithstanding paragraph (a) of this section, the effectiveness of such paragraph as it relates to sources in the State of Minnesota is stayed as of [the effective date of the final rule].

[FR Doc. E9–11107 Filed 5–11–09; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket No. FEMA–B–7786]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Proposed rule; correction.

SUMMARY: On September 9, 2008, FEMA published in the **Federal Register** a proposed rule that contained an erroneous table. This notice provides corrections to that table, to be used in lieu of the information published at 73 FR 52234. The table provided here represents the flooding source, location of referenced elevation, effective and modified elevation, and communities affected for Plymouth County, Massachusetts (All Jurisdictions). Specifically, it addresses the flooding source ''Atlantic Ocean.''

FOR FURTHER INFORMATION CONTACT: William R. Blanton Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3151 or (email) *bill.blanton@dhs.gov.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) publishes proposed determinations of Base (1% annual-chance) Flood Elevations (BFEs) and modified BFEs for communities participating in the National Flood Insurance Program (NFIP), in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed BFEs and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, State, or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and are also used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in these buildings.

Correction

In the proposed rule published at 73 FR 52234, in the September 9, 2008, issue of the **Federal Register,** FEMA published a table under the authority of 44 CFR 67.4. The table, entitled ''Plymouth County, Massachusetts (All Jurisdictions)'' addressed the flooding source ''Atlantic Ocean.'' That table contained inaccurate information as to the location of referenced elevation, effective and modified elevation in feet, or communities affected for this flooding source. In this notice, FEMA is publishing a table containing the accurate information, to address these prior errors. The information provided below should be used in lieu of that previously published.

Flooding source(s)	Location of referenced elevation	*Elevation in feet (NGVD) +Elevation in feet (NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
Plymouth County, Massachusetts (All Jurisdictions)				
Atlantic Ocean	Approximately 150 feet south of intersection of Brant Beach Avenue and Ocean View Avenue.	+17	+19	Town of Hingham, Town of Hull, Town of Marion, Town of Mattapoisett, and Town of Wareham.
	Approximately 210 feet southeast of intersection of Highland Avenue and Mount Pleasant Way.	+9	+22	

Dated: April 30, 2009.

Deborah S. Ingram,

Acting Deputy Assistant Administrator for Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. E9–10988 Filed 5–11–09; 8:45 am]

BILLING CODE 9110–12–P

Notices

Federal Register

Vol. 74, No. 90

Tuesday, May 12, 2009

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

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

May 7, 2009.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

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

Rural Housing Service

Title: 7 CFR 1822–G, Rural Housing Loans, Policies, Procedures and Authorizations.

OMB Control Number: 0575–0071.

Summary of Collection: Section 523 and 524 of the Housing Act of 1949, as amended (Pub.L. 90–448) authorized the Secretary of Agriculture to establish the Self Help Land Development Fund to make loans to public or private nonprofit organizations and State, Local or Tribal Governments for acquiring and developing housing sites. Eligible entities assist very low and low income families that are without adequate housing to buy, build, or repair housing for their own use. Information is necessary to protect the public from projects being built in areas of low need by applicants that are unable to administer the program properly.

Need and Use of the Information: Rural Housing Service (RHS) uses the information collected to verify and ensure program eligibility requirements, appropriate use of loans, and continuing with legislative requirements. If the information is not collected, RHS would be unable to determine if the organization qualifies for loan assistance.

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

Number of Respondents: 4.

Frequency of Responses: Recordkeeping; Reporting: On occasion.

Total Burden Hours: 24.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. E9–11057 Filed 5–11–09; 8:45 am]

BILLING CODE 3410–XT–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request, Correction

May 7, 2009.

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

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

Food and Nutrition Service

Title: Status of Claims Against Households.

OMB Control Number: 0584–0069.

Summary of Collection: Section 11, 13, and 16 of the Food Stamp Act of 1977, as amended (the Act) and appropriate Supplemental Nutrition Assistance Program regulation are the basis for the information collected on FNS–209. Regulations at 7 CFR 273.18(m)(5) requires State agencies to submit at the end of every quarter the completed FNS–209, Status of Claims Against Households. The information required for the FNS–209 report is obtained from a State accountable system responsible for establishing claims, sending demand letters,

collecting claims, and managing other claim activity.

Need and Use of the Information: The Food and Nutrition Service (FNS) will collect information on the outstanding aggregate claim balance; claims established; collections; any balance and collection adjustments; and the amount to be retained for collecting non-agency error claims. The information will be used by State agencies to ascertain aggregate claim balance and collections for determining overall performance, the collection amounts to return to FNS, and claim retention amounts. FNS will receive collections and report collection activity to Treasury. If this data is collected less often than quarterly, it would delay the Federal collection of the Federal share of the State agency's collections. FNS would not be able to effectively monitor the collection and recovery of program funds or protect the integrity of the program.

Description of Respondents: State, Local or Tribal Government.

Number of Respondents: 53.

Frequency of Responses: Reporting: Quarterly.

Total Burden Hours: 636.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. E9–11058 Filed 5–11–09; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Central Idaho Resource Advisory Committee Meeting

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the authorities in the Federal Advisory Committee Act (Pub. L. 92–463) and under the Secure Rural Schools and Community Self Determination Act of 2000 (Pub. L. 106–393), the Salmon-Challis National Forest's Central Idaho Resource Advisory Committee will conduct a business meeting which is open to the public.

DATES: Thursday, May 21, 2009, beginning at 10 a.m.

ADDRESSES: Salmon-Challis N.F. South Zone Office, Highway 93, Challis, Idaho.

SUPPLEMENTARY INFORMATION: Agenda topics will include review and approval of project proposals, and an open public forum.

FOR FURTHER INFORMATION CONTACT: William A. Wood, Forest Supervisor and Designated Federal Officer, at 208–756–5111.

Dated: May 5, 2009.

Lyle Powers,

Acting Forest Supervisor, Salmon-Challis National Forest.

[FR Doc. E9–10983 Filed 5–11–09; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: StormReady, TsunamiReady and StormReady/TsunamiReady Application Forms.

OMB Control Number: 0648–0419.

Form Number(s): None.

Type of Request: Regular submission.

Burden Hours: 240.

Number of Respondents: 120.

Average Hours per Response: 2.

Needs and Uses: StormReady and TsunamiReady are voluntary programs offered as a means of providing guidance and incentive to officials interested in improving their respective hazardous weather operations. The StormReady Application Form, TsunamiReady Application Form and TsunamiReady/StormReady Application Form will be used by localities to apply for initial StormReady or TsunamiReady and StormReady recognition and renewal of that recognition every six years. A typical StormReady and/or TsunamiReady community would use one of these forms 2 times every 10 years. The government will use the information collected to determine whether a community has met all of the criteria to receive StormReady and/or TsunamiReady recognition. This information collection supports Public Law 109–424, the Tsunami Warning and Education Act, specifically Section 5, which describes the development of a ''community-based tsunami hazard mitigation program to improve tsunami preparedness of at-risk areas in the United States and its territories.''

Affected Public: State, Local or Tribal Government; business or other for-profit organizations.

Frequency: Every six years.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Nicholas Fraser, (202) 395–5887.

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 Nicholas Fraser, OMB Desk Officer, FAX number (202) 395–7285, or *Nicholas_A._Fraser@omb.eop.gov*.

Dated: May 7, 2009.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E9–11007 Filed 5–11–09; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Environmental Compliance Questionnaire for National Oceanic and Atmospheric Administration Federal Financial Assistance Applicants.

OMB Control Number: 0648–0538.

Form Number(s): None.

Type of Request: Regular submission.

Burden Hours: 3,000.

Number of Respondents: 1,000.

Average Hours per Response: 3.

Needs and Uses: This questionnaire is needed to ensure that all projects supported by NOAA through grants or other financial assistance awards comply with the National Environmental Policy Act (NEPA 42 U.S.C. 4321–4347), the Council on Environmental Quality's (CEQ) Regulations for Implementing NEPA (40 CFR 1500–1508), and NOAA Administrative Order (NAO) 216–6. The NEPA and CEQ implementing regulations require that an environmental analysis be completed for all major Federal actions significantly affecting the environment. In order to determine NEPA compliance requirements for a project being funded by NOAA, NOAA must assess information which can only be provided

by the Federal financial assistance applicant.

Affected Public: Individuals or households; not-for-profit institutions.

Frequency: On occasion.

Respondent's Obligation: Required to retain or obtain benefits.

OMB Desk Officer: Nicholas Fraser, (202) 395–5887.

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 Nicholas Fraser, OMB Desk Officer, FAX number (202) 395–7285, or *Nicholas_A._Fraser@omb.eop.gov.*

Dated: May 7, 2009.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E9–11008 Filed 5–11–09; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; North Pacific Groundfish Observer Program Vessel/Plant Operator's Comment Form

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Notice.

SUMMARY: The Department of Commerce, 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.

DATES: Written comments must be submitted on or before July 13, 2009.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 7845, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Jerald D. Berger, 206–526–4193 or *jerry.berger@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The National Marine Fisheries Service (NMFS) North Pacific Groundfish Observer Program (NPGOP) is managed by the Fisheries Monitoring and Analysis Division at the Alaska Fisheries Science Center (AFSC). NPGOP observers serve aboard commercial fishing vessels in Alaskan waters and at processing plants in Alaska as required by the Magnuson-Stevens Fishery Conservation and Management Act and the Marine Mammal Protection Act.

NMFS AFSC requests information from vessel or plant operators who have had NPGOP observers on their vessels or at their plants. This information would be collected on a voluntary basis as a qualitative survey to provide NMFS with direct feedback on observer performance. This information, upon receipt, will ensure higher data quality, provide feedback on observer performance, and offer a direct line of communication from vessel/plant operators to the NPGOP management.

II. Method of Collection

Paper survey to be submitted to the NPGOP at the AFSC via U.S. mail or facsimile transmission of paper forms. The survey will also be available on the Internet.

III. Data

OMB Control No: 0648–0550.

Form Number: None.

Type of Review: Regular submission.

Affected Public: Not-for-profit institutions; and business or other for-profits organizations.

Estimated Number of Respondents: 400.

Estimated Time per Response: 15 minutes.

Estimated Total Annual Burden Hours: 500.

Estimated Total Annual Cost to Public: $0.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: May 7, 2009.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E9–11000 Filed 5–11–09; 8:45 am]

BILLING CODE 3510–22–P

CONSUMER PRODUCT SAFETY COMMISSION

Notice of Stay of Enforcement Pertaining to Youth Motorized Recreational Vehicles

AGENCY: Consumer Product Safety Commission.

ACTION: Stay of enforcement.

SUMMARY: This notice announces the decision of the Consumer Product Safety Commission (''CPSC'' or ''Commission'') to stay enforcement of section 101(a) of the Consumer Product Safety Improvement Act of 2008 (''CPSIA''), Public Law 110–314 with regard to certain parts and youth motorized vehicles that contain those parts. Specifically, the Commission is staying enforcement of the specified lead level as it pertains to certain parts of youth all-terrain vehicles, youth off-road motorcycles and youth snowmobiles (''Youth Motorized Recreational Vehicles'' or ''Vehicles''), specifically battery terminals containing up to 100 percent lead, and components made with metal alloys, including steel containing up to 0.35 percent lead, aluminum with up to 0.4 percent lead, and copper with up to 4.0 percent lead, and the vehicles that contain them.

This stay will remain in effect until May 1, 2011, unless prior to that time the Commission, based upon evidence submitted to it, decides to continue the stay for an additional period of time with regard to all or some of the vehicles.

DATES: This stay of enforcement is effective on May 12, 2009.

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

SUPPLEMENTARY INFORMATION:

I. Background

On August 14, 2008, Congress enacted the Consumer Product Safety Improvement Act of 2008 (''CPSIA''), Public Law 110–314, 122 Stat. 3016. Section 101(a) of the CPSIA phases in declining limits on allowable lead content in children's products (defined as a consumer product designed or intended primarily for children 12 years of age or younger), starting on February 10, 2009 with 600 ppm and decreasing to 300 ppm on August 14, 2009. On August 15, 2011, the lead limit will be 100 ppm unless the Commission determines that a limit of 100 ppm is not technologically feasible for a product or a product category. The law does contain certain exclusions from the lead limits. One is for component parts that contain more than the allowable lead content but where the component is not accessible to a child through normal and reasonably foreseeable use and abuse. The Commission can also determine, for certain electronic devices, that it is not technologically feasible for them to comply immediately with the lead limits and shall establish a schedule by which such devices shall be in full compliance unless the Commission determines that full compliance will not be technologically feasible for such devices within a schedule set by the Commission. The Commission may also, under section 101(b)(1) exclude a specific product or material that exceeds the lead limits if the Commission determines on the basis of the best available, objective, peer-reviewed, scientific evidence that lead in such product or material will neither: (1) Result in the absorption of any lead into the human body, taking into account normal and reasonably foreseeable use and abuse of such product by a child, including swallowing, mouthing, breaking, or other children's activities, and the aging of the product; nor (2) have any other adverse impact on public health or safety.

On March 11, 2009, the Commission issued a final rule on procedures and requirements for seeking, inter alia, an exclusion under section 101(b)(1) of the CPSIA for materials and products that exceed the lead content limits. 74 FR 10475. The final rule set forth: (1) That a request for exclusion must be accompanied by evidence that will meet the statutory test for the exclusion outlined above; and (2) that the EXHR staff would evaluate the evidence and provide a scientific recommendation to the Commission as to whether the party submitting the request had met this statutory test.

The Specialty Vehicle Institute of America (SVIA), Polaris Industries, Inc., American Suzuki Motor Corporation, Arctic Cat Inc., Bombardier Recreational Products Inc., Kawasaki Motors Corp., USA, American Honda Motor Co., Inc., Yamaha Motor Corporation, USA, and the Motorcycle Industry Council filed a petition to exclude a class of materials under section 101(b)(1) of the CPSIA. The petition was submitted prior to March 11, 2009, the date of the issuance of the final rule on procedures or requirements for seeking an exclusion under section 101(b)(1) of the CPSIA. The Commission has decided to treat this petition as a request for exclusion under these procedures. The petitioners sought exclusion for certain parts of their youth motorized recreational vehicles including battery terminals containing up to 100 percent lead, and components made with metal alloys, including steel containing up to 0.35 percent lead, aluminum with up to 0.4 percent lead, and copper with up to 4 percent lead. Specified components include: Tire valve stems, fittings and connectors made with copper (and brass) alloys; brake and clutch levers and other brake components, throttle controls, engine housings, and carburetors made with aluminum alloys; and fasteners, frames and structural or engine components made with steel alloys.

The petitioners submitted an exposure study, extrapolated from the ''best-available existing data'' based on an analysis of the lead in metal jewelry (for an aluminum and a brass alloy) and a faucet (for a brass alloy). This study concluded ''estimated lead intakes from motorized recreational vehicle components are well below background intakes of lead from food and water, and * * * such intake will not result in a measurable impact on blood lead levels in children * * *.''

The petitioners also asserted that steel, aluminum, and copper alloys containing lead are necessary for the functional purpose of the equipment and replacement-part components, including, but not limited to, lead batteries, fittings and connectors, engine housing, chassis parts, frames, drive lines, spoke nipples, tire valve stems, cables and hoses, brake levers and other brake system component clutch levers, and throttle controls. For support, they point to the European Union's End-of-Life Vehicles (ELV) Directive exemptions for lead in steel, aluminum and copper alloys and lead batteries (January 2008) and the Restriction of Certain Hazardous Substances in Electrical and Electronic Equipment (RoHS) Directive (EU Directive 2002/95/EC, January 27, 2003), which are based on the contribution of lead to the machinability, strength and corrosion resistance, and the availability (or lack thereof) of substitute materials that do not contain lead.

The Commission denied the petitioners' request for exclusion under section 101(b)(1) of the CPSIA. However, for the reasons discussed below, the Commission has decided to issue a temporary stay of enforcement.

II. Discussion

The petitioners provided no data on the lead content of the actual components in the vehicles for which they are seeking exclusion (other than that some battery terminals could be up to 100 percent lead). There was no attempt to differentiate among the types of vehicles or the various manufacturers in the petition, which makes it impossible for the Commission to know the actual state of affairs with regard to these vehicles. The petition was filed before the Commission issued its final rule on procedures and requirements, and therefore, before the petitioners knew how the Commission would interpret the language in section 101(b)(1). Thus they presented information that the lead exposure from their components would neither result in any measurable increase in blood lead level (a conclusion that the Commission has since determined is not dispositive of the absorption analysis in section 101(b)(1), although certainly important to scientists considering the risk of lead exposure), nor have any adverse impact on public health and safety. As noted above, the exposure study was not based on actual measurements or analysis of youth motorized recreational vehicle component parts and the materials may or may not be sufficiently similar to serve as a reasonable basis for the evaluation. Children riding these vehicles will interact with the metal brake and clutch levers and the throttle controls and may also interact with the tire valve stem and with certain of the other component parts. The study submitted by the petitioners did conclude that some lead would be ingested by a child who touched component parts containing lead in the amount the report determined to be comparable to a child handling the brake levers and the valve stem of a vehicle. The Commission has determined that some portion of ingested lead will be absorbed into the body, however small the absorbed amount. Because the petitioners' study

indicated that children's use of youth motorized recreational vehicles could result in intake of lead, and therefore absorption, the petition does not meet the statutory requirement for exclusion set out in section 101(b)(1)(A).

Petitioners also analogize their situation to the technological feasibility criterion in the electronics device exclusion for their reliance on the ELV and RoHS exemptions for batteries and certain metal alloys. However, no such criterion is specified in section 101(b). The ELV and the RoHS Directives are focused on reducing hazardous waste in landfills and encouraging recycling of these hazardous waste products and thus have quite different purposes than the lead provisions of the CPSIA, which focus on protecting children from unnecessary exposure to lead through contact with it in children's products. Nevertheless, the Commission recognizes that unless it takes some action with regard to the information provided by the petitioners, the riders of these vehicles—children 12 and younger—would likely face a more serious and immediate risk of injury or death. For the reasons discussed in more detail below, the Commission is today announcing a time-limited stay of enforcement with regard to certain parts and the vehicles that contain these parts.

The petitioners allege, and the Commission believes it could bear out that if any period of time passes in which youth motorized recreational vehicles are not available for sale (or existing ones are not able to be serviced) that some parents would allow their children to instead ride adult models or over-sized and over-powered versions of the youth models. Our work on ATVs has shown that the vast majority of the deaths of children from driving ATVs occur on adult-sized models. Part of the Commission's work in its ongoing ATV rulemaking is to encourage the development of accurately sized and powered vehicles for children so they will not ride an adult model. Some manufacturers have told the Commission that they have instructed their dealers to remove youth motorized recreational vehicles from their showrooms and to not sell them. The Commission has received reports of dealers refusing to do routine maintenance on previously sold youth vehicles. Finally, one manufacturer has written to the Commission informing it that they are relabeling their Y–6+ and their Y–10+ youth vehicles to Y–12+ and they are advising their dealers they can remove the speed limiting devices from these vehicles. Due to the long lead time in designing and manufacturing these motor vehicles, it would likely be model year 2011 or 2012 before a complying youth ATV could be on the market (ignoring for a moment the other issues concerning the feasibility of making a completely complying vehicle). This safety dilemma applies equally to vehicles that have already been made and are in inventory with dealers or have already been sold and are in the hands of resellers or consumers. If parents of youth riders are unable to buy youth-sized vehicles (whether new or used) they may very well choose to allow their children to ride adult or over-powered, wrongly-sized versions of youth ATVs. Because used ATVs need periodic maintenance and repair, an inability to obtain certain replacement parts could lead to these vehicles becoming inoperable. If no youth-sized substitutes are available, this would similarly lead to parents consenting to their children crossing over to adult-sized machines before they are physically and mentally capable of safely operating them. While it might be possible to change out some of the non-complying components on existing vehicles, for many of the components that is simply not an option. Thus replacement parts that have the same amount of lead content (or less) as the original part are included in our enforcement stay.

The other safety-related allegation made by the petitioners is that a certain amount of lead is needed in some component parts of their vehicles for ''functionality, durability and other reasons that are safety critical to the components.'' See Statement of David Murray, Counsel for Yamaha, at the March 11, 2009, public meeting on ATVs and other youth motorized recreational vehicles.

The petitioners again point to the ELV Directive for their support of this contention. However, the ELV report's exemption for steel for machining purposes containing up to 0.35% lead by weight seems to rest more on the easier machining properties of leaded steel than on safety considerations. The ELV report deals with leaded steels versus unleaded steels, rather than an analysis of how much lead is actually needed for any particular application. Galvanized steel does, according to the report, have advantages in corrosion resistance, which could have safety implications. The exemption for aluminum for machining purposes with a lead content up to 0.4% by weight was granted due to its higher resistance to corrosion and to the extent it is used in brake and clutch systems and perhaps certain other applications, such an exemption would appear to be safety related. The granting of the exemption for copper alloy containing up to 4% lead by weight, like steel for machining purposes, appears to be chiefly because the lead makes the copper more easily machinable. The ELV report noted that the presence of lead did not significantly affect the strength or corrosion resistance of the copper alloy. The petitioners do state that the enhanced machinability of copper alloys ''permits the creation of deep grooves in threaded parts such as valve stems that are needed to ensure secure cap and air valve fitment for safety reasons.'' See Petition for Temporary Final Rule to Exclude a Class of Materials Under Section 101(b) of the Consumer product Safety Improvement Act, dated January 27, 2009, at 13. For the last ELV review, the copper industry was asked to indicate the applications in which the unavoidable use of lead had safety implications, but their response had not been received at the time the report was written. Thus the report's conclusion on copper alloys was that they were not able to carry out an in-depth evaluation based on the information that was made available to them and that the exemption should continue until a full assessment is carried out. The exemption for lead in batteries noted that the substitution of lead in lead-acid batteries is ''not possible'' and that avoiding the use of lead would require an alternative battery system. The report's conclusion was that lead-free alternatives to lead-acid batteries would reduce the functionality and reliability of vehicles and that the use of lead in this function is unavoidable at this time. It did note, however, that research was being actively pursued to develop a substitute for lead in this application.

Another argument advanced by the petitioners and also supported by the ELV report is that for certain alloys no acceptable substitutes exist or if they exist, they do not exist in sufficient quantities to satisfy the global requirements. The ELV report found, for example, that there was as yet no technically feasible way to remove lead from aluminum.

The Commission staff had very little time to assess these issues independently. Therefore, the ELV report's analysis, which was strictly limited to the technological feasibility of a substitute for lead and not on the higher cost of a viable substitute, is instructive. To the extent that these alloys are required for safety reasons related to functionality, greater durability, or corrosion resistance, removing the lead from those alloys could result in a vehicle that is more

prone to structural breakage, premature brake failure, or other defects that could present a risk of death or serious injury. For example, failure of a less durable brake lever may result in an inability to stop or control a vehicle and result in death or serious injury to the child operating the vehicle. In contrast, Congress has eliminated the risk analysis associated with the absorption of lead. Yet, while we acknowledge that there are adverse health effects associated with lead poisoning or elevated blood lead levels, we also must acknowledge that, based on our experience with these vehicles and current available information, the risk of death or serious injury associated with broken or defective vehicle parts is both more likely and more significant than any risks associated with possible absorption of lead. In such circumstances, enforcement discretion is the only means for the Commission to protect riders of youth ATVs.

The petitioners did not address what level of lead is necessary for their various components to meet acceptable functionality, durability and corrosion criteria. The industry, at the March 2009 public meeting indicated that in terms of the uncontrollable variability of the lead content in the metal alloys they buy, the 600 ppm limit was ''probably not an issue.'' It would, however, be a problem when the lead limit drops to 300 ppm in August of this year. The statement was also made at that meeting that they were seeking exclusions for these metal alloys ''at or below'' the levels established by the European Union. But how much below the EU level they can go toward the statutory limit without compromising safety is something they do not appear to know at this time. A spokeswoman for the industry stated at the public meeting that it should not take several years for the industry to test the metal alloys, but it will take some time because certain considerations such as the aging of the materials will have to be taken into account. She also asserted that all of the members of their coalition were willing to move to low lead alloys if they can be shown to be appropriate for real-world applications under real-world stresses.

The petitioners appear to be in various stages of attempting to comply with the lead limits. They stated at the March public meeting that their clients have been working diligently to remove, substitute or shield from accessibility, non-complying, lead-containing components in their vehicles. They appear to have removed lead from the vinyl components of their vehicles, such as the handlebar grips and the seats. One of the largest makers of youth ATVs stated that their battery is in a recessed compartment and that they could put a cover over it and screw it in place. Under the Commission's accessibility proposals, that should qualify to make the engine components inaccessible and remove the 100 percent lead terminals as a matter of concern for their vehicles. Another spokesman at the meeting assured our staff that the industry members represented there were all exploring the issue of encasing their batteries. It was also noted that small motorcycles do not have batteries. A snowmobile manufacturer indicated at that same meeting that they had sent retrofit kits to all of their dealers to switch out a substitute ''for those few components'' that did not meet the lead limits. They additionally put a latch on the hood to make the engine inaccessible to children. They may, therefore, not need relief for their future production. A spokesman for the petitioners indicated they thought they could make other parts, such as the valve stem and some cable systems inaccessible. Thus even some of the parts that contain metal alloys that the petitioners were seeking exclusion for could, with time, be made compliant.

In the interim final rule on electronic devices where the Commission referenced the exemptions in the RoHs Directive, the Commission stated that it ''expects that manufacturers will continue to assess the technological feasibility of making electronic devices that have accessible component parts which contain lead above the lead content limits inaccessible, and make such component parts inaccessible whenever possible.'' Similarly, the stay of enforcement is issued with the expectation that manufacturers will not simply rely on the continued stay of enforcement for a particular metal alloy, but will explore other ways in which to comply with the lead limits. A periodic review is required in RoHS and ELV, a process the industry appears to embrace. As long as manufacturers are alleging that it is technologically infeasible for certain components to comply with the CPSIA either through being made inaccessible or otherwise, they must be required to periodically justify, with specificity as to the components and alloys from which the components are made, the continued need for enforcement abeyance.

In carrying out its responsibilities to protect the public, it is the Commission's role to take a broader view of any product and evaluate a safety versus safety tradeoff presented by a product's design when one appears. The Commission currently lacks the information it needs to make a vehicle by vehicle assessment of this industry's state of compliance with the lead limits. The industry needs more time to gather this information, taking into account their on-going work in this area, and the Commission needs time to review that information. Even a time-limited stay that has as its goals moving these vehicles toward compliance in a fashion that does not drive children to a riskier alternative and systematically reducing the lead content of these vehicles to the lowest level possible from a safety standpoint is not our preferred way to handle these types of issues. However, given the alternatives available to us and the information received thus far, we feel that this procedure is not inconsistent with the overall intent of the CPSIA, which is to protect consumers, particularly our children, from serious risk of harm, when the result of forcing compliance with the provisions within the original time constraints could result in a more immediate and potentially more serious hazard than a limited stay of enforcement.

To afford the manufacturers an appropriate amount of time to continue the testing they are already doing and to conduct any research and development necessary to bring component parts into compliance with the CPSIA and to identify any parts that are either technologically infeasible to bring into compliance during the stay period or identify those where such compliance, while technologically feasible, would expose children to other and greater safety risks, the stay will remain in effect until May 1, 2011.

III. The Stay

The United States Consumer Product Safety Commission hereby stays enforcement of section 101(a) of the Consumer Product Safety Improvement Act of 2008 (''CPSIA'') and related provisions with respect to certain parts of motorized recreational vehicles designed or intended primarily for children 12 years of age or younger, namely youth all-terrain vehicles, youth off-road motorcycles and youth snowmobiles, until May 1, 2011, upon the following conditions:

A. The stay shall apply to youth all-terrain vehicles, youth off-road motorcycles and youth snowmobiles (''Youth Motorized Recreational Vehicles'' or ''Vehicles'') that were manufactured before February 10, 2009, and to Youth Motorized Recreational Vehicles made on or after that date through April 30, 2011. The stay with regard to Youth Motorized Recreational Vehicles made during this time period

shall remain in effect for the life of those Vehicles.

B. The stay shall apply only to the following types of original equipment parts for Youth Motorized Recreational Vehicles: battery terminals containing up to 100 percent lead, and components made with metal alloys, including steel containing up to 0.35 percent lead, aluminum with up to 0.4 percent lead, and copper with up to 4.0 percent lead.

C. The stay shall also apply to any metal part sold separately as a replacement for one of the parts described above, provided that the lead content in the replacement part is less than or equal to the lead content in the part originally installed on the Vehicles.

D. Each manufacturer (which can include a distributor where appropriate) who is covered by the stay shall file with the Secretary of the Commission, not later than 60 days after the publication of this stay in the Federal Register, a report identifying each model of Youth Motorized Recreational Vehicles it has produced between March 1, 2008 and March 1, 2009. For each such model, the manufacturer shall give the production volume by calendar month and shall list each component part that is made of metal and that is accessible to children, the material specification for each part, and a measurement of the lead content of representative samples of each part in parts per million (ppm). The lead content measurement may be by x-ray fluorescence or the method posted on the Commission Web site to test for lead in metal for certification purposes.

E. No later than November 1, 2009, each manufacturer covered by the stay shall present a comprehensive plan to the Commission describing how and when it intends to reduce the lead exposure from each part described in paragraph D above whose measured lead content exceeds 300 parts per million. The plan shall set forth the steps the manufacturer intends to take to limit children's lead exposure in future production and an estimated schedule for achieving such reductions. The manufacturer should include a discussion of any adverse safety impacts that could result from accelerating the estimated schedule. If some Vehicles have been modified after January 27, 2009, to reduce the lead content of certain parts or to make certain parts inaccessible, the manufacturer should outline those changes in general terms and the dates such changes were made.

F. Manufacturers who have timely submitted both the report in paragraph D and the plan in paragraph E above, who need additional time to complete their plan prior to the expiration of the stay may seek an extension of the stay. They shall, no later than December 1, 2010, file a request with the Secretary of the Commission for an extension containing all of the information described in paragraph D above, including an update of the production volume by month for each previously listed model and for any new youth model introduced after the date of the prior report, lead content measurements taken within 90 days of the report submission for each part to be subject to the stay extension and a revised timetable for the reduction of lead exposure from those parts. The report shall detail the manufacturer's progress in reducing children's exposure to lead from each part containing more than 300 ppm, specifying what actions have been taken with regard to each affected part. The report will also explain why any parts that remain above 300 ppm have not able to be made inaccessible, substituted with another material, or made with a complying level of lead.

G. Any report submitted under paragraph F shall also identify the Youth Motorized Recreational Vehicles by model that the manufacturer intends to produce on or after May 1, 2011. The manufacturer shall provide a listing of each component part that is expected to be used in the production Vehicles if its lead content is expected to exceed 100 ppm and will be accessible to children. For each such part the manufacturer shall explain why it is not feasible to make the part inaccessible or why it is not technologically feasible to reduce the lead content to 100 ppm or lower.

H. While the stay is in effect for particular Vehicles, the Office of Compliance shall not prosecute any person for any violation of laws administered by the Commission based on the lead content of any part of, or replacement part for, those Vehicles to which the stay applies, including provisions relating to certification of compliance, reporting of noncompliances, or the sale, offering for sale, importation or exportation.

I. While the stay is in effect for particular Vehicles, the Commission will not refuse admission into the United States of such Vehicles based on the lead content of any part of such Vehicles to which the stay applies or any replacement part for such Vehicles as described in paragraph C.

J. This stay does not apply to Vehicles that are stockpiled by the manufacturer. Stockpiling shall be determined on a model-by-model basis. Vehicles shall be deemed to be stockpiled if their production in the six-month period ending on April 30, 2011 exceeds by more than fifteen percent the production of that model or its predecessor during the six-month period ending on April 30, 2010. The production of new models must not exceed by more than fifteen percent the production of similar models by the same manufacturer.

K. The Commission hereby delegates to the Assistant Executive Director, Office of Compliance and Field Operations, authority to implement the stay of enforcement as specified here and the authority to modify provisions in individual cases where necessary due to unique or unforeseen circumstances.

The stay in no way limits the Commission's ability to take action with regard to Youth Motorized Recreational Vehicles for other safety-related issues including, but not limited to, failure to comply with the ban on lead-containing paint or with the American National Standard for Four Wheel All-Terrain Vehicles Equipment Configuration, and Performance Requirements developed by the Specialty Vehicle Institute of America effective on April 13, 2009 and the requirement to comply in all respects with an action plan on file with the Commission as set forth in the CPSIA.

Dated: May 1, 2009.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. E9–10981 Filed 5–11–09; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before July 13, 2009.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or

Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.,* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: May 7, 2009.

Angela C. Arrington,

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

Institute of Education Sciences

Type of Review: Revision.

Title: Evaluation of Moving High-Performing Teachers to Low-Performing Schools.

Frequency: On occasion.

Affected Public: Individuals or household; Not-for-profit institutions.

Reporting and Recordkeeping Hour Burden:

Responses: 494.
Burden Hours: 825.

Abstract: This is the second submission of a two-stage clearance request for approval of data collection activities that will be used to support An Impact Evaluation of Moving High-Performing Teachers to Low-Performing Schools. The evaluation aims to estimate the impact of a program, labeled the Talent Transfer Initiative (TTI) program, on student achievement. This program identifies teachers with consistently high performance using value-added student learning gains and offers them monetary incentives to transfer to schools identified as low-performing based on average student test scores.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 4024. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E9–11046 Filed 5–11–09; 8:45 am]
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DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before July 13, 2009.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: May 7, 2009.

Angela C. Arrington,

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

Institute of Education Sciences

Type of Review: Revision.

Title: What Works Clearinghouse Database Forms.

Frequency: On Occasion.

Affected Public: Businesses or other for-profit; Federal Government; Individuals or household; Not-for-profit institutions; State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 127.
Burden Hours: 53.

Abstract: The What Works Clearinghouse (WWC) Registry of Randomized Controlled Trails (RCTs) allows members of the public to review and submit information relating to Randomzied Controlled Trials in the field of education. Primary members of the affected public include individuals or households. Data from the submissions will be used to further populate the Registry of RCTs for the WWC.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 4031. When you access the information collection, click on

''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E9–11050 Filed 5–11–09; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before July 13, 2009.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: May 6, 2009.

Angela C. Arrington,

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

Office of Planning, Evaluation and Policy Development

Type of Review: New.

Title: Evaluation of the Implementation of the Carl D. Perkins Career and Technical Education Act of 2006.

Frequency: On occasion.

Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 2,712.

Burden Hours: 3,443.

Abstract: The 2011 National Assessment of Career and Technical Education (NACTE) will examine the implementation of the Carl D. Perkins Career and Technical Education Act of 2006 (Perkins IV). This evaluation study, which is part of a larger evaluation effort directed by the Policy and Program Studies Service (PPSS), focuses on evaluating how state agencies and local providers are responding to the new legislation and how new provisions contained within the legislation are being implemented. Information collected from the NACTE study will be incorporated in two reports submitted to Congress: An interim report (due January 1, 2010) and final report (due July 1, 2011), which are mandated in the legislation. These reports are to detail the condition of CTE and the success of state agencies and local programs in improving the quality of CTE services. To capture state agency staff and local provider input about the Act's implementation, researchers will administer surveys to the state secondary and postsecondary director of CTE in each of the 50 states, the District of Columbia, and other territories and possessions in outlying areas. A second set of surveys will be administered to a nationally representative sample of 1,265 secondary level local education agencies and/or intermediary agencies (*i.e.,* dedicated CTE facilities) and 765 institutions of higher education. To assess the distribution of Federal resources to local programs, researchers will collect 2006–07 and 2009–10 fiscal allocation data from state secondary and postsecondary agencies administering Federal Perkins dollars.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 4012. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E9–11051 Filed 5–11–09; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before June 11, 2009.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503, be faxed to (202) 395–5806,

or send e-mail to *oira_submission@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Director, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: May 6, 2009.

Angela C. Arrington,

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

Office of Postsecondary Education

Type of Review: New.

Title: Application Package for the Erma Byrd Scholarship Program.

Frequency: Annually.

Affected Public: Individuals or household; Businesses or other for-profit; Not-for-profit institutions.

Reporting and Recordkeeping Hour Burden:

Responses: 220.
Burden Hours: 110.

Abstract: These instructions and forms will be used by scholarship applicants to provide information to the U.S. Department of Education that is needed to select recipients for the Erma Byrd Scholarship Program. Title III of the Omnibus Appropriations Act, 2009 authorizes the Secretary to award scholarships to individuals pursuing a course of study that will lead to a career in industrial health and safety occupations, including mine safety. Under the Erma Byrd Scholarship Program, individual students apply for scholarships. In order to judge all applications in a consistent manner and to reduce the time required for the review process, it is necessary to collect the appropriate information from all individual applicants by means of a uniform application form.

This information collection is being submitted under the Streamlined Clearance Process for Discretionary Grant Information Collections (1894–0001). Therefore, the 30-day public comment period notice will be the only public comment notice published for this information collection.

Requests for copies of the information collection submission for OMB review may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 4026. When you access the information collection, click on ''Download Attachments '' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to the Internet address *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E9–11049 Filed 5–11–09; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before July 13, 2009.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: May 6, 2009.

Angela C. Arrington,

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

Office of Communications and Outreach

Type of Review: Revision.

Title: Application for the Presidential Scholars Program.

Frequency: Annually.

Affected Public: Individuals or household.

Reporting and Recordkeeping Hour Burden:

Responses: 2,600.
Burden Hours: 41,600.

Abstract: The United States Presidential Scholars Program is a national recognition program to honor outstanding graduating high school seniors. Candidates are invited to apply based on academic achievements on the SAT or ACT assessments, or on artistic merits based on participation in a national talent search. This program was

established by Presidential Executive Orders 11155 and 12158.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 3983. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E9–11048 Filed 5–11–09; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2003–0033; FRL–8903–5]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Modification of Secondary Treatment Requirements for Discharges Into Marine Waters (Renewal), EPA ICR Number 0138.09, OMB Control Number 2040–0088

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA)(44 U.S.C. 3501 et seq.), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. This ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before June 11, 2009.

ADDRESSES: Submit your comments, referencing docket ID number EPA–HQ–OW–2003–0033, to (1) EPA online using *http://www.regulations.gov* (our preferred method), by e-mail to *OW–Docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Water Docket, Mail Code 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB by mail to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Virginia Fox-Norse, Oceans and Coastal Protection Division, Office of Wetlands, Oceans and Watersheds, (Mail Code 4504T), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 566–1266; fax number: (202) 566–1337; e-mail address: *fox-norse.virginia@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On December 29, 2008 (73 FR 79467), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received one comment during the comment period, which is addressed in the ICR. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OW–2003–0033, which is available for online viewing at *http://www.regulations.gov,* or in person viewing at the Water Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Water Docket is (202) 566–2426. Use EPA's electronic docket and comment system at *http://www.regulations.gov* to submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov.*

Title: Modification of Secondary Treatment Requirements for Discharges into Marine Waters (Renewal).

ICR Numbers: EPA ICR No. 0138.09, OMB Control No. 2040–0088.

ICR Status: This ICR is scheduled to expire on May 31, 2009. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: The Clean Water Act (CWA) section 301(h) program involves collecting information from two sources: (1) The municipal wastewater treatment facility, commonly called a publicly owned treatment works (POTW); and (2) the state in which the POTW is located. Municipalities had the opportunity to apply for a waiver from secondary treatment requirements, but that opportunity closed in December 1982. A POTW that seeks a section 301(h) waiver does so voluntarily to obtain or retain a benefit. A POTW seeking to obtain a 301(h) waiver, holding a current waiver, or reapplying for a waiver, provides application, monitoring, and toxic control program information. The state provides information on its determination whether the proposed conditions of the waiver ensure the protection of water quality, biological habitats, and beneficial uses of receiving waters, and whether the discharge will result in additional treatment, pollution control, or any other requirement for any other point or nonpoint sources. The state also provides information to certify that the discharge will meet all applicable state laws and that the state accepts all permit conditions. EPA requires updated information on the discharge to: (1) Determine whether the section 301(h) criteria are still being met and whether the section 301(h) waiver should be reissued; (2) determine whether the water quality, biological habitats, and beneficial uses of the receiving waters are protected; and (3) ensure that the permittee is effectively

minimizing industrial and nonindustrial toxic pollutant and pesticide discharges into the treatment works. EPA needs information from the state to: (1) Allow the state's views to be taken into account when EPA reviews the section 301(h) application and develops permit conditions; and (2) ensure that all state laws are met and that the state accepts all permit conditions. This information is the means by which the state can non-concur with a section 301(h) approval decision made by the EPA Regional office. Regulations implementing CWA section 301(h) are found at 40 CFR part 125, subpart G. The information covered by this information collection request involves treatment plant operating data, effects of POTWs' discharges on marine environments, and states' viewpoints on issues concerning effects of POTWs' discharges on marine environments.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 686 hours per response for POTWs and 88 hours per response for States. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Entities potentially affected by this action are those municipalities that currently have section 301(h) waivers from secondary treatment, have applied for a renewal of a section 301(h) waiver, and the states within which these municipalities are located.

Estimated Number of Respondents: 45.

Frequency of Response: Varies from one time to once every five years, to case-by-case, depending on the category of information.

Estimated Total Annual Hour Burden: 59,370 hours.

Estimated Total Annual Cost: $1,503,270, includes $0 annualized capital or O&M costs.

Changes in the Estimates: There is a decrease of 2,007 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. This decrease is due to a reduction in the number of POTWs in the 301(h) program and by extension the number of states within which these POTWs are located.

Dated: May 6, 2009.

John Moses,

Director, Collection Strategies Division.

[FR Doc. E9–11102 Filed 5–11–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2008–0504; FRL–8903–4]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Partial Update of the TSCA Section 8(b) Inventory Data Base, Production and Site Reports; EPA ICR No. 1884.04, OMB Control No. 2070–0162

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection Supporting Statement, Partial Update of the TSCA Section 8(b) Inventory Data Base, Production and Site Reports. The ICR, which is abstracted below, describes the nature of the information collection activity and its expected burden and costs.

DATES: Additional comments may be submitted on or before June 11, 2009.

ADDRESSES: Submit your comments, referencing docket ID Number EPA–HQ–OPPT–2008–0504 to (1) EPA online using www.regulations.gov (our preferred method), by e-mail to *oppt.ncic@epa.gov* or by mail to: Document Control Office (DCO), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, Mail Code: 7407T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *Attention:* Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Barbara Cunningham, Director, Environmental Assistance Division, Office of Pollution Prevention and Toxics, Environmental Protection Agency, Mailcode: 7408–M, 1200 Pennsylvania Ave., NW., Washington, DC 20460; *telephone number:* 202–554–1404; *e-mail address: TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On September 5, 2008 (73 FR 51805), EPA sought comments on this renewal ICR pursuant to 5 CFR 1320.8(d). EPA received two comments during the comment period, which are addressed in the Supporting Statement. Any comments related to this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OPPT–2008–0504, which is available for online viewing at *http://www.regulations.gov,* or in person inspection at the OPPT Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for the Pollution Prevention and Toxics Docket is 202–566–0280.

Use EPA's electronic docket and comment system at www.regulations.gov to submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above.

Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in www.regulations.gov as EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose public disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in www.regulations.gov. The entire printed comment, including the copyrighted material, will be available in the public docket. Although identified as an item in the official docket, information claimed as CBI, or whose disclosure is otherwise restricted

by statute, is not included in the official public docket, and will not be available for public viewing in www.regulations.gov. For further information about the electronic docket, go to www.regulations.gov.

Title: Partial Update of the TSCA Section 8(b) Inventory Data Base, Production and Site Reports.

ICR Numbers: EPA ICR No. 1884.04, OMB Control No. 2070–0162.

ICR Status: This ICR is currently scheduled to expire on May 31, 2009. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9. *Abstract:* The Toxic Substances Control Act (TSCA) requires EPA to compile and keep current a complete list of chemical substances manufactured or processed in the United States. EPA updates this inventory of chemicals every five years by requiring manufacturers, processors and importers to provide production volume, plant site information and site-limited status information. This information allows EPA to identify what chemicals are or are not currently in commerce and to take appropriate regulatory action as necessary. EPA also uses the information for screening chemicals for risks to human health or the environment, for priority-setting efforts, and for exposure estimates. This ICR addresses the collection of inventory-related information.

Responses to the collection of information are mandatory (*see* 40 CFR part 710). Respondents may claim all or part of a notice confidential. EPA will disclose information that is covered by a claim of confidentiality only to the extent permitted by, and in accordance with, the procedures in TSCA section 14 and 40 CFR part 2.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average about 31.5 hours per response. Burden means the total time, effort or financial resources expended by persons to generate, maintain, retain or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install and utilize technology and systems for the purposes of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Entities potentially affected by this action are companies that manufacture, process or import chemical substances, mixtures or categories.

Frequency of Collection: Once every five years.

Estimated average number of responses for each respondent: 15.56.

Estimated No. of Respondents: 4,190.

Estimated Total Annual Burden on Respondents: 410,485 hours.

Estimated Total Annual Costs: $22,628,227.

Changes in Burden Estimates: There is a decrease of 3,090 hours (from 413,575 hours to 410,485 hours) in the total estimated respondent burden compared with that currently in the OMB inventory. This decrease reflects a regulatory change such that respondents (including importers) of inorganic chemicals must complete full reports, rather than partial reports as was the case in the past, when the site-specific production volume is 300,000 pounds or more. This increase is offset by a change in reporting requirements such that respondents must provide information once every five years versus once every four years previously. These changes are program changes. The burden decrease also reflects an increase of EPA's current estimate of the number of sites that will respond to this collection of information, offset by a decrease in the estimated burden for rule familiarization. These changes are adjustments. The Supporting Statement provides additional detail concerning the changes in burden estimates.

Dated: May 6, 2009.

John Moses,

Acting Director, Collection Strategies Division.

[FR Doc. E9–11101 Filed 5–11–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–ORD–2009–0266; FRL–8903–8]

Board of Scientific Counselors, Executive Committee Meeting—June 2009

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, Public Law 92–463, the Environmental Protection Agency, Office of Research and Development (ORD), gives notice of a meeting of the Board of Scientific Counselors (BOSC) Executive Committee.

DATES: The meeting will be held on Thursday, June 4, 2009, from 8:15 a.m. to 5 p.m., and will continue on Friday, June 5, 2009, from 8:15 a.m. until 12 noon. All times noted are Central Standard Time. The meeting may adjourn early if all business is finished. Requests for the draft agenda or for making oral presentations at the meeting will be accepted up to one business day before the meeting.

ADDRESSES: The meeting will be held at the EPA Office of Research and Development, National Health and Environmental Effects Laboratory, 6201 Congdon Boulevard, Duluth, Minnesota 55804. Submit your comments, identified by Docket ID No. EPA–HQ–ORD–2009–0266, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail:* Send comments by electronic mail (e-mail) to: *ORD.Docket@epa.gov,* Attention Docket ID No. EPA–HQ–ORD–2009–0266.
- *Fax:* Fax comments to: (202) 566–0224, Attention Docket ID No. EPA–HQ–ORD–2009–0266.
- *Mail:* Send comments by mail to: Board of Scientific Counselors, Executive Committee Meeting—June 2009 Docket, Mailcode: 28221T, 1200 Pennsylvania Ave., NW., Washington, DC, 20460, Attention Docket ID No. EPA–HQ–ORD–2009–0266.
- *Hand Delivery or Courier.* Deliver comments to: EPA Docket Center (EPA/DC), Room B102, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC, Attention Docket ID No. EPA–HQ–ORD–2009–0266. *Note:* this is not a mailing address. Such deliveries are only accepted during the docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–ORD–2009–0266. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Board of Scientific Counselors, Executive Committee Meeting—June 2009 Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the ORD Docket is (202) 566–1752.

FOR FURTHER INFORMATION CONTACT: The Designated Federal Officer via mail at: Lorelei Kowalski, Mail Code 8104–R, Office of Science Policy, Office of Research and Development, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; via phone/voice mail at: (202) 564–3408; via fax at: (202) 565–2911; or via e-mail at: *kowalski.lorelei@epa.gov.*

SUPPLEMENTARY INFORMATION:

General Information

Any member of the public interested in receiving a draft BOSC agenda or making a presentation at the meeting may contact Lorelei Kowalski, the Designated Federal Officer, via any of the contact methods listed in the **FOR FURTHER INFORMATION CONTACT** section above. In general, each individual making an oral presentation will be limited to a total of three minutes.

Proposed agenda items for the meeting include, but are not limited to: ORD response to the BOSC Homeland Security program review report; Executive Committee review of the BOSC Human Health Program Review Subcommittee, Science and Technology for Sustainability Mid-Cycle Subcommittee, and National Center for Environmental Research draft reports; site visit to the ORD National Health and Environmental Effects Laboratory; update on BOSC mid-cycle review subcommittees (Human Health Risk Assessment); update on the BOSC program review subcommittees (Clean Air and Endocrine Disrupting Chemicals); update on the BOSC standing subcommittees (National Center for Environmental Research, National Exposure Research Lab, and National Center for Computational Toxicology); a briefing from the Tennessee Valley Authority on the Kingston Project; an update on BOSC workgroups; an ORD update (including optimizing the BOSC program review process); an update on EPA's Science Advisory Board activities; and future issues and plans. The meeting is open to the public.

Information on Services for Individuals with Disabilities: For information on access or services for individuals with disabilities, please contact Lorelei Kowalski (202) 564–3408 or *kowalski.lorelei@epa.gov.* To request accommodation of a disability, please contact Lorelei Kowalski, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: May 5, 2009.

Mary Ellen Radzikowski,

Acting Director, Office of Science Policy.

[FR Doc. E9–11105 Filed 5–11–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8903–9]

Science Advisory Board Staff Office; Notification of a Public Teleconference of the Chartered Science Advisory Board

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA Science Advisory Board (SAB) Staff Office announces a public teleconference of the Chartered Science Advisory Board to discuss EPA's research budget for Fiscal Year 2010.

DATES: The teleconference date is Thursday, May 28, 2009, from 1 p.m. to 4 p.m. (Eastern Time).

ADDRESSES: The teleconference will be conducted by telephone only.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing to obtain general information concerning this public teleconference should contact Mr. Thomas O. Miller, Designated Federal Officer (DFO), EPA Science Advisory Board (1400F), 1200 Pennsylvania Ave., NW, Washington, DC 20460; via telephone/voice mail: (202) 343–9982; fax: (202) 233–0643; or e-mail at *miller.tom@epa.gov.* General information concerning the EPA Science Advisory Board can be found on the SAB Web site at *http://www.epa.gov/sab.*

SUPPLEMENTARY INFORMATION: The SAB was established by 42 U.S.C. 4365 to provide independent scientific and technical advice to the Administrator on the technical basis for Agency positions and regulations. The SAB is a Federal advisory committee chartered under the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C., App 2. The SAB will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies. Pursuant to the Federal Advisory Committee Act, Public Law 92–463, notice is hereby given that the EPA SAB will hold a public teleconference to discuss a draft letter on immediate EPA science needs.

Background: The SAB conducts a review of the EPA research budget annually and provides written

comments to the EPA Administrator and testimony to the U.S. Congress on the adequacy of the EPA's research budget. The purpose of this teleconference will be to allow the SAB to discuss with Agency representatives the research priorities that are covered by the Fiscal Year 2010 research budget. Previous SAB budget advisories are on the SAB Web site at *http://www.epa.gov/sab.*

Availability of Meeting Materials: The agenda and other materials in support of this teleconference will be placed on the SAB Web site at *http://www.epa.gov/sab* in advance of this teleconference.

Procedures for Providing Public Input: Interested members of the public may submit relevant written or oral information for the SAB to consider on the topics included in this advisory activity. *Oral Statements:* In general, individuals or groups requesting an oral presentation at a public teleconference will be limited to three minutes per speaker, with no more than a total of one-half hour for all speakers. Interested parties should contact Mr. Miller, DFO, in writing (preferably via e-mail) at the contact information noted above, by May 21, 2009 to be placed on a list of public speakers for the teleconference. *Written Statements:* Written statements should be received in the SAB Staff Office by May 21, 2009 so that the information may be made available to the SAB Panel members for their consideration and placed on the SAB Web site for public information. Written statements should be supplied to the DFO in the following formats: one hard copy with original signature, and one electronic copy via e-mail (acceptable file format: Adobe Acrobat PDF, WordPerfect, MS Word, MS PowerPoint, or Rich Text files in IBM-PC/Windows 98/2000/XP format). Submitters are asked to provide versions of each document submitted with *and* without signatures, because the SAB Staff Office does not publish documents with signatures on its Web sites.

Accessibility: For information on access or services for individuals with disabilities, please contact Mr. Thomas Miller at (202) 343–9982, or *miller.tom@epa.gov.* To request accommodation of a disability, please contact Mr. Miller, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: May 7, 2009.

Vanessa T. Vu,

Director, EPA Science Advisory Board Staff Office.

[FR Doc. E9–11106 Filed 5–11–09; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[AU Docket No. 09–56; DA 09–843]

Auction of FM Broadband Radio Service (BRS) Licenses Scheduled for October 27, 2009; Comment Sought on Competitive Bidding Procedures for Auction 86

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document announces the auction of unassigned Broadband Radio Service (BRS) licenses scheduled to commence on October 27, 2009 (Auction 86). This document also seeks comments on competitive bidding procedures for Auction 86.

DATES: Comments are due on or before May 15, 2009, and reply comments are due on or before May 29, 2009.

ADDRESSES: Comments and reply comments must be identified by AU Docket No. 09–56. Comments may be filed electronically using the Internet by accessing the Federal Communications Commission's Electronic Comment Filing System (ECFS) at *http://www.fcc.gov/cgb/ecfs.* Filers should follow the instructions provided on the Web site for submitting comments. The Wireless Telecommunications Bureau requests that a copy of all comments and reply comments be submitted electronically to the following address: *auction86@fcc.gov.* In addition, comments and reply comments may be submitted by any of the following methods:

- *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although the Bureaus continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Attn: WTB/ASAD, Office of the Secretary, Federal Communications Commission.
- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. Eastern Time (ET). All hand deliveries must be held together with rubber bands or fasteners. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW., Washington, DC 20554.
- *People With Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: *FCC504@fcc.gov* or telephone: 202–418–0530 or TTY: 202–418–0432.

FOR FURTHER INFORMATION CONTACT: *Wireless Telecommunications Bureau, Auctions and Spectrum Access Division:* For auction legal questions: Sayuri Rajapakse at (202) 418–0660. For general auction questions: Jeff Crooks at (202) 418–0660 or Lisa Stover at (717) 338–2868; *Broadband Division:* For BRS service rule questions: Nancy Zaczek (legal) or Stephen Zak (technical) at (202) 418–2487.

SUPPLEMENTARY INFORMATION: This is a summary of the *Auction 86 Comment Public Notice* released on April 24, 2009. The complete text of the *Auction 86 Comment Public Notice,* including Attachments A and B, and related Commission documents, are available for public inspection and copying from 8 a.m. to 4:30 p.m. ET Monday through Thursday or from 8 a.m. to 11:30 a.m. ET on Fridays in the FCC Reference Information Center, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The *Auction 86 Comment Public Notice* and related Commission documents also may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–488–5300, facsimile 202–488–5563, or you may contact BCPI at its Web site: *http://www.BCPIWEB.com.* When ordering documents from BCPI, please provide the appropriate FCC document number, for example, DA 09–843. The *Auction 86 Comment Public Notice* and related documents also are available on the Internet at the Commission's website: *http://wireless.fcc.gov/auctions/86/,* or by using the search function for AU Docket No. 09–56 on the ECFS Web page at *http://www.fcc.gov/cgb/ecfs/.*

I. Licenses To Be Offered in Auction 86

1. The licenses to be offered in Auction 86 consist of the available spectrum in 78 BRS service areas. BRS service areas are BTAs or additional service areas similar to BTAs adopted by the Commission. Overlay licenses for 75 of the BTAs originally offered in Auction 6 are available now as a result of default, cancellation, or termination. This auction will also include three

additional licenses for BRS service areas in the Gulf of Mexico. A complete list of licenses available for Auction 86 is included as Attachment A of the *Auction 86 Comment Public Notice.*

2. Where unencumbered, the licenses to be auctioned consist of 76.5 megahertz of spectrum at 2496–2502, 2602–2614, 2614–2615, 2616–2618, and 2618–2673.5 MHz. The Bureau notes that the licenses issued pursuant to this auction will be issued pursuant to the post-transition band plan contained in 47 CFR 27.5(i)(2). A table showing the channelization of this spectrum is included as Attachment B of the *Auction 86 Comment Public Notice.*

3. *Incumbency Issues.* There are pre-existing BRS incumbent licenses. The service area for each of those site-based licenses is a 35-mile circle centered at the station's reference coordinates, and is bounded by the chord(s) drawn between the intersection points of the licensee's previous protected service area and those of respective adjacent market, co-channel licensees. Any licenses granted pursuant to this auction will not include the geographic service areas of any overlapping, co-channel incumbent licenses. If an incumbent license cancels or is forfeited, however, the right to operate within that area shall revert to the overlay licensee that holds the license for the BRS service area that encompasses that BTA. BRS incumbent licenses are entitled to interference protection in accordance with the applicable technical rules.

4. In addition, on the E and F channel groups, grandfathered Educational Broadband Service licenses originally issued on those channels prior to 1983 may continue to operate indefinitely. Such grandfathered EBS licenses must be protected in accordance with the applicable technical rules.

5. Operations within the 2614–2618 MHz band are secondary to adjacent channel operations.

6. Finally, in the 2496–2500 MHz band, BRS licensees must share the band on a co-primary basis with the Code Division Multiple Access Mobile Satellite Service, grandfathered Broadcast Auxiliary Service stations, and grandfathered land mobile and microwave licenses licensed under Parts 90 and 101 of the Commission's rules, respectively. In addition, the 2400–2500 MHz band is allocated for use by Industrial, Scientific, and Medical equipment under Part 18 of the Commission's rules.

II. Bureau Seeks Comment on Auction Procedures

A. Auction Structure

i. Simultaneous Multiple-Round Auction Design

7. The Bureau proposed to auction all licenses included in Auction 86 using the Commission's standard simultaneous multiple-round auction format. This type of auction offers every license for bid at the same time and consists of successive bidding rounds in which eligible bidders may place bids on individual licenses. Typically, bidding remains open on all licenses until bidding stops on every license. The Bureau seeks comment on this proposal.

ii. Anonymous Bidding

8. The Bureau proposes to conduct Auction 86 using certain procedures for limited information disclosure or anonymous bidding. Specifically, the Bureau proposes to withhold, until after the close of bidding, public release of (1) Bidders' license selections on their short-form applications (FCC Form 175), (2) the amounts of bidders' upfront payments and bidding eligibility, and (3) information that may reveal the identities of bidders placing bids and taking other bidding-related actions.

9. The Bureau seeks comment on the details regarding our proposal for implementation of anonymous bidding in Auction 86, and on alternative proposals for anonymous bidding or other information disclosure procedures.

iii. Bidding Rounds

10. Auction 86 will consist of sequential bidding rounds. The initial bidding schedule will be announced in a public notice to be released at least one week before the start of the auction.

11. The Commission will conduct Auction 86 over the Internet, and telephonic bidding will be available as well. The toll-free telephone number for the Auction Bidder Line will be provided to qualified bidders.

12. The Bureau proposes to retain the discretion to change the bidding schedule in order to foster an auction pace that reasonably balances speed with the bidders' need to study round results and adjust their bidding strategies. Under this proposal, the Bureau may change the amount of time for bidding rounds, the amount of time between rounds, or the number of rounds per day, depending upon bidding activity and other factors. The Bureau seeks comment on this proposal. Commenters may wish to address the role of the bidding schedule in managing the pace of the auction and the tradeoffs in managing auction pace by bidding schedule changes, by changing the activity requirements or bid amount parameters, or by using other means.

iv. Stopping Rule

13. For Auction 86, the Bureau proposes to employ a simultaneous stopping rule approach. A simultaneous stopping rule means that all licenses remain available for bidding until bidding closes simultaneously on all licenses. More specifically, bidding will close simultaneously on all licenses after the first round in which no bidder submits any new bids, applies a proactive waiver, or withdraws any provisionally winning bids. Thus, unless the Bureau announces alternative stopping procedures, bidding will remain open on all licenses until bidding stops on every license. Consequently, it is not possible to determine in advance how long the auction will last.

14. Further, the Bureau proposes to retain the discretion to exercise any of the following options during Auction 86: (1) Use a modified version of the simultaneous stopping rule. The modified stopping rule would close the auction for all licenses after the first round in which no bidder applies a waiver, withdraws a provisionally winning bid, or places any new bids on any license for which it is not the provisionally winning bidder. Thus, absent any other bidding activity, a bidder placing a new bid on a license for which it is the provisionally winning bidder would not keep the auction open under this modified stopping rule; (2) declare that the auction will end after a specified number of additional rounds (special stopping rule). If the Bureau invokes this special stopping rule, it will accept bids in the specified final round(s) after which the auction will close; and (3) keep the auction open even if no bidder submits any new bids, applies a waiver, or withdraws any provisionally winning bids. In this event, the effect will be the same as if a bidder had applied a waiver. The activity rule, therefore, will apply as usual and a bidder with insufficient activity will either lose bidding eligibility or use a waiver.

15. The Bureau proposed to exercise these options only in certain circumstances, for example, where the auction is proceeding unusually slowly or quickly, there is minimal overall bidding activity, or it appears likely that the auction will not close within a reasonable period of time or will close

prematurely. Before exercising certain of these options, the Bureau is likely to attempt to change the pace of the auction by, for example, changing the number of bidding rounds per day and/or changing minimum acceptable bids. The Bureau proposes to retain the discretion to exercise any of these options with or without prior announcement during the auction. The Bureau seeks comment on these proposals.

v. Information Relating to Auction Delay, Suspension, or Cancellation

16. For Auction 86, the Bureau proposes that, by public notice or by announcement during the auction, the Bureau may delay, suspend, or cancel the auction in the event of natural disaster, technical obstacle, administrative or weather necessity, evidence of an auction security breach or unlawful bidding activity, or for any other reason that affects the fair and efficient conduct of competitive bidding. The Bureau seeks comment on this proposal.

B. Auction Procedures

i. Upfront Payments and Bidding Eligibility

17. The Bureau proposes that the amount of the upfront payment submitted by a bidder will determine the bidder's initial bidding eligibility in bidding units. The Bureau proposes that each license be assigned a specific number of bidding units equal to the upfront payment listed in Attachment A of the *Auction 86 Comment Public Notice.*

18. The proposed number of bidding units for each license and associated upfront payment amounts are listed in Attachment A. The Bureau seeks comment on these proposals.

ii. Activity Rule

19. In order to ensure that the auction closes within a reasonable period of time, an activity rule requires bidders to bid actively throughout the auction, rather than wait until late in the auction before participating. A bidder's activity in a round will be the sum of the bidding units associated with any licenses upon which it places bids during the current round and the bidding units associated with any licenses for which it holds provisionally winning bids. Bidders are required to be active on a specific percentage of their current bidding eligibility during each round of the auction. Failure to maintain the requisite activity level will result in the use of an activity rule waiver, if any remain, or a reduction in the bidder's eligibility, possibly curtailing or eliminating the bidder's ability to place additional bids in the auction.

20. The Bureau proposes to divide the auction into at least two stages, each characterized by a different activity requirement. The auction will start in Stage One. The Bureau proposes to advance the auction to the next stage by announcement during the auction. In exercising this discretion, the Bureau will consider a variety of measures of auction activity, including but not limited to the percentage of licenses (as measured in bidding units) on which there are new bids, the number of new bids, and the increase in revenue. The Bureau seeks comment on these proposals.

iii. Activity Rule Waivers and Reducing Eligibility

21. Use of an activity rule waiver preserves the bidder's eligibility despite the bidder's activity in the current round being below the required minimum level. An activity rule waiver applies to an entire round of bidding, not to particular licenses. Activity rule waivers can be either proactive or automatic and are principally a mechanism for bidders to avoid the loss of bidding eligibility in the event that exigent circumstances prevent them from bidding in a particular round.

22. The Bureau proposes that each bidder in Auction 86 be provided with three activity rule waivers that may be used as set forth above at the bidder's discretion during the course of the auction. The Bureau seeks comment on this proposal.

iv. Reserve Price or Minimum Opening Bids

23. The Bureau proposes to establish minimum opening bid amounts for Auction 86. The Bureau believes a minimum opening bid amount, which has been used in other auctions, is an effective bidding tool for accelerating the competitive bidding process. The Bureau does not propose a separate reserve price for the licenses to be offered in Auction 86. Specifically, for Auction 86, the Bureau proposes to calculate minimum opening bid amounts on a license-by-license basis using a formula based on bandwidth and license area population. The Bureau seeks comment on this approach, and, whether, consistent with Section 309(j), the public interest would be served by having no minimum opening bid amount or reserve price.

v. Bid Amounts

24. The Bureau proposes that, in each round, eligible bidders be able to place a bid on a given license using one or more pre-defined bid amounts. Under this proposal, the FCC Auction System interface will list the acceptable bid amounts for each license.

a. Minimum Acceptable Bids

25. The first of the acceptable bid amounts is called the minimum acceptable bid amount. The minimum acceptable bid amount for a license will be equal to its minimum opening bid amount until there is a provisionally winning bid on the license. After there is a provisionally winning bid for a license, the minimum acceptable bid amount for that license will be equal to the amount of the provisionally winning bid plus a percentage of that bid amount. In general, the percentage will be higher for a license receiving many bids than for a license receiving few bids. In the case of a license for which the provisionally winning bid has been withdrawn, the minimum acceptable bid amount will equal the second highest bid received for the license.

26. The percentage of the provisionally winning bid used to establish the minimum acceptable bid amount (the additional percentage) is calculated at the end of each round, based on an activity index. The activity index is a weighted average of (a) the number of distinct bidders placing a bid on the license, and (b) the activity index from the prior round. Specifically, the activity index is equal to a weighting factor times the number of bidders placing a bid covering the license in the most recent bidding round plus one minus the weighting factor times the activity index from the prior round. The additional percentage is determined as one plus the activity index times a minimum percentage amount, with the result not to exceed a given maximum. The additional percentage is then multiplied by the provisionally winning bid amount to obtain the minimum acceptable bid for the next round. The Bureau proposes initially to set the weighting factor at 0.5, the minimum percentage at 0.1 (10%), and the maximum percentage at 0.3 (30%). Hence, at these initial settings, the minimum acceptable bid for a license will be between ten percent and thirty percent higher than the provisionally winning bid, depending upon the bidding activity for the license.

b. Additional Bid Amounts

27. Any additional bid amounts are calculated using the minimum

acceptable bid amount and a bid increment percentage—more specifically, by multiplying the minimum acceptable bid by one plus successively higher multiples of the bid increment percentage. If, for example, the bid increment percentage is ten percent, the calculation of the first additional acceptable bid amount is (minimum acceptable bid amount) * (1 + 0.05), or (minimum acceptable bid amount) * 1.05; the second additional acceptable bid amount equals the minimum acceptable bid amount times one plus two times the bid increment percentage, or (minimum acceptable bid amount) * 1.1, etc. The Bureau will round the results of these calculations and the minimum acceptable bid calculations using the Bureau's standard rounding procedures. The Bureau proposes to set the bid increment percentage at 0.05.

28. The Bureau seeks comment on whether to start with eight additional bid amounts (for a total of nine bid amounts) or with fewer or no additional bid amounts for Auction 86. In particular, commenters should address the issue of additional bid amounts in light of particular circumstances of Auction 86, including the nature of the license inventory. The Bureau retains the discretion to change the minimum acceptable bid amounts, the additional bid amounts, the number of acceptable bid amounts, and the parameters of the formulas used to calculate minimum acceptable bid amounts and additional bid amounts if it determines that circumstances so dictate. Further, the Bureau retains the discretion to do so on a license-by-license basis.

29. The Bureau also retains the discretion to limit (a) the amount by which a minimum acceptable bid for a license may increase compared with the corresponding provisionally winning bid, and (b) the amount by which an additional bid amount may increase compared with the immediately preceding acceptable bid amount. The Bureau seeks comment on the circumstances under which it should employ such a limit, factors it should consider when determining the dollar amount of the limit, and the tradeoffs in setting such a limit or changing parameters of the activity-based formula, such as changing the minimum percentage. If the Bureau exercises this discretion, it will alert bidders by announcement in the FCC Auction System. The Bureau seeks comment on the above proposals.

vi. Provisionally Winning Bids

30. Provisionally winning bids are bids that would become final winning bids if the auction were to close in that given round. At the end of a bidding round, a provisionally winning bid for each license will be determined based on the highest bid amount received for the license. In the event of identical high bid amounts being submitted on a license in a given round (i.e., tied bids), we will use a random number generator to select a single provisionally winning bid from among the tied bids. (Each bid is assigned a random number, and the tied bid with the highest random number wins the tiebreaker.) The remaining bidders, as well as the provisionally winning bidder, can submit higher bids in subsequent rounds. However, if the auction were to end with no other bids being placed, the winning bidder would be the one that placed the provisionally winning bid. If any bids are received on the license in a subsequent round, the provisionally winning bid again will be determined by the highest bid amount received for the license.

31. A provisionally winning bid will remain the provisionally winning bid until there is a higher bid on the license at the close of a subsequent round, unless the provisionally winning bid is withdrawn. Bidders are reminded that provisionally winning bids count toward activity for purposes of the activity rule.

vii. Bid Removal

32. For Auction 86, the Bureau proposes and seeks comment on the following bid removal procedures. Before the close of a bidding round, a bidder has the option of removing any bid placed in that round. By removing selected bids in the FCC Auction System, a bidder may effectively undo any of its bids placed within that round.

viii. Bid Withdrawal

33. A bidder may withdraw its provisionally winning bids using the withdraw bids function in the FCC Auction System. A bidder that withdraws its provisionally winning bid(s) is subject to the bid withdrawal payment provisions of the Commission rules.

34. For Auction 86, the Bureau proposes to limit each bidder to withdrawing provisionally winning bids in only one round during the course of the auction. To permit a bidder to withdraw bids in more than one round may encourage insincere bidding or the use of withdrawals for anti-competitive purposes. The round in which withdrawals may be used will be at the bidder's discretion, and there is no limit on the number of provisionally winning bids that may be withdrawn during that round. Withdrawals must be in accordance with the Commission's rules, including the bid withdrawal payment provisions specified in 47 CFR 1.2104(g). The Bureau seeks comment on these bid withdrawal procedures.

C. Post-Auction Procedures

i. Establishing the Interim Withdrawal Payment Percentage

35. The Bureau seeks comment on the appropriate percentage of a withdrawn bid that should be assessed as an interim withdrawal payment in the event that a final withdrawal payment cannot be determined at the close of the auction. Balancing the potential need for bidders to use withdrawals to avoid winning incomplete combinations of licenses with our interest in deterring abuses of our bidding procedures, the Bureau proposes an interim bid withdrawal payment level of fifteen percent for Auction 86.

36. In general, the Commission's rules provide that a bidder that withdraws a bid during an auction is subject to a withdrawal payment equal to the difference between the amount of the withdrawn bid and the amount of the winning bid in the same or subsequent auction(s). If a bid is withdrawn and no subsequent higher bid is placed and/or the license is not won in the same auction, the final withdrawal payment cannot be calculated until after the close of a subsequent auction in which a higher bid for the license (or the equivalent to the license) is placed or the license is won. When that final payment cannot yet be calculated, the bidder responsible for the withdrawn bid is assessed an interim bid withdrawal payment, which will be applied toward any final bid withdrawal payment that is ultimately assessed. 47 CFR 1.2104(g)(1) of the Commission rules requires that the percentage of the withdrawn bid to be assessed as an interim bid withdrawal payment be between three percent and twenty percent and that it be set in advance of the auction.

37. The Commission has determined that the level of the interim withdrawal payment in a particular auction will be based on the nature of the service and the inventory of the licenses being offered. The Commission has noted that it may impose a higher interim withdrawal payment percentage to deter the anti-competitive use of withdrawals when, for example, bidders likely will not need to aggregate the licenses being offered in the auction, such as when few licenses are offered that are on adjacent frequencies or in adjacent areas, or

when there are few synergies to be captured by combining licenses.

38. For Auction 86, it is not possible to combine licenses across multiple frequency blocks in a given geographic area, and opportunities for combining licenses in adjacent areas are somewhat limited, so there is likely to be little need to use withdrawals to protect against incomplete aggregations. Therefore, the Bureau proposes to establish the percentage of the withdrawn bid to be assessed as an interim bid withdrawal payment at fifteen percent for this auction. The Bureau seeks comment on this proposal.

ii. Establishing the Additional Default Payment Percentage

39. Any winning bidder that, after the close of an auction, defaults—by, for example, failing to remit the required down payment within the prescribed period of time, to submit a timely long-form application, or to make full payment—or is otherwise disqualified is liable for a default payment under 47 CFR 1.2104(g)(2). This payment consists of a deficiency payment, equal to the difference between the amount of the bidder's bid and the amount of the winning bid the next time a license covering the same spectrum is won in an auction, plus an additional payment equal to a percentage of the defaulter's bid or of the subsequent winning bid, whichever is less.

40. As previously noted by the Commission, defaults weaken the integrity of the auctions process and impede the deployment of service to the public. Given the nature of the service and the inventory of the licenses being offered in Auction 86, the Bureau believes that an additional default payment percentage of fifteen percent will provide a sufficient deterrent to defaults. Accordingly, the Bureau proposes an additional default payment of fifteen percent of the relevant bid for Auction 86 and seeks comment on this proposal.

III. Commission *ex parte* Rules

41. This proceeding has been designated as a permit-but-disclose proceeding in accordance with the Commission's *ex parte* rules. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. Other rules pertaining to oral and written *ex parte* presentations in permit-but-disclose proceedings are set forth in 47 CFR 1.1206(b).

Federal Communications Commission.

Gary D. Michaels,

Deputy Chief, Auctions and Spectrum Access Division, WTB.

[FR Doc. E9–11076 Filed 5–11–09; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Board of Governors of the Federal Reserve System.

TIME AND DATE: 11:30 a.m., Monday, May 18, 2009.

PLACE: Marriner S. Eccles Federal Reserve Board Building, 20th and C Streets, N.W., Washington, D.C. 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
2. Any items carried forward from a previously announced meeting.

FOR FURTHER INFORMATION CONTACT: Michelle Smith, Director, or Dave Skidmore, Assistant to the Board, Office of Board Members at 202–452–2955.

SUPPLEMENTARY INFORMATION: You may call 202–452–3206 beginning at approximately 5 p.m. two business days before the meeting for a recorded announcement of bank and bank holding company applications scheduled for the meeting; or you may contact the Board's Web site at *http://www.federalreserve.gov* for an electronic announcement that not only lists applications, but also indicates procedural and other information about the meeting.

Board of Governors of the Federal Reserve System, May 8, 2009.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E9–11199 Filed 5–8–09; 4:15 pm]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Biodefense Science Board; Notification of a Public Teleconference

AGENCY: Department of Health and Human Services, Office of the Secretary.

ACTION: Notice.

SUMMARY: As stipulated by the Federal Advisory Committee Act, the U.S. Department of Health and Human Services is hereby giving notice that the National Biodefense Science Board (NBSB) will be holding a public teleconference. The meeting is open to the public.

DATES: The NBSB will hold a public teleconference on May 22, 2009. The teleconference will be held from 2 p.m. to 4 p.m. EDT.

ADDRESSES: The conference will be conducted by phone. Public Conference Call-in Number is available by e-mailing *NBSB@hhs.gov* and will be posted on the NBSB Web site at *http://www.hhs.gov/aspr/omsph/nbsb/index.html* prior to the meeting. Participants should call in 15 minutes prior to the call and will be asked to provide their name, title, and organization.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing to obtain general information concerning this public teleconference should contact *NBSB@hhs.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to section 319M of the Public Health Service Act (42 U.S.C. 247d–7f) and section 222 of the Public Health Service Act (42 U.S.C. 217a), the Department of Health and Human Services established the National Biodefense Science Board. The Board shall provide expert advice and guidance to the Secretary on scientific, technical, and other matters of special interest to the Department of Health and Human Services regarding current and future chemical, biological, nuclear, and radiological agents, whether naturally occurring, accidental, or deliberate. The Board may also provide advice and guidance to the Secretary on other matters related to public health emergency preparedness and response.

Background: The purpose of the May 22, 2009 teleconference is to discuss issues regarding the 2009 H1N1 influenza outbreak. A special meeting of the Board is being convened to assure that the public is given the opportunity to provide comments on the actions and deliberations of the Board regarding the ongoing response to the H1N1 influenza. There will be time for members of the public to present their comments to the Board on this subject matter.

Availability of Materials: The agenda and other materials will be posted on the NBSB Web site at *http://www.hhs.gov/aspr/omsph/nbsb/index.html* prior to the meeting.

Procedures for Providing Public Input: Interested members of the public may submit relevant written or oral

information for the NBSB to consider. All written comments must be received prior to May 15, 2009 and should be sent by e-mail to *NBSB@hhs.gov* with ''NBSB Public Comment'' as the subject line.

Oral Statements: In general, individuals or groups requesting an oral presentation at a public NBSB teleconference will be limited to three minutes per speaker, with no more than a total of 20 minutes for all speakers. To be placed on the public participant list, you should notify the operator when you enter the call-in number.

Dated: May 5, 2009.

RADM William C. Vanderwagen,

Assistant Secretary for Preparedness and Response, U.S. Department of Health and Human Services.

[FR Doc. E9–11041 Filed 5–7–09; 4:15 pm]

BILLING CODE 4150–37–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Public Meeting of the Federal Coordinating Council on Comparative Effectiveness Research

AGENCY: Office of the Secretary, HHS.

ACTION: Notice of public meeting.

SUMMARY: Authorized by the American Recovery and Reinvestment Act of 2009 (ARRA), the Federal Coordinating Council for Comparative Effectiveness Research will help coordinate research and guide investments in comparative effectiveness research funded by the Recovery Act. The Coordinating Council is holding this meeting to hear from the public about their views on the Council's activities.

DATES: The meeting, which is the second of three public meetings that the Coordinating Council expects to convene, will be held on Wednesday, May 13, 2009, from 2:30 p.m.–5:30 p.m. CDT.

ADDRESSES: The meeting will be held at the University of Illinois at Chicago Forum, 725 W. Roosevelt Rd., (MC 126) Chicago, IL 60608. In addition, the meeting will be Web cast and individuals may also participate by audioconference.

FOR FURTHER INFORMATION CONTACT: Patrick Conway, Office of the Secretary, HHS, Telephone: 202–690–7858; E-mail: *Patrick.conway@hhs.gov.*

SUPPLEMENTARY INFORMATION: The Coordinating Council will assist the agencies of the Federal Government, including HHS, Departments of Veterans Affairs and Defense, as well as others, to coordinate comparative effectiveness and related health services research. The Coordinating Council also will provide input on priorities for the $400 million fund in the Recovery Act that the Secretary will allocate to advance this type of research.

The Coordinating Council will not recommend clinical guidelines for payment, coverage or treatment. The Coordinating Council will consider the needs of populations served by Federal programs and opportunities to build and expand on current investments and priorities.

Registration and Other Information About the Meeting: Individuals may participate in the meeting either by attending in person, viewing the meeting over the Internet, or by audioconference. Individuals may also nominate themselves to make a 3-minute statement before the Coordinating Council. In addition, individuals may submit written statements for the Coordinating Council's consideration, regardless of whether individuals are chosen to give an oral statement. The Coordinating Council does request that individuals nominating themselves to make an oral statement make every effort to be present to give their statement in person. However, to facilitate hearing as many different viewpoints as possible, consideration will be given to individuals who would make their oral statements via audioconference.

Oral statements, as well as written statements submitted for the Coordinating Council's consideration, should address the following kinds of questions:

- What types of investments in infrastructure for comparative effectiveness research should the Coordinating Council consider?
- What criteria should the Coordinating Council consider when evaluating different investment options?
- What Federal government activities in the area of comparative effectiveness research should the Coordinating Council focus its attention on?
- How can the Coordinating Council best foster integration of these activities across the programs managed by the Departments of Health and Human Services, Defense, and Veterans Affairs?
- What steps should the Coordinating Council consider to help ensure that public- and private-sector efforts in the area of comparative effectiveness research are mutually supportive?
- What information on the Coordinating Council's activities would be most useful?

The Office of the Secretary requests that interested persons register to participate and indicate (a) whether they will attend in person, view the Coordinating Council's meeting over the Internet, or listen by audioconference; (b) whether they are nominating themselves to give a 3-minute oral statement; and/or, (c) if they intend to submit a written statement for the Coordinating Council to consider. Per Section 3, ''Ensuring Responsible Spending of Recovery Act Funds,'' 74 FR 12531, 12533 (March 25, 2009), individuals who wish to make an oral statement will be asked to disclose whether they are registered lobbyists.

Individuals should register to participate no later than Monday, May 11, at 5 p.m., EDT. Due to time constraints, not everyone who volunteers to make an oral statement will be able to do so. However, all statements received will be considered by the Coordinating Council as part of their deliberations.

To register, go to *http://www.hhs.gov/recovery/programs/CER/index.html.* Individuals who do not register in advance will only be able to attend the meeting in person if space is available. Information on how to view the meeting over the Internet and participate by audioconference will be sent to registered participants in advance and posted on the Recovery.gov Web site on Tuesday, May 12, 2009. The number of audioconference lines for non-registered participants may be limited.

If sign language interpretation or other reasonable accommodation for a disability is needed, please contact Mr. Donald L. Inniss, Director, Office of Equal Employment Opportunity Program, Program Support Center, on (301) 443–1144.

Each public meeting is scheduled for a three-hour period, but will end sooner if participants have finished providing input before the time period expires. We are asking for input concerning specific topics as follows:

To help interested individuals prepare for the meetings, we invite review of the Act. The full text is set forth on the Internet at: *http://www.gpoaccess.gov/plaws/* (search for ''Public Law 111–50'').

Also, the Office of the Secretary has an e-mail notification list to provide interested parties with automatic notification of relevant information posted on Recovery.gov and the HHS Web site (*http://www.hhs.gov/recovery/programs/CER/index.html*) concerning the Federal Coordinating Council. To be added to the e-mail notification list, send your e-mail address to *CoordinatingCouncil@bls.com,* and use

the words ''Add me to the list'' in the subject line.

Dated: May 6, 2009.

Patrick Conway,

Executive Director, Federal Coordinating Council for Comparative Effectiveness Research.

[FR Doc. E9–11044 Filed 5–7–09; 4:15 pm]

BILLING CODE 4150–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; Comment Request; CareerTrac

SUMMARY: In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the Fogarty International Center (FIC) and the National Institute of Environmental Health Sciences (NIEHS), the National Institutes of Health (NIH) will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

Proposed Collection: Title: CareerTrac. *Type of Information Collection Request:* REVISION. *Need and Use of Information Collection:* This data collection system is being developed to track, evaluate and report short and long-term outputs, outcomes and impacts of international trainees involved in health research training programs—specifically tracking this for at least ten years following training by having Principal Investigators enter data after trainees have completed the program. The data collection system provides a streamlined, web-based application permitting principal investigators to record career achievement progress by trainee on a voluntary basis. FIC and NIEHS management will use this data to monitor, evaluate and adjust grants to ensure desired outcomes are achieved, comply with OMB Part requirements, respond to congressional inquiries, and as a guide to inform future strategic and management decisions regarding the grant program. *Frequency of Response:* Annual and periodic. *Affected Public:* None. *Type of Respondents:* Principal Investigators and/or their administrators funded by FIC and NIEHS. The annual reporting burden is as follows: *Estimated Number of Respondents:* 275; *Estimated Number of Responses per Respondent:* 15; *Average Burden Hours per Response:* .50; and *Estimated Total Annual Burden Hours Requested:* 2063. The annualized cost to respondents is estimated at $82,500: There are no Capital Costs to report. There are no Operating or Maintenance Costs to report.

Request for Comments: Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact Dr. Linda Kupfer, Acting Director, Division of International Science Policy, Planning and Evaluation, Fogarty International Center, National Institutes of Health, 16 Center Drive, Building 16, Bethesda, MD 20892–6705 or call non-toll-free number 301–496–3288 or e-mail your request, including your address to *kupferl@mail.nih.gov.*

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

Dated: April 30, 2009.

Timothy J. Tosten,

Executive Officer, FIC National Institutes of Health.

[FR Doc. E9–11018 Filed 5–11–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; 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: National Institute of Mental Health Special Emphasis Panel, NIMH Translational Research.

Date: May 28, 2009.

Time: 2 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852. (Telephone Conference Call).

Contact Person: Allan F. Mirsky, PhD, Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Boulevard, Rm. 6157, MSC 9609, Bethesda, MD 20892–9609. 301–496–2551. *afmirsky@mail.nih.gov.*

Name of Committee: National Institute of Mental Health Special Emphasis Panel, NIMH K99 Summer Review.

Date: June 11, 2009.

Time: 1 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852. (Telephone Conference Call).

Contact Person: Megan Libbey, PhD, Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6148, MSC 9609, Rockville, MD 20852–9609. 301–402–6807. *libbeym@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: May 5, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–11001 Filed 5–11–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; 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: National Institute of Mental Health Initial Review Group; Interventions Committee for Disorders Involving Children and Their Families.

Date: June 8–9, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: St. Gregory Hotel, 2033 M Street, NW., Washington, DC 20036.

Contact Person: David I. Sommers, PhD, Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, National Institutes of Health, 6001 Executive Blvd., Room 6154, MSC 9606, Bethesda, MD 20892–9606, 301–443–7861, *dsommers@mail.nih.gov*.

Name of Committee: National Institute of Mental Health Initial Review Group; Mental Health Services in Non-Specialty Settings.

Date: June 9–10, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Melrose Hotel, 2430 Pennsylvania Ave., NW., Washington, DC 20037.

Contact Person: Aileen Schulte, PhD, Scientific Review Administrator, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd, Room 6140, MSC 9608, Bethesda, MD 20892–9608, 301–443–1225, *aschulte@mail.nih.gov.*

Name of Committee: National Institute of Mental Health Initial Review Group; Mental Health Services in MH Specialty Settings.

Date: June 11, 2009.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Melrose Hotel, Melrose Hotel, 2430 Pennsylvania Ave., NW., Washington, DC 20037.

Contact Person: Marina Broitman, PhD, Scientific Review Administrator, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6153, MSC 9608, Bethesda, MD 20892–9608, 301–402–8152, *mbroitma@mail.nih.gov.*

Name of Committee: National Institute of Mental Health Initial Review Group, Interventions Committee for Adult Disorders.

Date: June 16–17, 2009.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: St. Gregory Hotel, 2033 M Street, NW., Washington, DC 20036.

Contact Person: David I. Sommers, PhD, Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, National Institutes of Health, 6001 Executive Blvd., Room 6154, MSC 9606, Bethesda, MD 20892–9606, 301–443–7861, *dsommers@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: May 5, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–11016 Filed 5–11–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Board of Scientific Counselors, National Center for Injury Prevention and Control (BSC, NCIPC)

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 committee:

Time and Date: 8:30 a.m.—11:45 a.m., May 28, 2009 (Open), 1 p.m.–4:30 p.m., May 28, 2009 (Closed).

Place: CDC, 1825 Century Blvd., First Floor, Rooms 1A and 1B, Atlanta, Georgia 30345.

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: The board makes recommendations regarding policies, strategies, objectives, and priorities, and reviews progress toward injury prevention goals and provides evidence in injury prevention-related research and programs. The board provides advice on the appropriate balance of intramural and extramural research, and provides advice on the structure, progress and performance of intramural programs. The Board of Scientific Counselors is also designed to provide guidance on extramural scientific program matters, including the: (1) Review of extramural research concepts for funding opportunity announcements; (2) conduct of Secondary Peer Review of extramural research grants, cooperative agreements, and contracts applications received in response to the funding opportunity announcements as it relates to the Center's programmatic balance and mission; (3) submission of secondary review recommendations to the Center Director of applications to be considered for funding support; (4) review of research portfolios, and (5) review of program proposals. The board shall provide guidance on the National Center of Injury Prevention and Control's programs and research activities by conducting scientific peer review of intramural research and programs within the National Center for Injury Prevention and Control; by ensuring adherence to Office of Management and Budget requirements for intramural peer review; and by monitoring the overall direction, focus, and success of the National Center for Injury Prevention and Control.

Matters To Be Discussed: The Board of Scientific Counselors at this meeting will conduct the Secondary Peer Review of extramural research grant and cooperative agreement applications received in response to the funding opportunity announcements as it relates to the Center's programmatic balance and mission and make secondary review recommendations to the Center Director of applications to be considered for funding support. Applications for the following FOAs will be discussed and voted upon: (1) RFA–CE–09–005, Research Priorities in Acute Injury Care (RO1); (2) RFA–CE–09–007 Research Grants for Preventing Violence and Violence-Related Injury (RO1); (3) RFA–CE–09–004, Unintentional Poisoning from Drug Overdoses in Adults (R21); (4) RFA–CE–09–002, Adaptations of Evidence-Based Parenting Programs to Engage Fathers in Maltreatment Prevention (UO1); (5) RFA–CE–09–008, Identifying Neighborhood Level Protective and Promotive Factors for Youth Violence (UO1);(6) RFA–CE–09–009, Youth Violence Prevention through Economic, Environmental, and Policy Change (UO1); (7) RFA–CE–09–003, Preventing Sexual Violence Perpetration: Targeting Modifiable Risk Factors (UO1); and (8) PA08–050, Small Business Innovative Research. Agenda items are subject to change as priorities dictate.

Contact Person for More Information: Gwendolyn Cattledge, Ph.D., MSEH, Executive Secretary, NCIPC, CDC, 4770 Buford Highway, NE., Mailstop F–63, Atlanta, Georgia 30341, Telephone: (770) 488–1430. 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: May 5, 2009.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. E9–11027 Filed 5–11–09; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Complementary & Alternative Medicine; 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 Center for Complementary and Alternative Medicine, Special Emphasis Panel, CAM Approaches in the Management of HIV Disease and Its Complications (R01).

Date: June 12, 2009.

Time: 12 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: NCCAM, 6707 Democracy Boulevard, Suite 401, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Ray Bramhall, PhD, Scientific Review Officer, Office of Scientific Review, National Center for Complementary and Alternative Medicine, NIH, 6707 Democracy Blvd., Suite 401, Bethesda, MD 20892. *bramhallr@mail.nih.gov.*

Dated: May 5, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–11017 Filed 5–11–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2009–0335]

National Boating Safety Advisory Council; Vacancies

AGENCY: Coast Guard, DHS.

ACTION: Request for applications.

SUMMARY: The Coast Guard seeks applications for membership on the National Boating Safety Advisory Council (NBSAC). NBSAC advises the Coast Guard on matters related to recreational boating safety.

DATES: Application forms should reach us on or before July 23, 2009.

ADDRESSES: This notice and the application form are available on the Internet at: *http://homeport.uscg.mil/NBSAC.* You may request an application form by writing to Commandant, Boating Safety Division (CG–54221), U.S. Coast Guard, 2100 Second Street, SW., Washington, DC 20593–0001; by calling 202–372–1062; or by faxing 202–372–1932. Please send your application in written form to the street address listed above.

FOR FURTHER INFORMATION CONTACT: Mr. Jeff Ludwig, Executive Secretary of NBSAC, telephone 202–372–1062, fax 202–372–1932, or e-mail: *jeffrey.a.ludwig@uscg.mil.*

SUPPLEMENTARY INFORMATION: The National Boating Safety Advisory Council (NBSAC) is a Federal advisory committee under the Federal Advisory Committee Act (codified at 5 U.S.C. App.). NBSAC advises the Coast Guard regarding regulations and other major boating safety matters. NBSAC has 21 members: Seven State officials responsible for State boating safety programs, seven recreational boat and associated equipment manufacturers, and seven national recreational boating organizations and the general public. Members are appointed by the Secretary of the Department of Homeland Security.

NBSAC normally meets twice each year at a location selected by the Coast Guard. When attending NBSAC meetings, members are provided travel expenses and per diem.

We will consider applications received in response to this notice for the following seven positions that expire or become vacant in December 2009:

- Two representatives of State officials responsible for State boating safety programs,
- Two representatives of recreational boat and associated equipment manufacturers, and
- Three representatives of the general public or national recreational boating organizations.

Applicants are considered for membership on the basis of their particular expertise, knowledge, and experience in recreational boating safety. Prior applicants should submit an updated application to ensure consideration for the vacancies announced in this notice. Each member serves for a term of up to three years. Members may serve consecutive terms. In support of the policy of the U. S. Coast Guard on gender and ethnic diversity, we encourage qualified women and members of minority groups to apply.

If you are selected as a non-representative member, or as a member who represents the general public, you will be appointed and serve as a special Government employee (SGE) as defined in section 202(a) of title 18, United States Code. As a candidate for appointment as a SGE, applicants are required to complete a Confidential Financial Disclosure Report (OGE Form 450). A completed OGE Form 450 is not releasable to the public except under an order issued by a Federal court or as otherwise provided under the Privacy Act (codified at 5 U.S.C. 552a). Only the Designated Agency Ethics Official or his or her designate may release a Confidential Financial Disclosure Report.

Dated: May 5, 2009.

J.A. Watson,

Rear Admiral, U.S. Coast Guard, Director of Prevention Policy.

[FR Doc. E9–11055 Filed 5–11–09; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5285–N–18]

Notice of Proposed Information Collection: Comment Request; Home Mortgage Disclosure Act (HMDA) Loan/Application Register

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* July 13, 2009.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Lillian Deitzer, Departmental Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410; e-mail *Lillian_L._Deitzer@HUD.gov* or telephone (202)402–8048.

FOR FURTHER INFORMATION CONTACT: Chuck Capone, Director, Office of

Evaluation, Office of Finance and Budget, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 755–7500 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection 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 agency's estimate of the burden of the proposed collection of information; (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 the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Home Mortgage Disclosure Act (HMDA) Loan/Application Register.

OMB Control Number, if applicable: 2502–0539.

Description of the need for the information and proposed use: The HMDA Loan/Application Register collects information from mortgage lenders on application for, and originations and purchases of, mortgage and home improvement loans. Nondepository mortgage lending institutions are required to use the information generated as a running log throughout the calendar year, and send the information to HUD by March 1 of the following calendar year.

Agency form numbers, if applicable: FR HMDA–LAR.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The estimated total number of hours needed to prepare the information collection is 132,000; the number of respondents is 1,100 generating approximately 1,100 annual responses; the frequency of response is on occasion and annually; and the estimated time needed to prepare the response is an average of 120 hours.

Status of the proposed information collection: This is an extension of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: May 5, 2009.

Ronald Y. Spraker,

Acting General Deputy Assistant Secretary for Housing—Deputy Federal Housing Commissioner.

[FR Doc. E9–10980 Filed 5–11–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5311–N–01]

Notice of Availability: Notice of Funding Availability (NOFA) for American Recovery and Reinvestment Act Capital Fund Recovery Competition Grants

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice.

SUMMARY: Through this notice, HUD announces the availability on its Web site of the application information, eligibility requirements, review and selection procedures, and other program requirements governing the availability of $995 million in Capital Fund Recovery Competition Grants under the American Recovery and Reinvestment Act of 2009. The assistance is intended to preserve and create jobs, promote economic recovery, assist those impacted by the recession, and invest in transportation, environment, and infrastructure that will provide long-term economic benefits. The notice establishing the program requirements is available on the HUD Web site at: *http://www.hud.gov/recovery.*

FOR FURTHER INFORMATION CONTACT: If you have a question or need a clarification, you may contact the Office of Capital Improvements by sending an email message to *PIHOCI@hud.gov.* Please see *http://www.hud.gov/offices/pih/programs/ph/capfund/ocir.cfm*, which can be accessed from *http://www.hud.gov/recovery/,* for additional information.

Dated: May 5, 2009.

Paula O. Blunt,

General Deputy Assistant Secretary for Public and Indian Housing.

[FR Doc. E9–11162 Filed 5–8–09; 4:15 pm]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

North Bay Water Recycling Program (formerly North San Pablo Bay Restoration and Reuse Project), California

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of availability of the Draft Environmental Impact Statement/Environmental Impact Report (EIS/EIR) and notice of public hearings.

SUMMARY: The Bureau of Reclamation (Reclamation), as the National Environmental Policy Act Federal lead agency, and the Sonoma County Water Agency, acting as administrator for the North Bay Water Reuse Authority (NBWRA) and the California Environmental Quality Act State lead agency, have made available for public review and comment the North Bay Water Recycling Program Draft EIS/EIR. The purpose of the project is to create a regional wastewater reuse project to provide recycled water for agricultural, urban, and environmental uses as an alternative to discharging treated wastewater to San Pablo Bay. In this way, water demand issues and wastewater discharge issues of the region can be addressed in an integrated and synergistic manner. Three public hearings will be held to receive comments from individuals and organizations on the Draft EIS/EIR.

DATES: Three public hearings have been scheduled to receive oral or written comments regarding environmental effects:

- June 9, 2009, 6 p.m. to 7:30 p.m., Novato, CA.
- June 10, 2009, 6:30 p.m. to 7:30 p.m., Sonoma, CA.
- June 11, 2009, 6 p.m. to 7:30 p.m., Napa, CA.

A 1-hour open house to view project information and interact with the project team will precede the public hearings.

The Draft EIS/EIR will be available for a 60-day public review period. Comments are due by July 13, 2009.

ADDRESSES: The public hearings will be held at the following locations:

- Novato at Margaret Todd Senior Center, 1560 Hill Road.
- Sonoma at Sonoma Community Center, 276 East Napa Street.
- Napa at Napa Elks Lodge, 2840 Soscol Avenue.

Written comments on the Draft EIS/EIR should be sent to Mr. Marc Bautista, Sonoma County Water Agency, 404 Aviation Boulevard, Santa Rosa, CA

95403; or e-mailed to *mbautista@scwa.ca.gov.*

Copies of the Draft EIS/EIR may be requested from Mr. Marc Bautista, by writing to the Sonoma County Water Agency (SCWA), P.O. Box 11628, Santa Rosa, CA 95406; by calling 707–547–1998; or by e-mailing *mbautista@scwa.ca.gov.*

The Draft EIS/EIR is also accessible from the following Web site: *http://www.usbr.gov/mp/nepa/nepa_projdetails.cfm?Project_ID=2157.*

FOR FURTHER INFORMATION CONTACT: Mr. Marc Bautista, 707–547–1998; *mbautista@scwa.ca.gov.*

SUPPLEMENTARY INFORMATION: The Draft EIS/EIR documents the direct, indirect, and cumulative effects to the physical, biological, and socioeconomic environment that may result from North Bay Recycled Water Program.

The NBWRA, comprised of four wastewater utilities and one water agency in the North San Pablo Bay region of California, plans to expand the use of recycled water and reduce discharge into San Pablo Bay with this long-term inter-agency project. The area encompasses 318 square miles of land in Marin, Sonoma, and Napa Counties. Participants include Las Gallinas Valley Sanitary District (LGVSD), Novato Sanitary District (Novato SD), Sonoma Valley County Sanitation District (SVCSD), and Napa Sanitation District (Napa SD). In addition, North Marin Water District and the County of Napa are participating financially and providing support. Sonoma County Water Agency is acting as project administrator, and will be the CEQA Lead Agency. Reclamation is the Federal lead agency for NEPA because the Proposed Action may be partially federally funded under Title XVI of Public Law 102–575, as amended, which provides a mechanism for Federal participation and cost sharing in approved water reuse projects.

The North San Pablo Bay regions of Sonoma, Marin and Napa Counties are facing long-term water supply shortfalls. Surface and groundwater supplies within these areas are limited, and some local groundwater basins are overpumped, with detrimental effects on water levels and water quality. Recycled water can augment local water supplies on a regional basis, provide water that meets agricultural and municipal nonpotable quality needs, and provide increased reliability.

Additionally, reliable water supply is needed in order to continue the restoration of tidal wetlands in San Pablo Bay that contain habitat for endangered and threatened species. Wastewater treatment agencies also face strict regulatory limits on the timing and quality of the treated wastewater they can discharge to San Pablo Bay, as well as the rivers and streams that flow to it. By treating wastewater to the stricter regulatory levels required for reuse, the agencies can recycle the water productively to address water supply needs and reduce the amount released to San Pablo Bay and its tributaries.

The project would provide recycled water for agricultural, urban, and environmental uses thereby reducing reliance on local and imported surface water and groundwater supplies and reducing the amount of treated effluent releases to San Pablo Bay and its tributaries. Some of the project benefits include reduction of wastewater discharge to regional waterways and the resulting environmental benefit to fish and wildlife.

NBWRA has developed a regional program for expanding cooperative water reuse within the North San Pablo Bay region. The Proposed Action consists of distribution facilities, treatment capacity improvements, and storage to make between 17,000 and 25,000 acre-feet per year of recycled water available for environmental, agricultural, and municipal reuse, consistent with the California Code of Regulations, Title 22, pertaining to the use of tertiary-treated recycled water. At this time, there are no known or possible Indian trust assets or environmental justice issues associated with the Proposed Action.

Special Assistance for Public Meetings

If special assistance is required to participate in the public meetings, please contact David White at 916–978–5074, TDD 916–978–5608, or via e-mail at *dtwhite@mp.usbr.gov.* Please notify Mr. White as far in advance as possible to enable Reclamation to secure the needed services. If a request cannot be honored, the requestor will be notified. A telephone device for the hearing impaired (TDD) is available at 916–978–5608.

Public Disclosure

Before including your name, 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 1, 2009.

Richard M. Johnson,

Acting Regional Director, Mid-Pacific Region.

[FR Doc. E9–11040 Filed 5–11–09; 8:45 am]

BILLING CODE 4310–MN–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R6–R–2009–N0027];[60138–1265–6CCP–S3]

Final Comprehensive Conservation Plan for 12 National Wildlife Refuges in North Dakota

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability: final comprehensive conservation plan and finding of no significant impact for environmental assessment.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce that our final Comprehensive Conservation Plan (CCP) for 12 National Wildlife Refuges (Refuges) in the State of North Dakota is available. This final CCP describes how we intend to manage these particular Refuges in the State for the next 15 years.

ADDRESSES: To obtain a copy of the CCP, write to John Esperance, Division of Refuge Planning, U.S. Fish and Wildlife Service, 134 Union Boulevard, Suite 300, Lakewood, CO 80228; or download a copy from *http://mountain-prairie.fws.gov/planning.*

FOR FURTHER INFORMATION CONTACT: John Esperance, 303–236–4369 (phone); 303–236–4792 (fax); or *John_Esperance@fws.gov* (e-mail).

SUPPLEMENTARY INFORMATION: The 12 North Dakota Refuges this CCP covers are Audubon, Chase Lake, Kellys Slough, Lake Alice, Lake Ilo, Lake Nettie, Lake Zahl, McLean, Shell Lake, Stump Lake, Stewart Lake, and White Lake. These sites are located throughout the State of North Dakota.

All 12 Refuges were established under authority to provide breeding ground for migratory birds and other wildlife. These 12 Refuges conserve, restore, and enhance the ecological diversity of grasslands and wetlands of the North Dakota prairie to support healthy populations of ducks and geese, other migratory birds, and native species. Through this work, these 12 Refuges provide vital resting and breeding habitat.

We made available our draft CCP and environmental assessment to the public for a 30-day review and comment period by publishing a **Federal Register** notice

on August 28, 2008 (73 FR 50834). The draft CCP/EA evaluated 3 alternatives for managing the 12 Refuges for the next 15 years.

The preferred alternative will provide for enhanced wetland and upland management, where warranted, on Refuge lands. Management objectives for various habitat types are based on habitat preferences of groups of target species, such as waterfowl, migratory shore birds, grassland bird species, and priority species. Refuge staff will focus on high-priority tracts and medium-priority tracts. The Refuge staff will implement compatible production enhancement techniques for targeted migratory bird populations. The Refuge staff will maintain existing environmental education and public use programs, with additional waterfowl emphasis. We propose, at a future date, a new environmental learning center for Audubon Refuge, and we are also planning interpretive panels for Lake Alice Refuge.

We selected the preferred alternative because it best meets the purposes and goals of the Refuge, as well as the mission and goals of the National Wildlife Refuge System. The preferred alternative will benefit migrating and nesting waterfowl, shore birds, migratory upland birds, and resident wildlife. Environmental education and partnerships will result in improved wildlife-dependent recreational opportunities. Cultural and historical resources as well as federally listed species will be protected.

We are furnishing this notice to advise other agencies and the public of the availability of the final CCP and Finding of No Significant Impact, to provide information on desired conditions for the Refuges, and to detail how we will implement management strategies. Based on the review and evaluation of the information contained in the environmental assessment, our Regional Director has determined that implementation of the final CCP does not constitute a major Federal action that would significantly affect the quality of the human environment within the meaning of Section 102(2)(c) of the National Environmental Policy Act. Therefore, an Environmental Impact Statement will not be prepared. Future site-specific proposals discussed in the final CCP will be addressed in separate planning efforts with full public involvement.

Dated: March 10, 2009.

Noreen E Walsh,

Deputy Regional Director.

[FR Doc. E9–11024 Filed 5–11–09; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLUT91000–L11400000–PH0000–24–1A]

Notice of Utah's Resource Advisory Council (RAC)/Recreation RAC Meeting

AGENCY: Bureau of Land Management, Department of Interior.

ACTION: Notice of Utah's Resource Advisory Council (RAC)/Recreation RAC Meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management's (BLM) Utah Resource Advisory Council (RAC)/Recreation RAC will meet as indicated below.

DATES: The Utah Resource Advisory Council (RAC)/Recreation RAC will meet June 19 (8:30 a.m.–4 p.m.) in Salt Lake City, Utah.

ADDRESSES: The Council will meet at the Radisson Hotel (Wasatch 4 meeting room), 215 West South Temple, Salt Lake City, Utah.

FOR FURTHER INFORMATION CONTACT: Contact Sherry Foot, Special Programs Coordinator, Utah State Office, Bureau of Land Management, P.O. Box 45155, Salt Lake City, Utah 84145–0155; phone (801) 539–4195.

SUPPLEMENTARY INFORMATION: The 15-member Council advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of planning and management issues associated with public land management in Utah. Planned agenda topics include a welcome and introduction of new Council members; an update of Utah-BLM issues; and, recreation fee increase proposals from the Bureau of Land Management (Sand Flats Recreation Area and Moab campgrounds) and U.S. Forest Service (Christmas tree permit fee increases) for the RAC's approval. A half-hour public comment period, where the public may address the Council, is scheduled from 3:15 p.m.–3:45 p.m. Written comments may be sent to the Bureau of Land Management addressed listed above. All meetings are open to the public; however, transportation, lodging, and meals are the responsibility of the participating public.

Dated: May 5, 2009.

Selma Sierra,

State Director.

[FR Doc. E9–11023 Filed 5–11–09; 8:45 am]

BILLING CODE 4310–DQ–P

DEPARTMENT OF THE INTERIOR

National Park Service

National Preservation Technology and Training Board—National Center for Preservation Technology and Training: Meeting

AGENCY: National Park Service, U.S. Department of the Interior.

ACTION: Notice.

SUMMARY: Notice is hereby given in accordance with the Federal Advisory Committee Act (FACA) (5 U.S.C. Appendix (1988)), that the Preservation Technology and Training Board (PTTBoard) of the National Center for Preservation Technology and Training, National Park Service, will meet on Friday and Saturday, May 29–30, 2009 in Natchitoches, Louisiana.

The PTTBoard was established by Congress to provide leadership, policy advice, and professional oversight to the National Center for Preservation Technology and Training (NCPTT) in compliance with Section 404 of the National Historic Preservation Act of 1966, as amended, (16 U.S.C. 470x–2(e)).

The PTTBoard will meet at Lee H. Nelson Hall, the headquarters of NCPTT, at 645 University Parkway, Natchitoches, LA 71457— telephone (318) 356–7444. The meeting will run from 9 a.m. to 5 p.m. on May 29 and from 9 a.m. to 5 p.m. on May 30.

The PTTBoard's meeting agenda will include: review and comment on NCPTT FY2008 accomplishments and operational priorities for FY2009; FY2009 and FY2010 National Center budget and initiatives; the Pocantico Conference on Sustainability in Preservation; revitalization of the Friends of NCPTT; and Board workgroup reports.

The PTTBoard meeting is open to the public. Facilities and space for accommodating members of the public are limited, however, and persons will be accommodated on a first-come, first-served basis. Any member of the public may file a written statement concerning any of the matters to be discussed by the PTTBoard.

Persons wishing more information concerning this meeting, or who wish to submit written statements, may contact: Mr. Kirk A. Cordell, Executive Director, National Center for Preservation Technology and Training, National Park Service, U.S. Department of the Interior, 645 University Parkway, Natchitoches, LA 71457—telephone (318) 356–7444. In addition to U.S. Mail or commercial delivery, written comments may be sent by fax to Mr. Cordell at (318) 356–9119.

Minutes of the meeting will be available for public inspection no later than 90 days after the meeting at the office of the Executive Director, National Center for Preservation Technology and Training, National Park Service, U.S. Department of the Interior, 645 University Parkway, Natchitoches, LA 71457—telephone (318) 356–7444.

Dated: April 28, 2009.

Kirk A. Cordell,

Executive Director, National Center for Preservation Technology and Training, National Park Service.

[FR Doc. E9–11026 Filed 5–11–09; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1149 (Final)]

Circular Welded Carbon Quality Steel Line Pipe From China

Determination

On the basis of the record [1] developed in the subject investigation, the United States International Trade Commission (Commission) determines, pursuant to section 735(b) of the Tariff Act of 1930 (19 U.S.C. 1673d(b)) (the Act), that an industry in the United States is materially injured or threatened with material injury by reason of imports from China of circular welded carbon quality steel line pipe from China, provided for in subheadings 7306.19.10 and 7306.19.51 of the Harmonized Tariff Schedule of the United States, that have been found by the Department of Commerce (Commerce) to be sold in the United States at less than fair value (LTFV).[2]

Background

The Commission instituted this investigation effective April 3, 2008, following receipt of a petition filed with the Commission and Commerce by Maverick Tube Corp. (Houston, TX), Tex-Tube Co. (Houston, TX), U.S. Steel Corp. (Pittsburgh, PA), and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO–CLC (Pittsburgh, PA).[3] The final phase of the investigation was scheduled by the Commission following notification of a preliminary determination by Commerce that imports of circular welded carbon quality line pipe from China were being sold at LTFV within the meaning of section 733(b) of the Act (19 U.S.C. 1673b(b)). Notice of the scheduling of the final phase of the Commission's investigation and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of September 22, 2008 (73 FR 54618) and December 12, 2008 (73 FR 75770). The hearing was held in Washington, DC, on November 24, 2008, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determination in this investigation to the Secretary of Commerce on May 6, 2009. The views of the Commission are contained in USITC Publication 4075 (May 2009), *entitled Circular Welded Carbon Quality Line Pipe from China: Investigation No. 731–TA–1149 (Final*).

By order of the Commission.

Issued: May 6, 2009.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E9–11045 Filed 5–11–09; 8:45 am]

BILLING CODE 7020–02–P

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

[2] Commissioners Charlotte R. Lane, Irving A. Williamson, and Dean A. Pinkert based their affirmative determinations on findings of present material injury. Chairman Shara L. Aranoff, Vice Chairman Daniel R. Pearson, and Commissioner Deanna Tanner Okun based their affirmative determinations on findings of threat of material injury, and further determined that they would not have found material injury but for the suspension of liquidation.

[3] On April 4, 2008, Wheatland Tube Co. (Sharon, PA) separately filed an entry of appearance in support of the petition. Counsel for petitioning firm Tex-Tube Co. amended its entry of appearance on October 31, 2008, to include domestic producers Northwest Pipe Co. (Vancouver, WA); Stupp Corp. (Baton Rouge, LA); and TMK IPSCO Tubulars (Lisle, IL); the same counsel amended its entry of appearance again on November 3, 2008, to add domestic producer American Steel Pipe Division of ACIPCO (Birmingham, AL).

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Comment Request

AGENCY: National Science Foundation.

ACTION: Submission for OMB Review; Comment Request.

SUMMARY: The National Science Foundation (NSF) has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. This is the second notice for public comment; the first was published in the **Federal Register** at 74 FR 8818, and no comments were received. NSF is forwarding the proposed renewal submission to the Office of Management and Budget (OMB) for clearance simultaneously with the publication of this second notice. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; or (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for National Science Foundation, 725 17th Street, NW., Room 10235, Washington, DC 20503, and to Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 295, Arlington, Virginia 22230 or send e-mail to *chines@nsf.gov.* Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling 703–292–7556.

FOR FURTHER INFORMATION CONTACT: Suzanne H. Plimpton at (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.

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

Title: Request for Proposals.

OMB Control Number: 3145–0080.

Proposed Project: The Federal Acquisition Regulations (FAR) Subpart 15.2—''Solicitation and Receipt of Proposals and Information'' prescribes policies and procedures for preparing and issuing Requests for Proposals. The

FAR System has been developed in accordance with the requirement of the Office of Federal Procurement Policy Act of 1974, as amended. The NSF Act of 1950, as amended, 42 U.S.C. 1870, Sec. II, states that NSF has the authority to:

(c) Enter into contracts or other arrangements, or modifications thereof, for the carrying on, by organizations or individuals in the United States and foreign countries, including other government agencies of the United States and of foreign countries, of such scientific or engineering activities as the Foundation deems necessary to carry out the purposes of this Act, and, at the request of the Secretary of Defense, specific scientific or engineering activities in connection with matters relating to international cooperation or national security, and, when deemed appropriate by the Foundation, such contracts or other arrangements or modifications thereof, may be entered into without legal consideration, without performance or other bonds and without regard to section 5 of title 41, U.S.C.

Use of the Information: Request for Proposals (RFP) is used to competitively solicit proposals in response to NSF need for services. Impact will be on those individuals or organizations who elect to submit proposals in response to the RFP. Information gathered will be evaluated in light of NSF procurement requirements to determine who will be awarded a contract.

Estimate of Burden: The Foundation estimates that, on average, 558 hours per respondent will be required to complete the RFP.

Respondents: Individuals; business or other for-profit; not-for-profit institutions; Federal government; state, local, or tribal governments.

Estimated Number of Responses: 75.

Estimated Total Annual Burden on Respondents: 41,850 hours.

Dated: May 7, 2009.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. E9–11042 Filed 5–11–09; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0200]

Notice; Applications and Amendments to Facility Operating Licenses Involving Proposed No Significant Hazards Considerations and Containing Sensitive Unclassified Non-Safeguards Information or Safeguards Information and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information or Safeguards Information

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 notice. The Act requires the Commission to 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 notice includes notices of amendments containing sensitive unclassified non-safeguards information (SUNSI) or safeguards information (SGI).

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. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland.

The filing of requests for a hearing and petitions for leave to intervene is discussed below.

Within 60 days after the date of publication of this notice, 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, or at *http://www.nrc.gov/reading-rm/doc-collections/cfr/part002/part002–0309.html*. 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.html*. 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 an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the petitioner/requestor must contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov*, or by calling (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances in which the petitioner/requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each petitioner/requestor will need to download the Workplace Forms Viewer™ to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The Workplace Forms Viewer™ is free and is available at *http://www.nrc.gov/site-help/e-submittals/install-viewer.html.* Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.*

Once a petitioner/requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the filer submits its documents through EIE. To be timely, an electronic filing must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system 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 toll-free 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 or the presiding officer of the Atomic Safety and Licensing Board that the petition and/or request should be granted and/or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp,* unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, 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.*

Florida Power Corporation, et al., Docket No. 50–302, Crystal River Unit 3 Nuclear Generating Plant, Citrus County, Florida

Date of amendment request: February 26, 2009.

Description of amendment request: This amendment request contains sensitive unclassified non-safeguards information (SUNSI). The proposed amendment would allow adopting a new methodology, developed by AREVA NP, to analyze the rod ejection accident under extended power uprate conditions. The Crystal River Unit 3 Nuclear Generating Plant (CR–3) Improved Technical Specifications Section 5.6.2.18, ''Core Operating Limits Report (COLR),'' would be revised to add ANP–2788P, ''Crystal River 3 Rod Ejection Accident Methodology Report,'' to the list of approved methods used in developing the COLR. In addition, this amendment would delete Operating License Condition 2.C.(12) that identified topical reports BAW–10164P–A, Revision 4, and BAW–1 0241 P, Revision 0, that were used in developing COLR for Cycle 14. These topical reports were subsequently incorporated into BAW–10179P–A, ''Safety Criteria Methodology for Acceptable Cycle Reload Analysis.''

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 not involve a significant increase in the probability or consequences of an accident previously evaluated.

This amendment addresses analytical tools. A spectrum of Rod Ejection Accident events will be analyzed using this methodology and the results will be factored into developing the Core Operating Limits Report. The improved methods have no impact on any actual event probability. No change to any installed plant components is required to utilize this methodology. The improved methods more accurately predict accident consequences, but cannot increase them.

Therefore, granting this LAR does not involve any increase in the probability or consequences of the Rod Ejection Accident (REA).

2. Does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The amendment addresses analytical tools and therefore, it has no impact on plant performance. Plant systems, structures, or components will not be altered or replaced in order to utilize this methodology. Plant software used to control equipment or monitor plant parameters will not be affected by this methodology change. Thus, it cannot create the possibility of a new or different kind of accident.

The improved methods do address aspects of rod ejection methods that current methods do not address. Additionally, the methodology continues to evaluate the range of rod ejection accidents against similar but more limiting acceptance criteria (dose, energy deposition and peak clad temperature).

Therefore, the proposed change will not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does not involve a significant reduction in a margin on safety.

The new methodology evaluates the Rod Ejection Accident against substantially more limiting acceptance criteria. Specifically, the peak radial average fuel enthalpy limit is reduced from the previous limit of 280 cal/g to the Standard Review Plan, Section 4.2, Revision 3, limit of less than 230 cal/g. This peak radial average fuel enthalpy limit is further reduced to 150 cal/g in the new methodology. The dose limit has not been changed. However, an additional conservative peak clad temperature limit has been added to preclude the potential for rod ballooning. This limit is significantly below the value expected for incipient fuel melt. The methodology includes consideration of appropriate conservatisms, benchmarks, and uncertainties. If applied to the same input conditions, the proposed methodology would predict lower results than the current methodology because of the increased thoroughness and rigorous consideration of a number of factors. The actual margin of safety is not negatively affected by application of a more robust model.

Therefore, 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: David T. Conley, Associate General Counsel II—Legal Department, Progress Energy Service Company, LLC, Post Office Box 1551, Raleigh, North Carolina 27602.

NRC Branch Chief: Thomas H. Boyce.

Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information (SUNSI) and Safeguards Information (SGI) for Contention Preparation

Florida Power Corporation, et al., Docket No. 50–302, Crystal River Unit 3 Nuclear Generating Plant, Citrus County, Florida

1. This order contains instructions regarding how potential parties to the proceedings listed above may request access to documents containing sensitive unclassified non-safeguards information (SUNSI) and safeguards information (SGI).

2. Within ten (10) days after publication of this notice of opportunity for hearing, any potential party as defined in 10 CFR 2.4 who believes access to SUNSI or SGI is necessary for a response to the notice may request access to SUNSI or SGI. A ''potential party'' is any person who intends or may intend to participate as a party by demonstrating standing and the filing of an admissible contention under 10 CFR 2.309. Requests submitted later than ten (10) days will not be considered absent a showing of good cause for the late filing, addressing why the request could not have been filed earlier.

3. The requester shall submit a letter requesting permission to access SUNSI and/or SGI to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and provide a copy to the Associate General Counsel for Hearings, Enforcement and Administration, Office of the General Counsel, Washington, DC 20555–0001. The expedited delivery or courier mail address for both offices is U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, MD 20852. The e-mail address for the Office of the Secretary and the Office of the General Counsel are *hearing.docket@nrc.gov* and *ogcmailcenter.resource@nrc.gov,* respectively.[1] The request must include the following information:

a. A description of the licensing action with a citation to this **Federal Register** notice of opportunity for hearing;

b. The name and address of the potential party and a description of the potential party's particularized interest that could be harmed by the action identified in (a);

c. If the request is for SUNSI, the identity of the individual requesting access to SUNSI and the requester's need for the information in order to meaningfully participate in this adjudicatory proceeding, particularly why publicly available versions of the application would not be sufficient to provide the basis and specificity for a proffered contention;

d. If the request is for SGI, the identity of the individual requesting access to SGI and the identity of any expert, consultant or assistant who will aid the requester in evaluating the SGI, and information that shows:

(i) Why the information is indispensable to meaningful participation in this licensing proceeding; and

(ii) The technical competence (demonstrable knowledge, skill, experience, training or education) of the requester to understand and use (or evaluate) the requested information to provide the basis and specificity for a proffered contention. The technical competence of a potential party or its counsel may be shown by reliance on a qualified expert, consultant or assistant who demonstrates technical competence as well as trustworthiness and reliability, and who agrees to sign a non-disclosure affidavit and be bound by the terms of a protective order; and

e. If the request is for SGI, Form SF–85, ''Questionnaire for Non-Sensitive Positions,'' Form FD–258 (fingerprint card), and a credit check release form completed by the individual who seeks access to SGI and each individual who will aid the requester in evaluating the SGI. For security reasons, Form SF–85 can only be submitted electronically, through a restricted-access database. To obtain online access to the form, the requester should contact the NRC's Office of Administration at 301–492–3524.[2] The other completed forms must be signed in original ink, accompanied by a check or money order payable in the amount of $191.00 to the U.S. Nuclear Regulatory Commission for each individual, and mailed to the: Office of Administration, Security Processing Unit, Mail Stop TWB–05B32M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0012.

These forms will be used to initiate the background check, which includes fingerprinting as part of a criminal history records check. *Note:* Copies of these forms do *not* need to be included with the request letter to the Office of the Secretary, but the request letter should state that the forms and fees have been submitted as described above.

4. To avoid delays in processing requests for access to SGI, all forms should be reviewed for completeness and accuracy (including legibility) before submitting them to the NRC. Incomplete packages will be returned to the sender and will not be processed.

5. Based on an evaluation of the information submitted under items 2 and 3.a through 3.d, above, the NRC staff will determine within ten days of receipt of the written access request whether (1) there is a reasonable basis to believe the petitioner is likely to establish standing to participate in this NRC proceeding, and (2) there is a legitimate need for access to SUNSI or need to know the SGI requested. For SGI, the need to know determination is made based on whether the information requested is necessary (*i.e.,* indispensable) for the proposed recipient to proffer and litigate a specific contention in this NRC proceeding[3] and whether the proposed recipient has the technical competence (demonstrable knowledge, skill, training, education, or experience) to evaluate and use the specific SGI requested in this proceeding.

6. If standing and need to know SGI are shown, the NRC staff will further determine based upon completion of the background check whether the proposed recipient is trustworthy and reliable. The NRC staff will conduct (as necessary) an inspection to confirm that the recipient's information protection systems are sufficient to protect SGI from inadvertent release or disclosure. Recipients may opt to view SGI at the NRC's facility rather than establish their own SGI protection program to meet SGI protection requirements.

7. A request for access to SUNSI or SGI will be granted if:

a. The request has demonstrated that there is a reasonable basis to believe that a potential party is likely to establish standing to intervene or to otherwise participate as a party in this proceeding;

b. The proposed recipient of the information has demonstrated a need for SUNSI or a need to know for SGI, and that the proposed recipient of SGI is trustworthy and reliable;

[1] *See* footnote 6. While a request for hearing or petition to intervene in this proceeding must comply with the filing requirements of the NRC's ''E-Filing Rule,'' the initial request to access SUNSI and/or SGI under these procedures should be submitted as described in this paragraph.

[2] The requester will be asked to provide his or her full name, Social Security number, date and place of birth, telephone number, and e-mail address. After providing this information, the requester usually should be able to obtain access to the online form within one business day.

[3] Broad SGI requests under these procedures are thus highly unlikely to meet the standard for need to know; furthermore, staff redaction of information from requested documents before their release may be appropriate to comport with this requirement. These procedures do not authorize unrestricted disclosure or less scrutiny of a requester's need to know than ordinarily would be applied in connection with an already-admitted contention.

c. The proposed recipient of the information has executed a Non-Disclosure Agreement or Affidavit and agrees to be bound by the terms of a Protective Order setting forth terms and conditions to prevent the unauthorized or inadvertent disclosure of SUNSI and/or SGI; and

d. The presiding officer has issued a protective order concerning the information or documents requested.[4] Any protective order issued shall provide that the petitioner must file SUNSI or SGI contentions 25 days after receipt of (or access to) that information. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI or SGI contentions by that later deadline.

8. If the request for access to SUNSI or SGI is granted, the terms and conditions for access to sensitive unclassified information will be set forth in a draft protective order and affidavit of non-disclosure appended to a joint motion by the NRC staff, any other affected parties to this proceeding,[5] and the petitioner(s). If the diligent efforts by the relevant parties or petitioner(s) fail to result in an agreement on the terms and conditions for a draft protective order or non-disclosure affidavit, the relevant parties to the proceeding or the petitioner(s) should notify the presiding officer within ten (10) days, describing the obstacles to the agreement.

9. If the request for access to SUNSI is denied by the NRC staff or a request for access to SGI is denied by NRC staff either after a determination on standing and need to know or, later, after a determination on trustworthiness and reliability, the NRC staff shall briefly state the reasons for the denial. Before the Office of Administration makes an adverse determination regarding access, the proposed recipient must be provided an opportunity to correct or explain information. The requester may challenge the NRC staff's adverse determination with respect to access to SUNSI or with respect to standing or need to know for SGI by filing a challenge within ten (10) days of receipt of that determination with (a) the presiding officer designated in this proceeding; (b) if no presiding officer has been appointed, the Chief Administrative Judge, or if he or she is unavailable, another administrative judge, or an administrative law judge with jurisdiction pursuant to § 2.318(a); or (c) if another officer has been designated to rule on information access issues, with that officer. In the same manner, an SGI requester may challenge an adverse determination on trustworthiness and reliability by filing a challenge within fifteen (15) days of receipt of that determination.

In the same manner, a party other than the requester may challenge an NRC staff determination granting access to SUNSI whose release would harm that party's interest independent of the proceeding. Such a challenge must be filed within ten (10) days of the notification by the NRC staff of its grant of such a request.

If challenges to the NRC staff determinations are filed, these procedures give way to the normal process for litigating disputes concerning access to information. The availability of interlocutory review by the Commission of orders ruling on such NRC staff determinations (whether granting or denying access) is governed by 10 CFR 2.311.[6]

10. The Commission expects that the NRC staff and presiding officers (and any other reviewing officers) will consider and resolve requests for access to SUNSI and/or SGI, and motions for protective orders, in a timely fashion in order to minimize any unnecessary delays in identifying those petitioners who have standing and who have propounded contentions meeting the specificity and basis requirements in 10 CFR Part 2. Attachment 1 to this Order summarizes the general target schedule for processing and resolving requests under these procedures.

Dated at Rockville, MD, this 6th day of May 2009.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

ATTACHMENT 1—GENERAL TARGET SCHEDULE FOR PROCESSING AND RESOLVING REQUESTS FOR ACCESS TO SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION (SUNSI) AND SAFEGUARDS INFORMATION (SGI) IN THIS PROCEEDING

Day	Event/activity
0	Publication of **Federal Register** notice of proposed action and opportunity for hearing, including order with instructions for access requests.
10	Deadline for submitting requests for access to SUNSI and/or SGI with information: Supporting the standing of a potential party identified by name and address; describing the need for the information in order for the potential party to participate meaningfully in an adjudicatory proceeding; demonstrating that access should be granted (*e.g.,* showing technical competence for access to SGI); and, for SGI, including application fee for fingerprint/background check.
60	Deadline for submitting petition for intervention containing: (i) Demonstration of standing; (ii) all contentions whose formulation does not require access to SUNSI and/or SGI (+25 Answers to petition for intervention; +7 petitioner/requestor reply).
20	NRC staff informs the requester of the staff's determination whether the request for access provides a reasonable basis to believe standing can be established and shows (1) need for SUNSI or (2) need to know for SGI. (For SUNSI, NRC staff also informs any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information.) If NRC staff makes the finding of need for SUNSI and likelihood of standing, NRC staff begins document processing (preparation of redactions or review of redacted documents). If NRC staff makes the finding of need to know for SGI and likelihood of standing, NRC staff begins background check (including fingerprinting for a criminal history records check), information processing (preparation of redactions or review of redacted documents), and readiness inspections.

[4] If a presiding officer has not yet been designated, the Chief Administrative Judge will issue such orders, or will appoint a presiding officer to do so.

[5] Parties/persons other than the requester and the NRC staff will be notified by the NRC staff of a favorable access determination (and may participate in the development of such a motion and protective order) if it concerns SUNSI and if the party/person's interest independent of the proceeding would be harmed by the release of the information (*e.g.,* as with proprietary information).

[6] As of October 15, 2007, the NRC's final ''E-Filing Rule'' became effective. *See* Use of Electronic Submissions in Agency Hearings (72 FR 49139; Aug. 28, 2007). Requesters should note that the filing requirements of that rule apply to appeals of NRC staff determinations (because they must be served on a presiding officer or the Commission, as applicable), but not to the initial SUNSI/SGI requests submitted to the NRC staff under these procedures.

ATTACHMENT 1—GENERAL TARGET SCHEDULE FOR PROCESSING AND RESOLVING REQUESTS FOR ACCESS TO SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION (SUNSI) AND SAFEGUARDS INFORMATION (SGI) IN THIS PROCEEDING—Continued

Day	Event/activity
25	If NRC staff finds no ''need,'' ''need to know,'' or likelihood of standing, the deadline for petitioner/requester to file a motion seeking a ruling to reverse the NRC staff's denial of access; NRC staff files copy of access determination with the presiding officer (or Chief Administrative Judge or other designated officer, as appropriate). If NRC staff finds ''need'' for SUNSI, the deadline for any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information to file a motion seeking a ruling to reverse the NRC staff's grant of access.
30	Deadline for NRC staff reply to motions to reverse NRC staff determination(s).
40	(Receipt +30) If NRC staff finds standing and need for SUNSI, deadline for NRC staff to complete information processing and file motion for Protective Order and draft Non-Disclosure Affidavit. Deadline for applicant/licensee to file Non-Disclosure Agreement for SUNSI.
190	(Receipt + 180) If NRC staff finds standing, need to know for SGI, and trustworthiness and reliability, deadline for NRC staff to file motion for Protective Order and draft Non-disclosure Affidavit (or to make a determination that the proposed recipient of SGI is not trustworthy or reliable). *Note:* Before the Office of Administration makes an adverse determination regarding access, the proposed recipient must be provided an opportunity to correct or explain information.
205	Deadline for petitioner to seek reversal of a final adverse NRC staff determination either before the presiding officer or another designated officer.
A	*If access granted:* Issuance of presiding officer or other designated officer decision on motion for protective order for access to sensitive information (including schedule for providing access and submission of contentions) or decision reversing a final adverse determination by the NRC staff.
A + 3	Deadline for filing executed Non-Disclosure Affidavits. Access provided to SUNSI and/or SGI consistent with decision issuing the protective order.
A + 28	Deadline for submission of contentions whose development depends upon access to SUNSI and/or SGI. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI or SGI contentions by that later deadline.
A + 53	(Contention receipt +25) Answers to contentions whose development depends upon access to SUNSI and/or SGI.
A + 60	(Answer receipt +7) Petitioner/Intervenor reply to answers.
B	Decision on contention admission.

[FR Doc. E9–11034 Filed 5–11–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 52–012–COL, ASLBP No. 09–885–08–COL–BD01 and 52–013–COL]

South Texas Project Nuclear Operating Company; Establishment of Atomic Safety and Licensing Board

Pursuant to delegation by the Commission dated December 29, 1972, published in the **Federal Register**, 37 FR 28710 (1972), and the Commission's regulations, *see* 10 CFR 2.104, 2.300, 2.303, 2.309, 2.311, 2.318, and 2.321, notice is hereby given that an Atomic Safety and Licensing Board (Board) is being established to preside over the following proceeding:

South Texas Project Nuclear Operating Company (South Texas Project Units 3 and 4)

This proceeding concerns a Petition for Intervention and Request for Hearing dated April 21, 2009 from the Sustainable Energy and Economic Development Coalition, *et al.,* that was submitted in response to a February 20, 2009 Notice of Order, Hearing, and Opportunity to Petition for Leave to Intervene (74 FR 7934). Petitioners challenge the application filed by the South Texas Project Nuclear Operating Company pursuant to Subpart C of 10 CFR Part 52 for a combined license for the South Texas Project, Units 3 and 4, to be located in Matagorda County, Texas.

The Board is comprised of the following administrative judges:

Michael M. Gibson, Chair, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001;

Gary S. Arnold, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001;

Randall J. Charbeneau, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

All correspondence, documents, and other materials shall be filed in accordance with the NRC E–Filing rule, which the NRC promulgated in August 2007 (72 FR 49,139).

Issued at Rockville, Maryland, this 1st day of May 2009.

E. Roy Hawkens,

Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. E9–11038 Filed 5–11–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Federal Register Notice

DATES: Weeks of May 11, 18, 25; June 1, 8, 15, 2009.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and closed.

Week of May 11, 2009

Thursday, May 14, 2009

9 a.m. Briefing on the Results of the Agency Action Review Meeting (Public Meeting) (Contact: Shaun Anderson, 301–415–2039).

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Week of May 18, 2009—Tentative

There are no meetings scheduled for the week of May 18, 2009.

Week of May 25, 2009—Tentative

Wednesday, May 27, 2009

9:30 a.m. Briefing on External Safety Culture (Public Meeting) (Contact: Stewart Magruder, 301–415–8730).

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Wednesday, May 27, 2009

1:30 p.m. Briefing on Internal Safety Culture (Public Meeting) (Contact: June Cai, 301–415–5192).

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Thursday, May 28, 2009

9:30 a.m. Briefing on Fire Protection Closure Plan (Public Meeting) (Contact: Alex Klein, 301–415–2822).

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Week of June 1, 2009—Tentative

Wednesday, June 3, 2009

9:30 a.m. Briefing on New Reactor Issues—Component Fabrication and Oversight—Part 1 (Public Meeting).

1:30 p.m. Briefing on New Reactor Issues—Component Fabrication and Oversight—Part 2 (Public Meeting) (Contact for both parts: Roger Rihm, 301–415–7807).

Both parts of this meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Thursday, June 4, 2009

9:30 a.m. Briefing on Digital Instrumentation and Control (Public Meeting) (Contact: Steve Arndt, 301–415–6502).

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

1:30 p.m. Meeting with the Advisory Committee on Reactor Safeguards (Public Meeting) (Contact: Tanny Santos, 301–415–7270).

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Week of June 8, 2009—Tentative

There are no meetings scheduled for the week of June 8, 2009.

Week of June 15, 2009—Tentative

There are no meetings scheduled for the week of June 15, 2009.

*The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—(301) 415–1292. Contact person for more information: Rochelle Bavol, (301) 415–1651.

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/about-nrc/policy-making/schedule.html.*

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.* braille, large print), please notify the NRC's Disability Program Coordinator, Rohn Brown, at 301–492–2279, TDD: 301–415–2100, or by e-mail at *rohn.brown@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

This notice is distributed electronically to subscribers. If you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969), or send an e-mail to *darlene.wright@nrc.gov.*

Dated: May 7, 2009.

Rochelle C. Bavol,

Office of the Secretary.

[FR Doc. E9–11129 Filed 5–8–09; 11:15 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket No. CP2009–29; Order No. 210]

Global Direct Contracts (MC2009–9) Agreement

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently filed Postal Service request to add an additional Global Direct Contracts agreement to the Competitive Product List. This notice addresses procedural steps associated with this filing.

DATES: Comments are due May 13, 2009.

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

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

SUPPLEMENTARY INFORMATION:

I. Background

On May 1, 2009, the Postal Service filed a notice announcing that it has entered into an additional Global Direct Contracts agreement.[1] Global Direct Contracts provide a rate for mail acceptance within the United States, transportation to a receiving country of mail that bears the destination country's indicia and payment by the Postal Service of the appropriate settlement charges to the receiving country. The Postal Service believes the instant agreement is functionally equivalent to previously submitted Global Direct agreements, and supported by the Governors' Decision filed in Docket No. MC2008–7.[2] The Postal Service contends that the instant agreement should be included within the Global Direct Contracts product.

The instant agreement. The Postal Service filed the instant agreement pursuant to 39 CFR 3015.5. In addition, the Postal Service contends that the agreement is in accordance with PRC Order No. 153.[3] It submitted the agreement and supporting material under seal, and attached a redacted copy of the certified statement required by 39 CFR 3015.5(c)(2) to the Notice.

The Notice provides the Postal Service's rationale for concluding that the instant agreement is functionally equivalent to the agreements filed in Docket Nos. CP2009–10, CP2009–11 and CP2009–18. *Id.* at 2–6.

The Postal Service states that the instant agreement fits within the Mail Classification Schedule language for Global Direct Contracts, and indicates that this agreement is set to expire 1 year after its effective date which the Postal Service states will be within 30 days of completion of all regulatory approvals.[4]

The Postal Service asserts that ''[i]n almost all substantive respects'' the instant agreement ''resembles the contract in Docket No. CP2009–11[.]'' *Id.* at 4. It notes that the agreement contains a volume commitment, whereas the agreement in Docket No. CP2009–11 has a postage commitment. Notwithstanding any differences in prices, foreign services offered, foreign destinations, or volume or postage commitments, the Postal Service contends that the instant agreement is functionally equivalent to Global Direct agreements filed previously. *Id.* at 4–5. It characterizes other differences from previous Global Direct agreements as cosmetic or minor, having no effect on

[1] Notice of United States Postal Service Filing of Functionally Equivalent Global Direct Contracts Negotiated Service Agreement, May 1, 2009 (Notice).

[2] Notice at 1–2. *See* Docket No. MC2008–7, Request of the United States Postal Service To Add Global Plus 2 Negotiated Service Agreements to the Competitive Product List, and Notice of Filing (Under Seal) the Enabling Governors' Decision and Two Functionally Equivalent Agreements, August 8, 2008; Attachment A is a redacted version of Decision of the Governors of the United States Postal Service on the Establishment of Prices and Classifications for Global Direct, Global Bulk Economy, and Global Plus Contracts (Governors' Decision No. 08–10), July 16, 2008. The Postal Service also filed under seal an unredacted version of the Governors' Decision in that docket.

[3] PRC Order No. 153, Order Concerning Global Direct Contracts Negotiated Service Agreements, December 19, 2008.

[4] The Postal Service notes this agreement has the same one-year duration as the previously approved Global Direct Contract agreements. Notice at 5.

the agreement's ''essential cost or market characteristics.'' *Id.* at 6.

Lastly, the Postal Service notes that the agreement contains provisions that provide certain automatic price changes triggered by objective, external factors. It argues that ''[t]he formulaic, pre-established nature of such changes essentially removes them from the area of Postal Service discretion.'' *Id.* at 5, n.8. Consequently, the Postal Service asserts that such changes do not represent price changes under 39 CFR 3015.5. Thus, in lieu of filing under rule 3015.5, it ''proposes to file such changes with the Commission on a notice-type basis, without the expectation that the filings should lead to further proceedings or review.'' *Id.*

II. Notice of Filing

The Commission establishes Docket No. CP2009–29 for consideration of matters related to the agreement identified in the Postal Service's Notice.

Interested persons may submit comments on whether the Postal Service's agreement is consistent with the policies of 39 U.S.C. 3632, 3633, or 3642. Comments are due no later than May 13, 2009. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Michael J. Ravnitzky to serve as Public Representative in the captioned filings.

It Is Ordered:

1. The Commission establishes Docket No. CP2009–29 for consideration of the matters raised in this docket.

2. Pursuant to 39 U.S.C. 505, Michael J. Ravnitzky is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

3. Comments by interested persons in these proceedings are due no later than May 13, 2009.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Steven W. Williams,

Secretary.

[FR Doc. E9–11060 Filed 5–11–09; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

Privacy Act of 1974, System of Records

AGENCY: Postal Service™.

ACTION: Notice of modification to existing systems of records.

SUMMARY: The United States Postal Service® is proposing to modify three of its Privacy Act Systems of Records: USPS 810.200, *http://www.usps.gov* Ordering, Payment, and Fulfillment; USPS 880.000, Post Office and Retail Services; and USPS 900.000, International Services. The proposed modifications reflect changes regarding how Customs declaration forms are collected, analyzed, and reported to appropriate Federal authorities. The proposed modifications to USPS 880.000, Post Office and Retail Services, reflect administrative updates as well as the sharing of certain claims data with foreign posts as a result of changes to title 39 of the United States Code.

DATES: Any interested party may submit written comments on the proposed modifications. The proposed modifications will become effective without further notice on June 22, 2009 unless comments received on or before that date result in a contrary determination.

ADDRESSES: Written comments on this proposal should be mailed or delivered to the Records Office, U.S. Postal Service, 475 L'Enfant Plaza SW., Room 5801, Washington, DC 20260. Copies of all written comments will be available for public inspection and photocopying at the above address between 8 a.m. and 4 p.m. Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Jane Eyre at 202–268–2608.

SUPPLEMENTARY INFORMATION: In this notice, USPS® is modifying three existing systems of records pursuant to the Privacy Act of 1974, 5 U.S.C. 552a: USPS 810.200, *http://www.usps.com* Ordering, Payment, and Fulfillment; USPS 880.000, Post Office and Retail Services; and USPS 900.000, International Services. These changes add a routine use to allow disclosure of certain Customs declaration information to the Office of Foreign Assets Control (OFAC) and other entities charged with enforcing foreign asset control policies, and to the U.S. Census Bureau (Census) for trade reporting purposes. The changes also add a routine use to permit disclosure of claims payment information to foreign posts. These changes are proposed for the reasons discussed below.

I. Background

Currently, USPS® provides Customs declaration information to U.S. Customs and Border Protection (Customs) pursuant to Federal law. The OFAC and the Census have advised the Postal Service™ of requirements to provide certain information collected on the Customs declaration forms and other records to their agencies. Consequently, we have revised the notices for Systems of Records that relate to Customs declarations. We have added 39 U.S.C. 407 as an additional authority for collection of this information. Changes to USPS 880.000 include revisions to retention periods for records and reflect changes within the organization.

II. Rationale for Changes to USPS Privacy Act Systems of Records

The OFAC is a regulatory office within the Department of the Treasury responsible for, among other things, promulgating, developing, and administering economic and trade sanctions against certain foreign countries. Some OFAC regulations apply to the Postal Service's handling of mail destined to these foreign countries.

The International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701–1706, authorizes the President to identify and respond to unusual or extraordinary threats originating outside the United States. Under this authority, President William Clinton issued Executive Orders 12957, 12959, and 13059, each of which prohibits specific transactions (including shipments of certain goods) with respect to the designated countries. In response to these orders, OFAC issued comprehensive regulations governing such shipments and transactions (31 CFR Chapter V). The Postal Service™ is subject to these regulations and must implement procedures to ensure compliance. Procedures include the capture of Customs information for certain mailpieces, the transmission of information to the OFAC (31 CFR 501.602), and the retention of related records for at least 5 years (31 CFR 501.601).

A prior **Federal Register** notice, dated May 6, 2005 (70 FR 24128–24129), established that Customs information may be disclosed to appropriate U.S. Customs officials under Privacy Act System of Records USPS 900.000, International Services, and, to the extent necessary, USPS 810.200, *http://www.usps.com* Ordering, Payment, and Fulfillment. These systems of records have been modified to add a routine use allowing disclosure to the OFAC.

Pursuant to 13 U.S.C. 301–309, the Census is responsible for collecting statistical data on foreign trade. While the mail has historically been exempt from this program, the Foreign Relations Authorization Act of 2002 (Pub. L. 107–228) amended 13 U.S.C. 303 to end the exemption. As a result, the Postal Service™ and its customers are now subject to the filing requirements in

Census's Foreign Trade Regulations (15 CFR Part 30). These regulations on outbound international shipments require Customs declarations forms and other accompanying documentation to include the following:

(i) A proof of filing citation showing that electronic export information has been filed via the Census's Automated Export System (AES);

(ii) An AES Downtime Citation indicating that an unsuccessful attempt was made to file electronic export information; or

(iii) An Exemption or Exclusion Legend showing that the goods are exempt from the filing requirements.

The Foreign Trade Regulations require this information to be forwarded to both Customs and the Census's Bureau of Industry and Security upon collection (15 CFR 30.8(a)). Changes to USPS 900.000 and 810.200 are required to add new routine uses allowing disclosure of this information to the Census.

USPS 880.000 is being updated to reflect changes enacted in the Postal Accountability and Enhancement Act of 2006 (Pub. L. 109–435), organizational changes, and updates to record retention schedules.

III. Description of Changes to Systems of Records

The Postal Service™ is modifying three systems of records: USPS 810.200, *http://www.usps.com* Ordering, Payment, and Fulfillment; USPS 880.000, Post Office and Retail Services; and USPS 900.000, International Services. Pursuant to 5 USC 552a(e)(11), interested persons are invited to submit written data, views, or arguments on this proposal. A report of the proposed modification has been sent to Congress and to the Office of Management and Budget for their evaluation. The Postal Service does not expect this amended notice to have any adverse effect on individual privacy rights. The Postal Service proposes amending the systems as shown below:

USPS 810.200

SYSTEM NAME:

http://www.usps.com Ordering, Payment, and Fulfillment.

* * * * *

CATEGORIES OF RECORDS IN THE SYSTEM:

* * * * *

[CHANGE TO READ:]

3. *Shipping and transaction information:* Product and/or service ID numbers, descriptions, value, date, postage and fees, and prices; name and address(es) of recipients; order number and delivery status; electronic address lists; electronic documents or images; job number; and applicable citation or legend required by the Foreign Trade Regulations.

4. Claims submitted for lost or damaged merchandise.

* * * * *

AUTHORITY FOR MAINTENANCE OF SYSTEM:

[CHANGE TO READ:]

39 U.S.C. 401, 403, 404, 407; 13 U.S.C. 301–307; 50 U.S.C. 1702.

PURPOSE(S):

* * * * *

[CHANGE TO READ:]

6. To satisfy reporting requirements for customs and foreign assets control purposes.

7. To satisfy statistical reporting requirements for foreign trade.

ROUTINE USES OF RECORDS IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

[CHANGE TO READ:]

a. Customs declaration records may be disclosed to domestic and foreign customs officials pursuant to Section 343(a) of the Trade Act of 2002, Public Law 107–210, and international agreements or regulations.

b. Records may be disclosed to the Office of Foreign Assets Control and other government authorities charged with enforcing assets control laws, rules, and policies, pursuant to 50 U.S.C. 1702.

c. Customs declaration records may be disclosed to the U.S. Census Bureau for export statistical purposes pursuant to 13 U.S.C. 301–307.

STORAGE:

[CHANGE TO READ:]

Automated databases, computer storage media, digital, and paper files.

SYSTEMS MANAGER(S) AND ADDRESS:

[CHANGE TO READ:]

President, Mailing and Shipping Services, United States Postal Service, 475 L'Enfant Plaza, SW., Washington, DC 20260. Chief Financial Officer and Executive Vice President, United States Postal Service, 475 L'Enfant Plaza, SW., Washington, DC 20260.

* * * * *

USPS 880.000

SYSTEM NAME:

Post Office and Retail Services.

SYSTEM LOCATION:

[CHANGE TO READ:]

USPS Headquarters, Consumer Advocate; Integrated Business Solutions Services Centers; Accounting Service Centers; and USPS facilities, including Post Offices (New Jersey, as an exception, does not store passport information in Post Offices) and contractor locations.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

[CHANGE TO READ:]

1. Customers who apply for or purchase products and services at Post Offices, online, or at other retail sites. This includes products and services related to passports, Post Office boxes, caller services, and self-service equipment.

2. Senders and recipients of Extra Services.

* * * * *

4. Customers with inquiries or claims relating to Extra Services.

CATEGORIES OF RECORDS IN THE SYSTEM:

* * * * *

[CHANGE TO READ:]

5. *Claim and inquiry information:* Mailer and addressee name, mail and e-mail address, and phone number; claimant signature; claim or inquiry description, number, and status.

* * * * *

7. *Product information:* Article number and class/services purchased.

AUTHORITY FOR MAINTENANCE OF SYSTEM:

[CHANGE TO READ:]

39 U.S.C. 401, 403, 404, 407, 411; 22 U.S.C. 214; 31 U.S.C. 7701.

PURPOSE:

* * * * *

[CHANGE TO READ:]

3. To respond to inquiries and claims related to Extra Services.

STORAGE:

[CHANGE TO READ:]

Automated databases, computer storage media, and digital and paper files.

RETRIEVABILITY:

[CHANGE TO READ:]

By name, customer ID(s), phone number, mail or e-mail address, or transaction or article number.

RETENTION AND DISPOSAL:

[CHANGE TO READ:]

1. Passport applications are mailed on the day of acceptance with fees and documentation. Records related to passports are retained 2 years.

2. Records related to Extra Services for domestic and international Express Mail items are retained up to 1 year.

3. Domestic and international Extra Services records are retained 2 years. Records relating to Post Office boxes and caller services are retained up to 3 years after the customer relationship ends.

* * * * *

SYSTEMS MANAGER(S) AND ADDRESS:

[CHANGE TO READ:]

President, Mailing and Shipping Services, United States Postal Service, 475 L'Enfant Plaza SW., Washington, DC 20260. Vice President, Delivery and Post Office Operations, United States Postal Service, 475 L'Enfant Plaza SW., Washington, DC 20260. Vice President and Managing Director, Global Business, United States Postal Service, 475 L'Enfant Plaza SW., Washington, DC 20260.

NOTIFICATION PROCEDURE:

* * * * *

[CHANGE TO READ:]

For Extra Services, information can be obtained from the facility where the service was obtained, or can be accessed on *http://www.usps.com.* Inquiries should include name, date of mailing, and article number. For domestic or international Extra Services claims, customers can write a letter, including name, date of claim, and claim number, to Accounting Services, P.O. Box 80143 (for domestic claims) or P.O. Box 80146 (for international claims), St. Louis, MO, 63180, or can call 1–866–974–2733. For international inquiries, customers can call 1–800–222–1811.

* * * * *

USPS 900.000

SYSTEM NAME:

International Services.

* * * * *

CATEGORIES OF RECORDS IN THE SYSTEM:

* * * * *

[CHANGE TO READ:]

3. *Information pertaining to mailings:* Contents, order number, volume, destination, weight, origin, value, date, postage and fees, type of mailing, and applicable citation or legend required by the Foreign Trade Regulations.

* * * * *

AUTHORITY FOR MAINTENANCE OF SYSTEM:

[CHANGE TO READ:]

39 U.S.C. 401, 403, 404, 407; 13 U.S.C. 301–307; 50 U.S.C. 1702.

PURPOSE(S):

* * * * *

[CHANGE TO READ:]

4. To satisfy reporting requirements for customs and foreign assets control purposes.

5. To satisfy statistical reporting requirements for foreign trade.

ROUTINE USES OF RECORDS IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

[CHANGE TO READ:]

a. Customs declaration records may be disclosed to domestic and foreign customs officials pursuant to Section 343(a) of the Trade Act of 2002, Public Law 107–210, and international agreements or regulations.

b. Records may be disclosed to the Office of Foreign Assets Control and other government authorities charged with enforcing assets control laws, rules, and policies, pursuant to 50 U.S.C. 1702.

c. Customs declaration records may be disclosed to the U.S. Census Bureau for export statistical purposes pursuant to 13 U.S.C. 301–307.

STORAGE:

[CHANGE TO READ:]

Automated databases, computer storage media, and digital and paper files.

RETENTION AND DISPOSAL:

[CHANGE TO READ:]

1. Customs declaration records created by mailers under international customized mail agreements are retained 5 years, and then purged according to the requirements of domestic and foreign Customs services. Other customs declaration records are retained 30 days.

2. Customs declarations to OFAC are retained 5 years.

* * * * *

SYSTEMS MANAGER(S) AND ADDRESS:

[CHANGE TO READ:]

Vice President and Managing Director, Global Business, United States Postal Service, 475 L'Enfant Plaza SW., Washington, DC 20260.

* * * * *

Stanley F. Mires,

Chief Counsel, Legislative.

[FR Doc. E9–10999 Filed 5–11–09; 8:45 am]

BILLING CODE 7710–12–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11736 and #11737]

Alabama Disaster #AL–00019

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 Alabama (FEMA–1835–DR), dated 05/01/2009.

Incident: Severe Storms, Flooding, Tornadoes, and Straight-line Winds.

Incident Period: 03/25/2009 through 04/03/2009.

DATES: *Effective Date:* 05/01/2009.

Physical Loan Application Deadline Date: 06/30/2009.

Economic Injury (EIDL) Loan Application Deadline Date: 02/01/2010.

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 05/01/2009, 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): Covington, Geneva, Houston.

Contiguous Counties (Economic Injury Loans Only):

Alabama: Butler, Coffee, Conecuh, Crenshaw, Dale, Escambia, Henry.

Florida: Holmes, Jackson, Okaloosa, Walton.

Georgia: Early, Seminole.

The Interest Rates are:

For Physical Damage:

	Percent
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:

The number assigned to this disaster for physical damage is 11736B and for economic injury is 117370.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. E9–11030 Filed 5–11–09; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11716 and #11717]

Florida Disaster Number FL–00039

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of Florida (FEMA–1831–DR), dated 04/21/2009.

Incident: Severe Storms, Flooding, Tornadoes, and Straight-line Winds.

Incident Period: 03/26/2009 and continuing.

Effective Date: 05/01/2009.

Physical Loan Application Deadline Date: 06/22/2009.

Economic Injury (EIDL) Loan Application Deadline Date: 01/21/2010.

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 Florida, dated 04/21/2009, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Escambia,

Franklin, Gadsden, Hamilton, Leon, Madison, Wakulla.

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. E9–11031 Filed 5–11–09; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11730 and #11731]

Alabama Disaster Number AL–00021

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment 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.

DATES: *Effective Date:* 05/04/2009.

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: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of Alabama, dated 04/28/2009, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties:

Dekalb.

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. E9–11035 Filed 5–11–09; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11724 and #11725]

Georgia Disaster Number GA–00023

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of Georgia (FEMA–1833–DR), dated 04/23/2009.

Incident: Severe Storms, Flooding, Tornadoes and Straight-line Winds.

Incident Period: 03/26/2009 and continuing.

DATES: *Effective Date:* 05/01/2009.

Physical Loan Application Deadline Date: 06/22/2009.

Economic Injury (EIDL) Loan Application Deadline Date: 01/23/2010.

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 Georgia, dated 04/23/2009, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties:

Brooks, Calhoun, Cook, Crisp, Decatur, Dodge, Dougherty, Irwin, Jeff Davis, Lanier, Miller, Monroe, Pulaski, Tattnall, Telfair, Tift, Thomas, Turner, Upson, Wayne, Wheeler, Wilcox, Worth.

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. E9–11032 Filed 5–11–09; 8:45 am]

BILLING CODE 8025–01–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 Thursday, May 14, 2009 at 2 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(5), (7), 9(B) and (10) and 17 CFR 200.402(a)(5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Walter, as duty officer, voted to consider the item listed for the Closed Meeting in closed session.

The subject matter of the Closed Meeting scheduled for Thursday, May 14, 2009 will be: Institution and settlement of injunctive actions; Institution and settlement of administrative proceedings of an enforcement nature; Consideration of amicus participation; Adjudicatory matters; Resolution of litigation claims; and Other matters related to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 551–5400.

Dated: May 7, 2009.

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–11100 Filed 5–8–09; 11:15 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59857; File No. SR–Phlx–2009–41]

Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Elimination of Options Transaction Charge for Customer Executions in Options on RUT, RMN, MNX and NDX

May 4, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934,[1] notice is hereby given that on April 29, 2009, NASDAQ OMX PHLX, Inc. (''Phlx'' 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 Phlx. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to eliminate the options transaction charge of $.12 per contract side for customer executions in options on the Russell 2000® Index (the ''Full Value Russell Index'' or ''RUT''), options on the one-tenth value Russell 2000® Index [2] (the ''Reduced Value Russell Index'' or ''RMN''), options on the Nasdaq 100 Index [3] traded under the symbol NDX (''NDX'') and options on the one-tenth value of the Nasdaq 100 Index traded under the symbol MNX (''MNX'').

While changes to the Fee Schedule pursuant to this proposal are effective upon filing, the Exchange has designated these changes to be operative for transactions settling on or after May 1, 2009.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqomxphlx.cchwallstreet.com/NASDAQOMXPHLX/Filings/*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Phlx included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Phlx has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to eliminate the options transaction charge of $.12 per contract side for customer executions in options on the Russell 2000® Index (the ''Full Value Russell Index'') traded under the symbol RUT, options on the one-tenth value Russell 2000® Index (the ''Reduced Value Russell Index'') traded under the symbol RMN (together referred to as ''Russell Products''), options on the Nasdaq 100 Index traded under the symbol NDX and options on the one-tenth value of the Nasdaq 100 Index traded under the symbol MNX (together referred to as ''Nasdaq Products''), in order that the Exchange may remain competitive and continue to attract order flow.

The Exchange currently assesses an options transaction charge for customer executions in options on the Nasdaq Products, namely NDX and MNX,[4] and options on the Russell Products, namely, RUT and RMN,[5] of $.12 per contract side. The Exchange will continue to assess payment for order flow fees [6] and surcharge fees [7] on the Russell Products and the Nasdaq Products. The Exchange proposes to

[1] 15 U.S.C. 78s(b)(1).

[2] Russell 2000® is a trademark and service mark of the Frank Russell Company, used under license. Neither Frank Russell Company's publication of the Russell Indexes nor its licensing of its trademarks for use in connection with securities or other financial products derived from a Russell Index in any way suggests or implies a representation or opinion by Frank Russell Company as to the attractiveness of investment in any securities or other financial products based upon or derived from any Russell Index. Frank Russell Company is not the issuer of any such securities or other financial products and makes no express or implied warranties of merchantability or fitness for any particular purpose with respect to any Russell Index or any data included or reflected therein, nor as to results to be obtained by any person or any entity from the use of the Russell Index or any data included or reflected therein.

[3] NASDAQ®, NASDAQ–100® and NASDAQ–100 Index® are registered trademarks of The NASDAQ OMX Group, Inc. (which with its affiliates are the ''Corporations'') and are licensed for use by NASDAQ OMX PHLX, Inc. in connection with the trading of options products based on the NASDAQ–100 Index®. The options products have not been passed on by the Corporations as to their legality or suitability. The options products are not issued, endorsed, sold, or promoted by the Corporations. The Corporations make no warranties and bear no liability with respect to the options products.

[4] *See* Securities Exchange Release No. 58049 (June 27, 2008), 73 FR 38286 (July 3, 2008) (SR–Phlx–2008–46). *See also* Securities Exchange Act Release No. 57936 (June 6, 2008), 73 FR 33481 (June 12, 2008) (SR–Phlx–2008–36) (proposed rule change relating to the listing and trading of options on the Nasdaq Products).

[5] *See* Securities Exchange Act Release No. 59243 (January 13, 2009), 74 FR 4272 (January 23, 2009) (SR–Phlx–2008–86). *See also* Securities Exchange Act Release No. 55305 (February 15, 2007), 72 FR 8240 (February 23, 2007) (SR–Phlx–2006–65).

[6] *See* proposed rule change SR–Phlx–2009–39. *See also* Securities Exchange Act Release No. 57851 (May 22, 2008), 73 FR 31177 (May 30, 2008) (SR–Phlx–2008–38).

[7] *See* Securities Exchange Act Release No. 58772 (October 10, 2008), 73 FR 63037 (October 22, 2008) (SR–Phlx–2008–72).

eliminate the $.12 per contract side options transaction charge for customer executions in options on NDX, MNX, RUT and RMN to remain competitive with other exchanges and attract additional order flow to the Exchange.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (''Act''),[8] in general, and furthers the objectives of Section 6(b)(4)[9] of the Act in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among Exchange members and other persons using its facilities. By eliminating the $.12 per contract side options transaction charge, the Exchange believes that members will benefit by not having an options transaction charge for customer executions in options on RUT, RMN, NDX and MNX and the Exchange will benefit by attracting order flow.

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 purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule change establishes or changes a due, fee, or other charge imposed by the Exchange, it has become effective pursuant to Section 19(b)(3)(A) of the Act[10] and subparagraph (f)(2) of Rule 19b–4[11] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2009–41 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–Phlx–2009–41. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of Phlx. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–Phlx–2009–41 and should be submitted on or before June 2, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–10993 Filed 5–11–09; 8:45 am]

BILLING CODE P

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(2).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59858; File No. SR–NASDAQ–2009–039]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change To Amend the Certificate of Incorporation and By-Laws of The NASDAQ OMX Group, Inc.

May 4, 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, The NASDAQ Stock Market LLC (the ''NASDAQ 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 NASDAQ 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 NASDAQ Exchange is filing this proposed rule change with regard to proposed changes to the Restated Certificate of Incorporation (the ''Certificate'') and the By-Laws of its parent corporation, The NASDAQ OMX Group, Inc. (''NASDAQ OMX''). The proposed rule change will be implemented as soon as practicable following approval by the Commission. The text of the proposed rule change is available at *http://www.cchwallstreet.com/nasdaq,* at the NASDAQ 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 NASDAQ Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NASDAQ Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NASDAQ OMX is proposing to make certain amendments to its By-Laws to make improvements in its governance and update several provisions.

The proposed changes to the By-Laws are as follows:

• Article I is being amended to reflect the recent name changes of the Philadelphia Stock Exchange and the Boston Stock Exchange to NASDAQ OMX PHLX, Inc. and NASDAQ OMX BX, Inc., respectively.

• Article III is being amended to modify the procedures governing proposals by stockholders, including proposals by stockholders to nominate directors. Specifically, the amendment will require a stockholder making a proposal to supply more complete information about the stockholder's background, including a description of any agreement, arrangement, or understanding between the stockholder, the beneficial owner of the stock, and any other persons acting in concert with them; a description of any agreement, arrangement or understanding (including any derivative or short positions, profit interests, options, warrants, convertible securities, stock appreciation or similar rights, hedging transactions, and borrowed or loaned shares), the effect or intent of which is to mitigate loss to, manage risk or benefit of share price changes for, or increase or decrease the voting power of, such stockholder or such beneficial owner, with respect to shares of stock of NASDAQ OMX; and any other information regarding the stockholder and beneficial owner that would be required to be disclosed in a proxy statement under Section 14(a) of the Act. These changes are designed to provide the NASDAQ OMX Board of Directors and its stockholders with greater insight into the identity and intentions of persons presenting stockholder proposals to allow more thorough consideration of the merits of such proposals. These requirements are deemed satisfied, however, in the case of a proposal that is validly submitted under the rules and regulations promulgated under the Act (*i.e.,* SEC Rule 14a–8) and included in NASDAQ OMX's proxy. However, compliance with the By-Laws or with SEC Rule 14a–8 provides the exclusive means for stockholders to make proposals. The amendments also provide that a representative of a stockholder qualified to appear at an annual meeting must be an officer, manager or partner of the stockholder or must have written authorization from the stockholder. The amendments also make several minor clarifying changes to the text of Article III.

• Article IV is being amended to state explicitly that the Management Compensation Committee and the Audit Committee must be composed exclusively of independent directors within the meaning of the rules of the NASDAQ Stock Market that govern NASDAQ OMX's listing (and, in the case of the Audit Committee, Section 10A of the Act).[3] Although NASDAQ OMX adheres scrupulously to the independence requirements imposed by the NASDAQ Stock Market and the Act, it believes that these requirements should be explicitly stated in the By-Laws as well. NASDAQ OMX is also removing language making its Chief Executive Officer an ex-officio, non-voting member of the Management Compensation Committee. In this regard, listing standards of the NASDAQ Stock Market require management compensation determinations regarding executive officers to be made by vote of the Board's independent directors, or by vote of or upon the recommendation of a committee composed solely of independent directors.[4] NASDAQ OMX has satisfied this requirement by submitting compensation decisions to the vote of all of NASDAQ OMX's independent directors, but removing the Chief Executive Officer as an ex-officio director will provide it with flexibility to act upon the vote or upon the recommendation of the committee.

• Currently, NASDAQ OMX's Nominating Committee is required to be composed of persons who are not directors or who are directors not standing for re-election. This compositional requirement, which NASDAQ OMX's predecessor, The Nasdaq Stock Market, Inc., originally adopted while it was a wholly owned subsidiary of the National Association of Securities Dealers (''NASD''), is highly unusual for a public company such as NASDAQ OMX. In light of NASDAQ OMX's continued evolution into a public company with global operations, NASDAQ OMX believes that it is appropriate to adopt a standard nominating committee structure in which the committee is composed exclusively of independent directors. Under the amended by-law, the nominating committee shall consist of four or five directors, each of whom shall be an independent director within the meaning [sic] the rules of the NASDAQ Exchange. In addition, the number of Non-Industry Directors (*i.e.,* Directors without material ties to the securities industry) must equal or exceed the number of Industry Directors, and at least two members of the committee must be Public Directors (*i.e.,* directors who have no material business relationship with a broker or dealer, NASDAQ OMX or its affiliates, or FINRA).

• Article VIII is being amended to provide that NASDAQ OMX shall provide indemnification against liability, advancement of expenses, and the power to purchase and maintain insurance on behalf of persons serving as a director, officer, or employee of any wholly owned subsidiary of NASDAQ OMX to the same extent as indemnification, advancement of expenses, and the power to maintain insurance is provided for directors, officers, or employees of NASDAQ OMX. Thus, for example, a director of one of NASDAQ OMX's US or Nordic exchanges would be entitled to indemnification (and advancement of expenses) by NASDAQ OMX if made a party to a lawsuit to the same extent as a director of NASDAQ OMX. Similarly, the discretionary authority of NASDAQ OMX under Section 8.1(c) of the By-Laws to provide indemnification to persons serving as an agent of NASDAQ OMX is being extended to persons serving as an agent of any wholly owned subsidiary of NASDAQ OMX. Article VIII is also amended to clarify that any repeal, modification or amendment of, or adoption of any provision inconsistent with, the indemnification and advancement of expenses provided for in Article VIII will not adversely affect the right of any person covered by the provision if the act or omission that any proceeding arises out of or is related to had occurred prior to the time for the repeal, amendment, adoption or modification.

• Article IX is being amended to modernize the language of the provisions dealing with capital stock to reflect possible participation in the Direct Registration System (the ''DRS''). The DRS provides for the electronic registration of eligible securities in an investor's name on the books of the transfer agent or corporation, eliminating the need for physical stock certificates or shares held in book-entry form by the beneficial owner's broker.

[3] 15 U.S.C. 78j–1(m). Notably, ''Staff Directors,'' who are officers of NASDAQ OMX serving on the NASDAQ OMX Board, are not considered independent under these provisions, and are therefore ineligible for service on the Audit Committee or Management Compensation Committee, or, as discussed below, the newly constituted Nominating Committee.

[4] NASDAQ Exchange Rule 4350(c)(3).

Although under the Delaware General Corporation Law, NASDAQ OMX can authorize participation in the program through a resolution, the various amendments to Article IX track more closely the language of Section 158 of the Delaware General Corporation Law, as recently revised, to explicitly reference the possibility of capital stock in uncertificated form. The amendments, however, do not require NASDAQ OMX to participate in the DRS or to eliminate stock certificates.

Article XII is being amended to conform certain of its provisions more closely to corresponding provisions in the Amended and Restated By-Laws of NYSE Euronext (the ''NYSE Euronext By-Laws''). Article XII contains provisions that govern the relationship between NASDAQ OMX and each of its subsidiaries that is a self-regulatory organization. First, the article requires NASDAQ OMX's ''[d]irectors, officers, employees, and *agents''* (emphasis added) to give due regard to the preservation of the independence of each self-regulatory subsidiary, not to take any actions that would interfere with each self-regulatory subsidiary's regulatory functions, to cooperate with the Commission, to consent to U.S. jurisdiction, and to consent in writing to the applicability of these provisions. Corresponding provisions of Articles VII, VIII, and IX of the NYSE Euronext By-Laws, however, do not include the ambiguous and potentially expansive word ''agent.'' NASDAQ OMX is concerned that a broad construction of the term—to include not only parties with which it establishes an explicit contractual agency relationship, but also other service providers such as law firms and financial advisors that may act on NASDAQ OMX's behalf on certain occasions—may deter some parties from providing services to NASDAQ OMX. However, in lieu of the requirement to obtain specific consents from agents, NASDAQ OMX proposes to adopt a provision from the NYSE Euronext By-Laws providing that NASDAQ OMX shall comply with the U.S. Federal securities laws and the rules and regulations thereunder and shall cooperate with the SEC and the Self-Regulatory Subsidiaries pursuant to and to the extent of their respective regulatory authority, and shall take reasonable steps necessary to cause its agents to cooperate, with the SEC and, where applicable, the Self-Regulatory Subsidiaries pursuant to their regulatory authority. Second, Article XII provides that NASDAQ OMX and its officers, directors and employees [5] agree to maintain an agent for service of process in the U.S. By contrast, Article VII of the NYSE Euronext By-Laws includes a statement that officers, directors and employees shall be deemed to agree that the Corporation may serve as the U.S. agent for service of process. Accordingly, NASDAQ OMX proposes to adopt this more self-executing version. Finally, while the NASDAQ OMX By-Laws provide that NASDAQ OMX shall take such action as is necessary to insure that officers, directors and employees consent in writing to the applicability of these provisions, Article IX of the NYSE Euronext By-Laws requires only that NYSE Euronext take reasonable steps necessary to cause officers, directors, and employees to consent. Although NASDAQ OMX has begun the process of collecting written consents from current officers, directors, and employees, it believes that the current language may be unreasonably demanding as applied to a multinational exchange operator with over 2,000 employees in over 20 countries. Accordingly, NASDAQ OMX proposes to adopt a version of NYSE Euronext's language, which will require reasonable steps to obtain consent from both current officers, directors, and employees, as well as prospective officers, directors, and employees prior to their acceptance of a position.

2. Statutory Basis

The NASDAQ Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[6] in general, and with Sections 6(b)(1) and (b)(5) of the Act,[7] in particular, in that the proposal enables the NASDAQ Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Act and to comply with and enforce compliance by members and persons associated with members with provisions of the Act, the rules and regulations thereunder, and self-regulatory organization rules, and is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed changes will enhance the clarity of NASDAQ OMX's governance documents and improve its Board committee structures.

B. Self-Regulatory Organization's Statement on Burden on Competition

The NASDAQ Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

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

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 such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2009–039 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–NASDAQ–2009–039. This file number should be included on the subject line if e-mail is used.

[5] The existing reference to ''agents'' in the sentence is proposed to be deleted.

[6] 15 U.S.C. 78f.

[7] 15 U.S.C. 78f(b)(1), (5).

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 offices 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–NASDAQ–2009–039, and should be submitted on or before June 2, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–10994 Filed 5–11–09; 8:45 am]

BILLING CODE 8010–01–P

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59864; File No. SR–NYSE–2009–44]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by New York Stock Exchange LLC Extending a Temporary Equity Transaction Fee for Shares Executed on the NYSE MatchPoint℠ System, Effective May 1, 2009 Until June 30, 2009

May 5, 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 29, 2009, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend a temporary equity transaction fee for shares executed on the NYSE MatchPoint℠ (''NYSE MatchPoint'' or ''MatchPoint'') system, effective May 1, 2009 until June 30, 2009. The Exchange will charge each member organization using the MatchPoint system a per share fee scaled to the average daily volume of shares it executes on the MatchPoint system. 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 of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

On January 7, 2009, the Exchange filed with the Securities and Exchange Commission (the ''Commission'') a proposed rule change to adopt a temporary equity transaction fee for shares executed on the NYSE MatchPoint℠ system, effective until February 28, 2009 (the ''January filing'').[4] On February 26, 2009, the Exchange filed with the Commission a proposed rule change to extend this temporary equity transaction fee until April 30, 2009 (the ''March filing'').[5] Through this filing, the Exchange proposes to extend this equity transaction fee to be effective May 1, 2009 until June 30, 2009.

[4] *See* Securities Exchange Act Release No. 59229 (January 12, 2009) 74 FR 3119 (January 16, 2009), approving [sic] SR–NYSE–2009–01.

Prior to the January filing, the equity transaction fee was $.0015 per share executed on the MatchPoint system. In the January filing, the Exchange proposed to adopt a scaled fee for MatchPoint users based on the average daily volume of shares executed during a calendar month through the MatchPoint system as follows:

Average daily volume of shares executed	Rate (per share)
50,000 shares or less	$.0015
Over 50,000 to 499,999	$.0010
500,000 and greater	$.0005

The March filing proposed to continue this fee schedule.

The Exchange believes that the extension of the fee schedule until June 30, 2009 will continue to reward those who have been using the MatchPoint system for share execution, and will provide a continued incentive for new participants in MatchPoint.

It is intended that the MatchPoint fee will revert to the equity transaction fee of $.0015 per share beginning July 1, 2009.

2. Statutory Basis

The basis under the Securities Exchange Act of 1934 (the ''Act'')[6] for the proposed rule change is the requirement under Section 6(b)(4) that an exchange have rules that provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. The Exchange believes the fees are reasonable in that they carry forward a reduction in fees that the January filing established and that the March filing extended, and are equitable in that they are available to all members who access the MatchPoint system.

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.

[5] *See* Securities Exchange Act Release No. 59491 (March 3, 2009) 74 FR 10107 (March 9, 2009) (SR–NYSE–2009–20).

[6] 15 U.S.C. 78a.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[7] of the Act and subparagraph (f)(2) of Rule 19b–4[8] thereunder, because it establishes a due, fee, or other charge imposed by the NYSE.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2009–44 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–NYSE–2009–44. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2009–44 and should be submitted on or before June 2, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–10995 Filed 5–11–09; 8:45 am]

BILLING CODE 8010–01–P

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(2).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59866; File No. SR–CBOE–2009–026]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Temporary Membership Status and Interim Trading Permit Access Fees

May 5, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on April 30, 2009, the Chicago Board Options Exchange, Incorporated (''CBOE'' 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 CBOE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

[1] 15 U.S.C. 78s(b)(1).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CBOE proposes to adjust (i) the monthly access fee for persons granted temporary CBOE membership status (''Temporary Members'') pursuant to Interpretation and Policy .02 under CBOE Rule 3.19 (''Rule 3.19.02'') and (ii) the monthly access fee for Interim Trading Permit (''ITP'') holders under CBOE Rule 3.27. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/Legal/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CBOE included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The CBOE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The current access fee for Temporary Members under Rule 3.19.02[2] and the current access fee for ITP holders under Rule 3.27[3] are both $8,817 per month. Both access fees are currently set at the indicative lease rate (as defined below) for April 2009. The Exchange proposes to adjust both access fees effective at the beginning of May 2009 to be equal to the indicative lease rate for May 2009 (which is $9,014). Specifically, the Exchange proposes to revise both the Temporary Member access fee and the ITP access fee to be $9,014 per month commencing on May 1, 2009.

The indicative lease rate is defined under Rule 3.27(b) as the highest clearing firm floating monthly rate[4] of

[2] *See* Securities Exchange Act Release No. 56458 (September 18, 2007), 72 FR 54309 (September 24, 2007) (SR–CBOE–2007–107) for a description of the Temporary Membership status under Rule 3.19.02.

[3] *See* Securities Exchange Act Release No. 58178 (July 17, 2008), 73 FR 42634 (July 22, 2008) (SR–CBOE–2008–40) for a description of the Interim Trading Permits under Rule 3.27.

[4] Rule 3.27(b) defines the clearing firm floating monthly rate as the floating monthly rate that a Clearing Member designates, in connection with

Continued

the CBOE Clearing Members that assist in facilitating at least 10% of the CBOE transferable membership leases.[5] The Exchange determined the indicative lease rate for May 2009 by polling each of these Clearing Members and obtaining the clearing firm floating monthly rate designated by each of these Clearing Members for that month.

The Exchange used the same process to set the proposed Temporary Member and ITP access fees that it used to set the current Temporary Member and ITP access fees. The only difference is that the Exchange used clearing firm floating monthly rate information for the month of May 2009 to set the proposed access fees (instead of clearing firm floating monthly rate information for the month of April 2009 as was used to set the current access fees) in order to take into account changes in clearing firm floating monthly rates for the month of May 2009.

The Exchange believes that the process used to set the proposed Temporary Member access fee and the proposed Temporary Member access fee itself are appropriate for the same reasons set forth in CBOE rule filing SR–CBOE–2008–12 with respect to the original Temporary Member access fee.[6] Similarly, the Exchange believes that the process used to set the proposed ITP access fee and the proposed ITP access fee itself are appropriate for the same reasons set forth in CBOE rule filing SR–CBOE–2008–77 with respect to the original ITP access fee.[7]

Each of the proposed access fees will remain in effect until such time either that the Exchange submits a further rule filing pursuant to Section 19(b)(3)(A)(ii) of the Act[8] to modify the applicable access fee or the applicable status (*i.e.,* the Temporary Membership status or the ITP status) is terminated. Accordingly, the Exchange may, and likely will, further adjust the proposed access fees in the future if the Exchange determines that it would be appropriate to do so taking into consideration lease rates for transferable CBOE memberships prevailing at that time.

The procedural provisions of the CBOE Fee Schedule related to the assessment of each proposed access fee are not proposed to be changed and will remain the same as the current procedural provisions relating to the assessment of that access fee.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Section 6(b)(4) of the Act,[10] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among persons using its facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule change establishes or changes a due, fee, or other charge imposed by the Exchange, it has become effective pursuant to Section 19(b)(3)(A) of the Act[11] and subparagraph (f)(2) of Rule 19b–4[12] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2009–026 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–CBOE–2009–026. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–CBOE–2009–026 and should be submitted on or before June 2, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–10997 Filed 5–11–09; 8:45 am]

BILLING CODE 8010–01–P

transferable membership leases that the Clearing Member assisted in facilitating, for leases that utilize that monthly rate.

[5] The concepts of an indicative lease rate and of a clearing firm floating month rate were previously utilized in the CBOE rule filings that set and adjusted the Temporary Member access fee. Both concepts are also codified in Rule 3.27(b) in relation to ITPs.

[6] *See* Securities Exchange Act Release No. 57293 (February 8, 2008), 73 FR 8729 (February 14, 2008) (SR–CBOE–2008–12), which established the original Temporary Member access fee, for detail regarding the rationale in support of the original Temporary Member access fee and the process used to set that fee, which is also applicable to this proposed change to the Temporary Member access fee as well.

[7] *See* Securities Exchange Act Release No. 58200 (July 21, 2008), 73 FR 43805 (July 28, 2008) (SR–CBOE–2008–77), which established the original ITP access fee, for detail regarding the rationale in support of the original ITP access fee and the process used to set that fee, which is also applicable to this proposed change to the ITP access fee as well.

[8] 15 U.S.C. 78s(b)(3)(A)(ii).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(2).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59871; File No. SR–NASDAQ–2009–045]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Establish the Trade Reporting File Upload Service and Related Fees

May 6, 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 May 1, 2009, The NASDAQ Stock Market LLC (''Nasdaq'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

Nasdaq proposes to establish a new service and related fees for use by Nasdaq Members. The new Trade Reporting File Upload service will enable subscribers to upload multiple trades in one file for submission to ACT via the NASDAQ Workstation or Weblink ACT 2.0.

The text of the proposed rule change is below. Proposed new language is in *italics*.[3]

* * * * *

7033. [Reserved] *Trade Reporting File Upload*

The Trade Reporting File Upload service allows subscribing members to upload multiple trade reports in batches to the Automated Confirmation Transaction (ACT) service via the Nasdaq Workstation or WeblinkACT 2.0.

The Trade Reporting File Upload service is available to members for a fee of $25 per user, per month.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq proposes to establish a new add-on service to the Nasdaq Workstation and Weblink ACT 2.0, and establish related fees. Nasdaq's Trade Reporting File Upload service is a new tool that gives firms the ability to upload multiple trades in one file for submission to ACT via the NASDAQ Workstation or Weblink ACT 2.0. Member firms typically use internal systems that report trades automatically. When member firms encounter connectivity issues or other problems that prevent their automated systems from reporting trades, all unreported trades must be submitted to avoid a violation of the trade reporting rules once the problem is resolved. Member firm automated trade reporting systems are not designed to enter such unreported trades, and as a consequence, member firms must manually enter the unreported trades to ACT via the NASDAQ Workstation or Weblink ACT 2.0. The manual entry of unreported trades can be a very laborious and time-consuming process, depending on the number of trades that were not reported through the member firm's automated system. Member firms requested that Nasdaq develop an automated process for submitting these trades, and in response Nasdaq has developed the Trade Reporting File Upload service.

The Trade Reporting File Upload service allows member firms to upload unreported trade data into a single file of up to 500 trades through the Nasdaq Workstation or Weblink ACT 2.0.[4] Once submitted, the trades are reviewed by the service for data entry errors. Each trade within the file that is accepted by the system will receive a discrete ACT control number for tracking purposes. Trades that are rejected are marked as ''error'' so that users can edit the information and resubmit each rejected trade. Rejected trades do not result in the rejection of the entire file.

The Trade Reporting File Upload service can only be accessed using a Nasdaq Workstation or Weblink ACT 2.0 user account. Member firms subscribing to the Trade Reporting File Upload service are charged a monthly fee per user, which provides access to the service for each Nasdaq Workstation and Weblink ACT 2.0 user account selected for subscription to the Trade Reporting File Upload service. Nasdaq proposes to offer the Trade Reporting File Upload service to each subscriber for a subscription fee of $25 per user, per month. Use of the Trade Reporting File Upload service is voluntary and the subscription fee will be imposed on all purchasers equally based on the number of users selected. The proposed fee will be applied to offset the costs associated with establishing the service, responding to customer requests, configuring Nasdaq's systems, programming to user specifications, and administering the service, among other things. To the extent that costs are covered by the proposed fee, the proposed fee may also provide Nasdaq with a profit.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[5] in general, and Section 6(b)(4) of the Act,[6] in particular, because it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that the Nasdaq operates or controls, and it does not unfairly discriminate between customers, issuers, brokers or dealers. As noted, use of the Trade Reporting File Upload service is voluntary and the subscription fees will be imposed on all purchasers equally based on the number of users. The proposed fee will be allocated to cover the costs associated with establishing the service, responding to customer requests, configuring Nasdaq's systems, programming to user specifications, and administering the service, among other things, and may provide Nasdaq with a profit to the extent costs are covered.

Nasdaq also believes that the proposed rule change is consistent with the provisions of Section 6(b)(5) of the Act[7] because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Changes are marked to the rules of The NASDAQ Stock Market LLC found at *http://nasdaqomx.cchwallstreet.com*. The Commission notes that deletions are in brackets.

[4] Subscribers to the Trade Reporting File Upload service must identify the unreported trades and provide a list of such trades in comma separated value format, also known as ''CSV''.

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(4).

[7] 15 U.S.C. 78f(b)(5).

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 Trade Reporting File Upload service will assist subscribing member firms to quickly upload reportable trades after recovering from a failure of their internal automated reporting system. As a result, member firms will be able to avoid a reporting violation that may otherwise result from using the time consuming manual entry process.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Pursuant to Section 19(b)(3)(A) of the Act[8] and Rule 19b–4(f)(6) thereunder,[9] Nasdaq has designated this proposal as one that effects a change that: (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 thirty days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. Nasdaq has provided the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change. Nasdaq believes that the filing may appropriately be designated for filing under Rule 19b-4(f)(6) because the filing provides a useful enhancement to an existing facility of Nasdaq that is designed to assist members in complying with reporting obligations and avoiding rule violations, and establishes a reasonable fee for such enhancement.

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2009–045 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–NASDAQ–2009–045. 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 Nasdaq. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2009–045 and should be submitted on or before June 2, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–10998 Filed 5–11–09; 8:45 am]

BILLING CODE 8010–01–P

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59865; File No. SR–BX–2009–022]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Volume Discount Given to Market Makers

May 5, 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 30, 2009, NASDAQ OMX BX, Inc. (the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The purpose of the proposed rule change is to amend the Fee Schedule of the Boston Options Exchange Group, LLC (''BOX'') relating to the volume discount (''Volume Discount'') given to Market Makers. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's Internet Web site at *http://nasdaqomxbx.cchwallstreet.com/NASDAQOMXBX/Filings/.*

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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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 Section 3 (Market Maker Trading Fees) of the BOX Fee Schedule.[3] BOX applies a Volume Discount to the fees charged to BOX Market Makers who engage in particularly active trading volume on BOX. The proposed changes will reflect that trading volume in both assigned and un-assigned classes is taken into account when determining a Market Maker's Volume Discount.

The proposed rule change will also remove the ''Example'' from Section 3(b) of the Fee Schedule. The Example is no longer necessary, as the differentiation between volume in assigned and un-assigned classes is no longer made for purposes of the Volume Discount. The proposed rule change will also make certain non-substantive changes by (i) correcting a cross-reference to an earlier section within the Fee Schedule regarding the pass-through of surcharge fees, and (ii) correcting the reference to the type of security (*e.g.* index options instead of options on exchange-traded funds (''ETF'')) for which such surcharges are applicable.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,[4] in general, and Section 6(b)(4) of the Act,[5] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. The proposed change allows for a potentially greater amount of volume being factored into the Volume Discount that a Market Maker may receive, thus reducing a Market Maker's cost of transacting business on the BOX market, benefiting the Market Maker and, through better pricing, the investing public.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Exchange Act[6] and Rule 19b–4(f)(2) thereunder,[7] because it establishes or changes a due, fee, or other charge applicable only to a member.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the rule change if it appears to the Commission that the action is necessary or appropriate in the public interest, for the protection of investors, or would otherwise further the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–BX–2009–022 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–BX–2009–022. 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–BX–2009–022 and should be submitted on or before June 2, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–10996 Filed 5–11–09; 8:45 am]

BILLING CODE 8010–01–P

[3] The BOX Fee Schedule can be found on the BOX Web site at *www.bostonoptions.com.*

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4).

[6] 15 U.S.C. 78s(b)(3)(A)(ii).

[7] 17 CFR 240.19b–4(f)(2).

[8] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 6610]

Culturally Significant Objects Imported for Exhibition Determinations: ''Lords of the Samurai: Legacy of a Daimyo Family''

Summary: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the objects in the exhibition: ''Lords of the Samurai: Legacy of a Daimyo Family,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or

display of the exhibit objects at the Asian Art Museum, San Francisco, CA, from on or about June 12, 2009, until on or about September 20, 2009, and at possible additional exhibitions or venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

For Further Information Contact: For further information, including a list of the exhibit objects, contact Julie Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (*telephone:* 202–453–8050). The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: May 6, 2009.

C. Miller Crouch,

Acting Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. E9–11090 Filed 5–11–09; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 6609]

Culturally Significant Objects Imported for Exhibition Determinations: ''Ron Arad: No Discipline''

Summary: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the objects to be included in the exhibition ''Ron Arad: No Discipline,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Museum of Modern Art, New York, NY, from on or about August 2, 2009, until on or about October 19, 2009, and at possible additional exhibitions or venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

For Further Information Contact: For further information, including a list of the exhibit objects, contact Carol B. Epstein, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–453–8048). The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: May 6, 2009.

C. Miller Crouch,

Acting Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. E9–11092 Filed 5–11–09; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Fort Drum Connector, Towns of Le Ray and Pamelia, Jefferson County, New York

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Limitation on Claims for Judicial Review of Actions by FHWA and Other Federal Agencies.

SUMMARY: This notice announces actions taken by the FHWA and other Federal agencies that are final within the meaning of 23 U.S.C. 139(l)(1). The actions relate to a proposed highway project, that includes construction of a new four-lane divided highway on new alignment that connects Interstate 81 (I–81) to the Fort Drum Army Base North Gate in the Towns of Le Ray and Pamelia in the State of New York. Those actions grant licenses, permits, and approvals for the project.

DATES: By this notice, the FHWA is advising the public of final agency actions subject to 23 U.S.C. 139(l)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before November 9, 2009. If the Federal law that authorizes judicial review of a claim provides a time period of less than 180 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: Jeffrey W. Kolb, P.E., Division Administrator, Federal Highway Administration, New York Division, Leo W. O'Brien Federal Building, 7th Floor, Clinton Avenue and North Pearl Street, Albany, New York 12207, Telephone: (518) 431–4127 or R. Carey Babyak, P.E., Regional Director, NYSDOT Region 7; 317 Washington Street, Watertown, NY 13601, Telephone: (315) 785–2333

SUPPLEMENTARY INFORMATION: Notice is hereby given that the FHWA, and other Federal agencies have taken final agency actions subject to 23 U.S.C. 139(l)(1) by issuing licenses, permits, and approvals for the following highway project in the State of New York: Fort Drum Connector project in the Towns of Le Ray and Pamelia, Jefferson County. The project will construct a 4.3 mile (6.9 km) four-lane divided highway on new alignment in compliance with Interstate design standards. A new free-flow trumpet interchange at I–81 would be located approximately 0.75 miles (1.2 km) north of Exit 48 (NY Route 342). The east end of the Connector will have a Single Point Urban Interchange (SPUI) at the US Route 11/North Memorial Drive intersection that is controlled with a traffic signal. The highway will have full control of access, with traffic entering only at the proposed interchanges with I–81 & US Route 11. Existing intersecting roads will be spanned with bridge structures, relocated, or dead-ended at the new highway. The actions by the Federal agencies, and the laws under which such actions were taken, are described in the Final Environmental Impact Statement (FEIS) for the project, approved on December 31, 2008 and in the FHWA Record of Decision (ROD) issued on March 6, 2009. The FEIS, ROD, and other project records are available by contacting the FHWA or the New York State Department of Transportation at the addresses provided above.

This notice applies to all Federal agency decisions related to the Fort Drum Connector project as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. National Environmental Policy Act [42 U.S.C. 4321–4351].
2. Federal-Aid Highway Act [23 U.S.C. 109 and 23 U.S.C. 128].
3. Clean Air Act [42 U.S.C. 7401–7671(q)].
4. Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303].
5. Endangered Species Act [16 U.S.C. 1531–1544 and Section 1536].
6. Migratory Bird Treaty Act [16 U.S.C. 703–712].
7. Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) *et seq.*].
8. Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)].
9. Farmland Protection Policy Act [7 U.S.C. 4201–4209].
10. Wetlands and Water Resources: Clean Water Act (Section 404, Section 401, Section 319) [33 U.S.C. 1251–1377].
11. Land and Water Conservation Fund [16 U.S.C. 4601–4604].

12. Executive Order 11990 Protection of Wetlands.

13. Executive Order 11988 Floodplain Management.

14. Executive Order 12898, Federal Actions To Address Environmental Justice in Minority Populations and Low Income Populations.

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

Authority: 23 U.S.C. 139(l)(1).

Issued on: April 30, 2009.

Jeffrey W. Kolb,

Division Administrator, Federal Highway Administration, Albany, New York.

[FR Doc. E9–10943 Filed 5–11–09; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

The Cancelation of the Fourth Plenary Meeting, NextGen Mid-Term Implementation Task Force

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of the Cancelation of a NextGen Mid-Term Implementation Task Force meeting.

SUMMARY: The FAA is issuing this notice to advise the public of the cancelation of a meeting of the NextGen Mid-Term Implementation Task Force.

DATES: The meeting scheduled for June 9, 2009 starting at 1 a.m. to 4 p.m. is canceled.

FOR FURTHER INFORMATION CONTACT: RTCA Secretariat, 1828 L Street, NW., Suite 850, Washington, DC 20036; telephone (202) 833–9339; fax (202) 833–9434; Web site *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for the cancelation of a NextGen Mid-Term Implementation Task Force meeting.

Issued in Washington, DC, on May 4, 2009.

Francisco Estrada C.,

RTCA Advisory Committee.

[FR Doc. E9–10984 Filed 5–11–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Eleventh Joint Meeting, RTCA Special Committee 205/EUROCAE Working Group 71: Software Considerations in Aeronautical Systems

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of RTCA Special Committee 205/EUROCAE Working Group 71 meeting.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of RTCA Special Committee 205/EUROCAE Working Group 71: Software Considerations in Aeronautical Systems.

DATES: The meeting will be held June 22–26, 2009, from 8:30 a.m.–5:30 p.m.

ADDRESSES: The meeting will be held at Legislative Office Building, 300 Capitol Avenue, Hartford, Connecticut 06106, United States, Telephone: 1–860–240–0100.

FOR FURTHER INFORMATION CONTACT: (1) RTCA Secretariat, 1828 L Street, NW., Suite 805, Washington, DC 20036; telephone (202) 833–9339; fax (202) 833–9434; Web site *http://www.rtca.org;* (2) Hotel Front Desk: (602) 273–7778; fax (602) 275–5616.

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for a Special Committee 205/EUROCAE Working Group 71 meeting. The agenda will include:

June 22

- Opening Plenary (Registration, Chair's Introductory Remarks, Review of Meeting Agenda and Agreement of Previous Minutes)
- Reports of Sub-Group Activity
- Other Committee/Other Documents Interfacing Personnel Reports (CAST, Unmanned Aircraft Systems, Security, WG–63/SAE S–18)
- Sub-Group Break Out Sessions
- New Member Introduction Session
- Sub-Group Break Out Sessions
- CAST Meeting
- Closing Plenary Session: Text Acceptance (for papers posted, commented on and reworked prior to Plenary)
- Executive Committee and SG Chairs/Secretaries Meeting

June 23

- Sub-Group Break Out Sessions
- Sub-Group Break Out Sessions
- IP submittals due for Wednesday Plenary
- Sub-Group Break Out Sessions
- Mandatory Paper Reading Session
- Executive Committee and SG Chairs/Secretaries Meeting

June 24

- IP Comment Reply & Sub-Group Break Out Sessions (focused on finalising any changes to papers being presented later in the morning)
- Plenary Text Acceptance (for papers posted, commented on and reworked prior to Plenary)
- Sub-Group Break Out Sessions
- CAST Meeting (to Close of Day)
- Sub-Group Break Out Sessions
- Executive Committee and SG Chairs/Secretaries Meeting

June 25

- Sub-Group Break Out Sessions
- Sub-Group Break Out Sessions
- IP submittals due for Friday Plenary
- Plenary Session
- Mandatory Paper Reading Session
- Executive Committee and SG Chairs/Secretaries Meeting

June 26

- IP Comment Reply & Sub-Group Break Out Sessions (focused on finalising any changes to papers being presented during the morning)
- Plenary Text Approval (reworked and late posted papers—with late posted papers only being accepted if (a) the changes are very minor in nature, and (b) adequate time has been allowed for the review of the papers).
- SG1: SCWG Document Integration Sub-Group Report
- SG2: Issue & Rationale Sub-Group Report
- SG3: Tool Qualification Sub-Group Report
- SG4: Model Based Design & Verification Sub-Group Report
- SG5: Object Oriented Technology Sub-Group Report
- SG6: Formal Methods Sub-Group Report
- SG7: Special Considerations Sub-Group Report
- Closing Plenary (Any Other Business and Next Meeting Information, Closing Remarks & Meeting Adjourned)

Attendance is open to the interested public but limited to space availability. With the approval of the chairmen, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on May 4, 2009.

Francisco Estrada C.,

RTCA Advisory Committee.

[FR Doc. E9–10985 Filed 5–11–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2009–0084; Notice 1]

American Honda Motor Co., Inc., Receipt of Petition for Decision of Inconsequential Noncompliance

American Honda Motor Co., Inc. (Honda) has determined that certain 2008 and 2009 model year Honda Civic Si model passenger cars when equipped with dealer accessory 18-inch diameter wheels do not fully comply with paragraph S4.2(a) of 49 CFR 571.138, Federal Motor Vehicle Safety Standard (FMVSS) No. 138 *Tire Pressure Monitoring Systems.* Honda has filed an appropriate report pursuant to 49 CFR Part 573, *Defect and Noncompliance Responsibility and Reports.*

Pursuant to 49 U.S.C. 30118(d) and 30120(h) (see implementing rule at 49 CFR part 556), Honda has petitioned for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety.

This notice of receipt of Honda's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercise of judgment concerning the merits of the petition.

The exact number of vehicles involved is not known. However, a total of approximately 952 wheels, or 238 complete wheel sets, were sold to Honda dealerships by Honda between July 2006 and September 2008. These wheel sets were sold with a replacement tire pressure placard in accordance with FMVSS No. 110, indicating a tire inflation pressure of 250 kPa (36 PSI) for 215/40RZ18 tires having a load capacity rating of 85Y.

Paragraph S4.2(a) of FMVSS No. 138 requires in pertinent part:

S4.2 TPMS detection requirements. The tire pressure monitoring system must:

(a) Illuminate a low tire pressure warning telltale not more than 20 minutes after the inflation pressure in one or more of the vehicle's tires, up to a total of four tires, is equal to or less than either the pressure 25 percent below the vehicle manufacturer's recommended cold inflation pressure, or the pressure specified in the 3rd column of Table 1 of this standard for the corresponding type of tire, whichever is higher * * *

In its petition, Honda explained that after the beginning of retail sales of 2009 model year Honda Civic Si models it discovered that the recommended electronic method of updating the TPMS settings to accommodate proper installation of the subject optional wheel sets would incorrectly inform technicians that the adjustments had been completed successfully. The result is that the TPMS warning threshold remains at the standard setting for the original equipment 17-inch wheels of not less than 175 kPa (25 PSI) for the standard recommended tire pressure of 230 kPa (33 PSI). The minimum allowable TPMS threshold for the 18-inch accessory wheels should be 190 kPa (27 PSI), based on the recommended pressure of 250 kPa (36 PSI) as indicated on the replacement tire pressure placard. As a result, the low tire pressure warning telltale required by S4.2(a) will not illuminate at the 27 PSI minimum allowable TPMS threshold necessitated by installation of the dealer accessory wheels and tires.

Honda explained that the load capacity for each of the 215/40RZ18 85Y tires is 500 kilograms (1,100 lbs) at 230 kPa (33 PSI), calculated using the Japan Automotive Tyre Manufacturer's Association (JATMA) method, as recognized by NHTSA in FMVSS No. 110. The maximum allowable load according to the Gross Axle Weight Ratings (GAWR) for a 2008 or 2009 Civic Si is 477 kilograms (1,050 lbs) for each front tire and 425 kilograms (938 lbs) for each rear tire, well within the load capacity specified by JATMA. Honda therefore expressed its belief that this noncompliance is inconsequential to motor vehicle safety because at the 25 PSI TPMS threshold, adequate load capacity remains for the 215/40RZ18 58Y tires when mounted on the subject replacement rims on these vehicles.

In summation, Honda states that it believes that the noncompliances are inconsequential to motor vehicle safety and that no corrective action is warranted.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance.

Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited at the beginning of this notice and be submitted by any of the following methods:

a. By mail addressed to: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

b. By hand delivery to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except Federal holidays.

c. Electronically: by logging onto the Federal Docket Management System (FDMS) Web site at *http://www.regulations.gov/.* Follow the online instructions for submitting comments. Comments may also be faxed to 1–202–493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that your comments were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

You may view documents submitted to a docket at the address and times given above. You may also view the documents on the Internet at *http://www.regulations.gov* by following the online instructions for accessing the dockets available at that Web site.

The petition, supporting materials, and all comments received before the close of business on the closing date indicated below will be filed and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the extent possible. When the petition is granted or denied, notice of the decision will be published in the **Federal Register** pursuant to the authority indicated below.

Comment closing date: June 11, 2009.

Authority: (49 U.S.C. 30118, 30120: delegations of authority at CFR 1.50 and 501.8).

Issued on: May 6, 2009.

Claude H. Harris,

Director, Office of Vehicle Safety Compliance.

[FR Doc. E9–11021 Filed 5–11–09; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) has received a request for a waiver of compliance from certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

Hoosier Valley Railroad Museum, Inc.

[Waiver Petition Docket Number FRA–2009–0023]

The Hoosier Valley Railroad Museum, Inc. (HVRM) seeks a waiver of compliance from 49 CFR 240.201(d) which states, ''After December 31, 1991, no railroad shall permit or require any person to operate a locomotive in any class of locomotive or train service unless that person has been certified as a qualified locomotive engineer and issued a certificate that complies with § 240.223.'' HVRM desires to conduct an ''engineer-for-an-hour'' charter, which would allow ''non-certified'' individuals to operate a locomotive.

HVRM currently operates on track owned by the town of North Judson, Indiana, which is controlled and operated by the Chesapeake and Indiana Railroad (CKIN). HVRM currently operates between milepost (MP) 212.5 and MP 223.0 on CKIN. The Museum Depot is located at approximately MP 213.4. HVRM proposes to conduct the engineer-for-an-hour operations between MP 213.5 and MP 216.

HVRM will verify that each participant is in possession of a valid state issued motor vehicle license, evaluate each participant visually for fitness to operate the locomotive with respect to obvious signs of alcohol and/or drug use, and will have a certified locomotive engineer in the cab at all times. The operations will be conducted under Absolute Block Authority (a section of track that can only be occupied by one train at a time) on a designated portion of track only during daylight hours. An HVRM qualified locomotive engineer will conduct a job briefing with each participant to ensure all parties know and understand the movement to be made and know and understand individual responsibilities in the proposed movements. HVRM would limit engineer-for-an-hour train size to one (1) locomotive and not more than three (3) cars with no revenue passengers or members of the public on board during operations. Any accident or incident that occurs during an engineer-for-an-hour movement will be immediately reported to the Federal Railroad Administration.

HVRM believes that granting this waiver will enable it to generate funds to support its goal of acquiring and refurbishing railroad antiquities so that they may be enjoyed by future generations. HVRM also believes these operations will not pose any safety concerns to the public at large.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (*e.g.*, Waiver Petition Docket Number FRA–2009–0023) and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Issued in Washington, DC, on May 6, 2009.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. E9–11020 Filed 5–11–09; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF THE TREASURY

Bureau of the Public Debt

Proposed Collection: Comment Request

ACTION: Notice and request for comments.

SUMMARY: The 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 104–13 (44 U.S.C. 3506(c)(2)(A). Currently the Bureau of the Public Debt within the Department of the Treasury is soliciting comments concerning the Claim For Lost, Stolen, or Destroyed United States Registered Securities.

DATES: Written comments should be received on or before July 6, 2009, to be assured of consideration.

ADDRESSES: Direct all written comments to Bureau of the Public Debt, Judi Owens, 200 Third Street, A4–A, Parkersburg, WV 26106–1328, or *judi.owens@bpd.treas.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Judi Owens, Bureau of the Public Debt, 200 Third Street, A4–A, Parkersburg, WV 26106–1328, (304) 480–8150.

SUPPLEMENTARY INFORMATION:

Title: Claim For Lost, Stolen, or Destroyed United States Registered Securities.

OMB Number: 1535–0014.

Form Number: PD F 1025.

Abstract: The information is requested to establish ownership and support a request for relief because of the loss, theft, or destruction of United States Registered Securities.

Current Actions: None.

Type of Review: Extension.

Affected Public: Individuals or businesses.

Estimated Number of Respondents: 500.

Estimated Time per Respondent: 55 minutes.

Estimated Total Annual Burden Hours: 460.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. 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 automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: May 4, 2009.

Judi Owens,

Manager, Information Management Branch.

[FR Doc. E9–10724 Filed 5–11–09; 8:45 am]

BILLING CODE 4810–39–P

DEPARTMENT OF THE TREASURY

Bureau of the Public Debt

Proposed Collection: Comment Request

ACTION: Notice and request for comments.

SUMMARY: The 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 104–13 (44 U.S.C. 3506(c)(2)(A). Currently the Bureau of the Public Debt within the Department of the Treasury is soliciting comments concerning the Affidavit of Forgery for United States Savings Bonds.

DATES: Written comments should be received on or before July 6, 2009, to be assured of consideration.

ADDRESSES: Direct all written comments to Bureau of the Public Debt, Judi Owens, 200 Third Street, A4–A, Parkersburg, WV 26106–1328, or *judi.owens@bpd.treas.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Judi Owens, Bureau of the Public Debt, 200 Third Street, A4–A, Parkersburg, WV 26106–1328, (304) 480–8150.

SUPPLEMENTARY INFORMATION:

Title: Affidavit of Forgery for United States Savings Bonds.

OMB Number: 1535–0067.

Form Number: PD F 0974.

Abstract: The information is requested to establish whether the registered owner signed the request for payment or if the signature was a forgery.

Current Actions: None.

Type of Review: Extension.

Affected Public: Individuals or households.

Estimated Number of Respondents: 2,500.

Estimated Time per Respondent: 15 minutes.

Estimated Total Annual Burden Hours: 625.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. 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 automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: May 4, 2009.

Judi Owens,

Manager, Information Management Branch.

[FR Doc. E9–10726 Filed 5–11–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE TREASURY

Bureau of the Public Debt

Proposed Collection: Comment Request

ACTION: Notice and request for comments.

SUMMARY: The 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 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently the Bureau of the Public Debt within the Department of the Treasury is soliciting comments concerning the Claim For United States Savings Bonds Not Received.

DATES: Written comments should be received on or before July 6, 2009, to be assured of consideration.

ADDRESSES: Direct all written comments to Bureau of the Public Debt, Judi Owens, 200 Third Street, A4–A, Parkersburg, WV 26106–1328, or *judi.owens@bpd.treas.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Judi Owens, Bureau of the Public Debt, 200 Third Street, A4–A, Parkersburg, WV 26106–1328, (304) 480–8150.

SUPPLEMENTARY INFORMATION:

Title: Claim For United States Savings Bonds Not Received.

OMB Number: 1535–0098.

Form Number: PD F 3062–4.

Abstract: The information is used to support a request for substitute savings bonds in lieu of savings bonds not received.

Current Actions: None.

Type of Review: Extension.

Affected Public: Individuals.

Estimated Number of Respondents: 25,000.

Estimated Time per Respondent: 10 minutes.

Estimated Total Annual Burden Hours: 4,175.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. 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 automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: May 4, 2009.

Judi Owens,

Manager, Information Management Branch.

[FR Doc. E9–10719 Filed 5–11–09; 8:45 am]

BILLING CODE 4810–39–P

DEPARTMENT OF THE TREASURY

Bureau of the Public Debt

Proposed Collection: Comment Request

ACTION: Notice and request for comments.

SUMMARY: The 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 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently the Bureau of the Public Debt within the Department of the Treasury is soliciting comments concerning the Report/Application for Relief on Account of Loss, Theft, or Destruction of United States Bearer Securities (Organizations).

DATES: Written comments should be received on or before July 6, 2009, to be assured of consideration.

ADDRESSES: Direct all written comments to Bureau of the Public Debt, Judi Owens, 200 Third Street, A4–A, Parkersburg, WV 26106–1328, or *judi.owens@bpd.treas.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Judi Owens, Bureau of the Public Debt, 200 Third Street, A4–A, Parkersburg, WV 26106–1328, (304) 480–8150.

SUPPLEMENTARY INFORMATION:

Title: Report/Application for Relief on Account of Loss, Theft, or Destruction of United States Bearer Securities (Organizations).

OMB Number: 1535–0015.

Form Number: PD F 1022.

Abstract: The information is requested to establish ownership and support a request for relief because of the loss, theft, or destruction of United States Bearer Securities.

Current Actions: None.

Type of Review: Extension.

Affected Public: Organizations.

Estimated Number of Respondents: 100.

Estimated Time per Respondent: 55 minutes.

Estimated Total Annual Burden Hours: 92.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. 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 automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: May 4, 2009.

Judi Owens,

Manager, Information Management Branch.

[FR Doc. E9–10721 Filed 5–11–09; 8:45 am]

BILLING CODE 4810–39–P

Federal Register

Tuesday,
May 12, 2009

Part II

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Part 483

Medicare Program; Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities for FY 2010; Minimum Data Set, Version 3.0 for Skilled Nursing Facilities and Medicaid Nursing Facilities; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 483

[CMS–1410–P]

RIN 0938–AP46

Medicare Program; Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities for FY 2010; Minimum Data Set, Version 3.0 for Skilled Nursing Facilities and Medicaid Nursing Facilities

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

ACTION: Proposed rule.

SUMMARY: This proposed rule would update the payment rates used under the prospective payment system for skilled nursing facilities, for fiscal year 2010. In addition, it would recalibrate the case-mix indexes so that they more accurately reflect parity in expenditures related to the implementation of case-mix refinements in January 2006. It also discusses the results of our ongoing analysis of nursing home staff time measurement data collected in the Staff Time and Resource Intensity Verification project, and proposes a new RUG–IV case-mix classification model that will use the updated Minimum Data Set (MDS) 3.0 resident assessment for case-mix classification. In addition, this proposed rule includes a request for public comment on a possible requirement for the quarterly reporting of nursing home staffing data, and would revise the regulations to incorporate certain technical corrections. Finally, this proposed rule includes a request for public comments on applying the quality monitoring mechanism in place for all other SNF PPS facilities to rural swing-bed hospitals.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on June 30, 2009.

ADDRESSES: In commenting, please refer to file code CMS–1410–P. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the instructions under the ''More Search Options'' tab.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1410–P, P.O. Box 8016, Baltimore, MD 21244–8016.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1410–P, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments before the close of the comment period to either of the following addresses:

a. Centers for Medicare & Medicaid Services, Department of Health & Human Services, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal Government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. Centers for Medicare & Medicaid Services, Department of Health & Human Services, 7500 Security Boulevard, Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, please call telephone number (410) 786–7195 in advance to schedule your arrival with one of our staff members.

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Ellen Berry, (410) 786–4528 (for information related to clinical issues).

Trish Brooks, (410) 786–4561 (for information related to Resident Assessment Protocols (RAPs) under the Minimum Data Set (MDS)).

Jeanette Kranacs, (410) 786–9385 (for information related to the development of the payment rates and case-mix indexes).

Abby Ryan, (410) 786–4343 (for information related to the STRIVE project).

Jean Scott, (410) 786–6327 (for information related to the request for comment on the possible quarterly reporting of nursing home staffing data).

Bill Ullman, (410) 786–5667 (for information related to level of care determinations, consolidated billing, and general information).

SUPPLEMENTARY INFORMATION: *Inspection of Public Comments:* All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: *http://www.regulations.gov.* Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1–800–743–3951.

To assist readers in referencing sections contained in this document, we are providing the following Table of Contents.

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Abbreviations

In addition, because of the many terms to which we refer by abbreviation in this proposed rule, we are listing these abbreviations and their corresponding terms in alphabetical order below:

ADLs Activities of Daily Living
AIDS Acquired Immune Deficiency Syndrome
AOTA American Occupational Therapy Association
APTA American Physical Therapy Association
ARD Assessment Reference Date
ASHA American Speech-Language-Hearing Association
BBA Balanced Budget Act of 1997, Pub. L. 105–33
BBRA Medicare, Medicaid, and SCHIP Balanced Budget Refinement Act of 1999, Pub. L. 106–113
BIMS Brief Interview for Mental Status
BIPA Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000, Pub. L. 106–554
CAH Critical Access Hospital
CAM Confusion Assessment Method
CARE Continuity Assessment Record and Evaluation
CAT Care Area Trigger
CBSA Core-Based Statistical Area
CFR Code of Federal Regulations
CMI Case-Mix Index
CMS Centers for Medicare & Medicaid Services
CMSO Center for Medicaid and State Operations
DRA Deficit Reduction Act of 2005, Pub. L. 109–171
DSM–IV Diagnostic and Statistical Manual of Mental Disorders, 4th Revision
FQHC Federally Qualified Health Center
FR **Federal Register**
FY Fiscal Year
GAO Government Accountability Office
HCPCS Healthcare Common Procedure Coding System
HHA Home Health Agencies
HIPPS Health Insurance Prospective Payment System
HIT Health Information Technology
HIV Human Immunodeficiency Virus Infection
IFC Interim Final Rule with Comment Period
IPPS Hospital Inpatient Prospective Payment System
IRF Inpatient Rehabilitation Facilities
LTCH Long-Term Care Hospital
MAC Medicare Administrative Contractor
MMACS Medicare/Medicaid Automated Certification System
MDS Minimum Data Set
MIPPA Medicare Improvements for Patients and Providers Act of 2008, Pub. L. 110–275
MMA Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. 108–173
MMSEA Medicare, Medicaid, and SCHIP Extension Act of 2007, Pub. L. 110–173
MSA Metropolitan Statistical Area
MS–DRG Medicare Severity Diagnosis-Related Group
NCQA National Committee for Quality Assurance
NF Nursing Facility
NRST Non-Resident Specific Time
NTA Non-Therapy Ancillary
OIG Office of the Inspector General
OMB Office of Management and Budget
OMRA Other Medicare Required Assessment
OSCAR Online Survey Certification and Reporting System
PAC Post-Acute Care
PHQ–9 9-Item Patient Health Questionnaire
PPS Prospective Payment System
QM Quality Measure
RAI Resident Assessment Instrument
RAP Resident Assessment Protocol
RAVEN Resident Assessment Validation Entry
RFA Regulatory Flexibility Act, Pub. L. 96–354
RHC Rural Health Clinic
RIA Regulatory Impact Analysis
RST Resident Specific Time
RUG–III Resource Utilization Groups, Version 3
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SCHIP State Children's Health Insurance Program
SNF Skilled Nursing Facility
SOM State Operations Manual
STM Staff Time Measurement
STRIVE Staff Time and Resource Intensity Verification
TEP Technical Expert Panel
UMRA Unfunded Mandates Reform Act, Pub. L. 104–4

I. Background

Annual updates to the prospective payment system (PPS) rates for skilled nursing facilities (SNFs) are required by section 1888(e) of the Social Security Act (the Act), as added by section 4432 of the Balanced Budget Act of 1997 (BBA) (Pub. L. 105–33, enacted on August 5, 1997), and amended by the Medicare, Medicaid, and State Children's Health Insurance Program (SCHIP) Balanced Budget Refinement Act of 1999 (BBRA) (Pub. L. 106–113, enacted on November 29, 1999), the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA) (Pub. L. 106–554, enacted December 21, 2000), and the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub. L. 108–173, enacted on December 8, 2003). Our most recent

annual update occurred in a final rule (73 FR 46416, August 8, 2008) that set forth updates to the SNF PPS payment rates for fiscal year (FY) 2009. We subsequently published a correction notice (73 FR 56998, October 1, 2008) with respect to those payment rate updates.

A. Current System for Payment of Skilled Nursing Facility Services Under Part A of the Medicare Program

Section 4432 of the BBA amended section 1888 of the Act to provide for the implementation of a per diem PPS for SNFs, covering all costs (routine, ancillary, and capital-related) of covered SNF services furnished to beneficiaries under Part A of the Medicare program, effective for cost reporting periods beginning on or after July 1, 1998. In this proposed rule, we propose to update the per diem payment rates for SNFs for FY 2010. Major elements of the SNF PPS include:

• *Rates*. As discussed in section I.F.1. of this proposed rule, we established per diem Federal rates for urban and rural areas using allowable costs from FY 1995 cost reports. These rates also included a ''Part B add-on'' (an estimate of the cost of those services that, before July 1, 1998, were paid under Part B but furnished to Medicare beneficiaries in a SNF during a Part A covered stay). We adjust the rates annually using a SNF market basket index, and we adjust them by the hospital inpatient wage index to account for geographic variation in wages. We also apply a case-mix adjustment to account for the relative resource utilization of different patient types. This adjustment utilizes a refined, 53-group version of the Resource Utilization Groups, version III (RUG–III) case-mix classification system, based on information obtained from the required resident assessments using the Minimum Data Set (MDS) 2.0. Additionally, as noted in the final rule for FY 2006 (70 FR 45028, August 4, 2005), the payment rates at various times have also reflected specific legislative provisions, including section 101 of the BBRA, sections 311, 312, and 314 of the BIPA, and section 511 of the MMA.

• *Transition*. Under sections 1888(e)(1)(A) and (e)(11) of the Act, the SNF PPS included an initial, three-phase transition that blended a facility-specific rate (reflecting the individual facility's historical cost experience) with the Federal case-mix adjusted rate. The transition extended through the facility's first three cost reporting periods under the PPS, up to and including the one that began in FY 2001. Thus, the SNF PPS is no longer operating under the transition, as all facilities have been paid at the full Federal rate effective with cost reporting periods beginning in FY 2002. As we now base payments entirely on the adjusted Federal per diem rates, we no longer include adjustment factors related to facility-specific rates for the coming FY.

• *Coverage*. The establishment of the SNF PPS did not change Medicare's fundamental requirements for SNF coverage. However, because the RUG–III classification is based, in part, on the beneficiary's need for skilled nursing care and therapy, we have attempted, where possible, to coordinate claims review procedures with the existing resident assessment process and case-mix classification system. This approach includes an administrative presumption that utilizes a beneficiary's initial classification in one of the upper 35 RUGs of the refined 53-group system to assist in making certain SNF level of care determinations. In the July 30, 1999 final rule (64 FR 41670), we indicated that we would announce any changes to the guidelines for Medicare level of care determinations related to modifications in the RUG–III classification structure (see section II.E. of this proposed rule for a discussion of the relationship between the case-mix classification system and SNF level of care determinations, and section III.D for a discussion of this process in the context of the proposed conversion to version 4 of the RUGs (RUG–IV)).

• *Consolidated Billing*. The SNF PPS includes a consolidated billing provision that requires a SNF to submit consolidated Medicare bills to its fiscal intermediary or Medicare Administrative Contractor for almost all of the services that its residents receive during the course of a covered Part A stay. In addition, this provision places with the SNF the Medicare billing responsibility for physical, occupational, and speech-language therapy that the resident receives during a noncovered stay. The statute excludes a small list of services from the consolidated billing provision (primarily those of physicians and certain other types of practitioners), which remain separately billable under Part B when furnished to a SNF's Part A resident. A more detailed discussion of this provision appears in section VII of this proposed rule.

• *Application of the SNF PPS to SNF services furnished by swing-bed hospitals*. Section 1883 of the Act permits certain small, rural hospitals to enter into a Medicare swing-bed agreement, under which the hospital can use its beds to provide either acute or SNF care, as needed.

For critical access hospitals (CAHs), Part A pays on a reasonable cost basis for SNF services furnished under a swing-bed agreement. However, in accordance with section 1888(e)(7) of the Act, these services furnished by non-CAH rural hospitals are paid under the SNF PPS, effective with cost reporting periods beginning on or after July 1, 2002. A more detailed discussion of this provision appears in section VIII of this proposed rule.

B. Requirements of the Balanced Budget Act of 1997 (BBA) for Updating the Prospective Payment System for Skilled Nursing Facilities

Section 1888(e)(4)(H) of the Act requires that we provide for publication annually in the **Federal Register**:

1. The unadjusted Federal per diem rates to be applied to days of covered SNF services furnished during the upcoming FY.
2. The case-mix classification system to be applied with respect to these services during the upcoming FY.
3. The factors to be applied in making the area wage adjustment with respect to these services.

Along with other revisions proposed later in this preamble, this proposed rule provides these required annual updates to the Federal rates.

C. The Medicare, Medicaid, and SCHIP Balanced Budget Refinement Act of 1999 (BBRA)

There were several provisions in the BBRA that resulted in adjustments to the SNF PPS. We described these provisions in detail in the SNF PPS final rule for FY 2001 (65 FR 46770, July 31, 2000). In particular, section 101(a) of the BBRA provided for a temporary 20 percent increase in the per diem adjusted payment rates for 15 specified RUG–III groups. In accordance with section 101(c)(2) of the BBRA, this temporary payment adjustment expired on January 1, 2006, upon the implementation of case-mix refinements (see section I.F.1. of this proposed rule). We included further information on BBRA provisions that affected the SNF PPS in Program Memorandums A–99–53 and A–99–61 (December 1999).

Also, section 103 of the BBRA designated certain additional services for exclusion from the consolidated billing requirement, as discussed in section VII. of this proposed rule. Further, for swing-bed hospitals with more than 49 (but less than 100) beds, section 408 of the BBRA provided for the repeal of certain statutory restrictions on length of stay and

aggregate payment for patient days, effective with the end of the SNF PPS transition period described in section 1888(e)(2)(E) of the Act. In the final rule for FY 2002 (66 FR 39562, July 31, 2001), we made conforming changes to the regulations at § 413.114(d), effective for services furnished in cost reporting periods beginning on or after July 1, 2002, to reflect section 408 of the BBRA.

D. The Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA)

The BIPA also included several provisions that resulted in adjustments to the SNF PPS. We described these provisions in detail in the final rule for FY 2002 (66 FR 39562, July 31, 2001). In particular:

- Section 203 of the BIPA exempted CAH swing-beds from the SNF PPS. We included further information on this provision in Program Memorandum A–01–09 (Change Request #1509), issued January 16, 2001, which is available online at *www.cms.hhs.gov/transmittals/downloads/a0109.pdf*.
- Section 311 of the BIPA revised the statutory update formula for the SNF market basket, and also directed us to conduct a study of alternative case-mix classification systems for the SNF PPS. In 2006, we submitted a report to the Congress on this study, which is available online at *www.cms.hhs.gov/SNFPPS/Downloads/RC_2006_PC-PPSSNF.pdf*.
- Section 312 of the BIPA provided for a temporary increase of 16.66 percent in the nursing component of the case-mix adjusted Federal rate for services furnished on or after April 1, 2001, and before October 1, 2002; accordingly, this add-on is no longer in effect. This section also directed the Government Accountability Office (GAO) to conduct an audit of SNF nursing staff ratios and submit a report to the Congress on whether the temporary increase in the nursing component should be continued. The report (GAO–03–176), which GAO issued in November 2002, is available online at *http://www.gao.gov/new.items/d03176.pdf*.
- Section 313 of the BIPA repealed the consolidated billing requirement for services (other than physical, occupational, and speech-language therapy) furnished to SNF residents during noncovered stays, effective January 1, 2001. (A more detailed discussion of this provision appears in section VII. of this proposed rule.)
- Section 314 of the BIPA corrected an anomaly involving three of the RUGs that section 101(a) of the BBRA had designated to receive the temporary payment adjustment discussed above in section I.C. of this proposed rule. (As noted previously, in accordance with section 101(c)(2) of the BBRA, this temporary payment adjustment expired upon the implementation of case-mix refinements on January 1, 2006.)
- Section 315 of the BIPA authorized us to establish a geographic reclassification procedure that is specific to SNFs, but only after collecting the data necessary to establish a SNF wage index that is based on wage data from nursing homes. To date, this has proven to be infeasible due to the volatility of existing SNF wage data and the significant amount of resources that would be required to improve the quality of that data.

We included further information on several of the BIPA provisions in Program Memorandum A–01–08 (Change Request #1510), issued January 16, 2001, which is available online at *www.cms.hhs.gov/transmittals/downloads/a0108.pdf*.

E. The Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA)

The MMA included a provision that results in a further adjustment to the SNF PPS. Specifically, section 511 of the MMA amended section 1888(e)(12) of the Act, to provide for a temporary increase of 128 percent in the PPS per diem payment for any SNF residents with Acquired Immune Deficiency Syndrome (AIDS), effective with services furnished on or after October 1, 2004. This special AIDS add-on was to remain in effect until ''* * * the Secretary certifies that there is an appropriate adjustment in the case mix * * * to compensate for the increased costs associated with [such] residents * * *.'' The AIDS add-on is also discussed in Program Transmittal #160 (Change Request #3291), issued on April 30, 2004, which is available online at *http://www.cms.hhs.gov/transmittals/downloads/r160cp.pdf*. As discussed in the SNF PPS final rule for FY 2006 (70 FR 45028, August 4, 2005), we did not address the certification of the AIDS add-on in that final rule's implementation of the case-mix refinements, thus allowing the temporary add-on payment created by section 511 of the MMA to remain in effect.

For the limited number of SNF residents that qualify for the AIDS add-on, implementation of this provision results in a significant increase in payment. For example, using FY 2007 data, we identified slightly more than 2,700 SNF residents with a diagnosis code of 042 (Human Immunodeficiency Virus (HIV) Infection). For FY 2010, an urban facility with a resident with AIDS in RUG group ''SSA'' would have a case-mix adjusted payment of $252.71 (see Table 4) before the application of the MMA adjustment. After an increase of 128 percent, this urban facility would receive a case-mix adjusted payment of approximately $576.18. A further discussion of the AIDS add-on in the context of research conducted during the recent STRIVE study appears in section III.E.6. of this proposed rule.

In addition, section 410 of the MMA contained a provision that excluded from consolidated billing certain practitioner and other services furnished to SNF residents by rural health clinics (RHCs) and Federally Qualified Health Centers (FQHCs). (Further information on this provision appears in section VII. of this proposed rule.)

F. Skilled Nursing Facility Prospective Payment—General Overview

We implemented the Medicare SNF PPS effective with cost reporting periods beginning on or after July 1, 1998. This PPS pays SNFs through prospective, case-mix adjusted per diem payment rates applicable to all covered SNF services. These payment rates cover all costs of furnishing covered skilled nursing services (routine, ancillary, and capital-related costs) other than costs associated with approved educational activities. Covered SNF services include post-hospital services for which benefits are provided under Part A, as well as those items and services (other than physician and certain other services specifically excluded under the BBA) which, before July 1, 1998, had been paid under Part B but furnished to Medicare beneficiaries in a SNF during a covered Part A stay. A comprehensive discussion of these provisions appears in the May 12, 1998 interim final rule (63 FR 26252).

1. Payment Provisions—Federal Rate

The PPS uses per diem Federal payment rates based on mean SNF costs in a base year (FY 1995) updated for inflation to the first effective period of the PPS. We developed the Federal payment rates using allowable costs from hospital-based and freestanding SNF cost reports for reporting periods beginning in FY 1995. The data used in developing the Federal rates also incorporated an estimate of the amounts that would be payable under Part B for covered SNF services furnished to individuals during the course of a covered Part A stay in a SNF.

In developing the rates for the initial period, we updated costs to the first effective year of the PPS (the 15-month period beginning July 1, 1998) using a SNF market basket index, and then standardized for the costs of facility differences in case mix and for geographic variations in wages. In compiling the database used to compute the Federal payment rates, we excluded those providers that received new provider exemptions from the routine cost limits, as well as costs related to payments for exceptions to the routine cost limits. Using the formula that the BBA prescribed, we set the Federal rates at a level equal to the weighted mean of freestanding costs plus 50 percent of the difference between the freestanding mean and weighted mean of all SNF costs (hospital-based and freestanding) combined. We computed and applied separately the payment rates for facilities located in urban and rural areas. In addition, we adjusted the portion of the Federal rate attributable to wage-related costs by a wage index.

The Federal rate also incorporates adjustments to account for facility case-mix, using a classification system that accounts for the relative resource utilization of different patient types. The RUG–III classification system uses beneficiary assessment data from the Minimum Data Set (MDS) completed by SNFs to assign beneficiaries to one of 53 RUG–III groups. The original RUG–III case-mix classification system included 44 groups. However, under incremental refinements that became effective on January 1, 2006, we added nine new groups—comprising a new Rehabilitation plus Extensive Services category—at the top of the RUG hierarchy. The May 12, 1998 interim final rule (63 FR 26252) included a detailed description of the original 44-group RUG–III case-mix classification system. A comprehensive description of the refined 53-group RUG–III case-mix classification system (RUG–53) appeared in the proposed and final rules for FY 2006 (70 FR 29070, May 19, 2005, and 70 FR 45026, August 4, 2005).

Further, in accordance with section 1888(e)(4)(E)(ii)(IV) of the Act, the Federal rates in this proposed rule reflect an update to the rates that we published in the final rule for FY 2009 (73 FR 46416, August 8, 2008) and the associated correction notice (73 FR 56998, October 1, 2008), equal to the full change in the SNF market basket index. A more detailed discussion of the SNF market basket index and related issues appears in section I.F.2. and section VI. of this proposed rule.

2. FY 2010 Rate Updates Using the Skilled Nursing Facility Market Basket Index

Section 1888(e)(5) of the Act requires us to establish a SNF market basket index that reflects changes over time in the prices of an appropriate mix of goods and services included in covered SNF services. We use the SNF market basket index to update the Federal rates on an annual basis. In the SNF PPS final rule for FY 2008 (72 FR 43425 through 43430, August 3, 2007), we revised and rebased the market basket, which included updating the base year from FY 1997 to FY 2004. The proposed FY 2010 market basket increase is 2.1 percent, which is based on IHS Global Insight, Inc. first quarter 2009 forecast with historical data through fourth quarter 2008.

In addition, as explained in the final rule for FY 2004 (66 FR 46058, August 4, 2003) and in section VI.B. of this proposed rule, the annual update of the payment rates includes, as appropriate, an adjustment to account for market basket forecast error. As described in the final rule for FY 2008, the threshold percentage that serves to trigger an adjustment to account for market basket forecast error is 0.5 percentage point effective for FY 2008 and subsequent years. This adjustment takes into account the forecast error from the most recently available FY for which there is final data, and applies whenever the difference between the forecasted and actual change in the market basket exceeds a 0.5 percentage point threshold. For FY 2008 (the most recently available FY for which there is final data), the estimated increase in the market basket index was 3.3 percentage points, while the actual increase was 3.6 percentage points, resulting in a difference of 0.3 percentage point. Accordingly, as the difference between the estimated and actual amount of change does not exceed the 0.5 percentage point threshold, the payment rates for FY 2010 do not include a forecast error adjustment. Table 1 shows the forecasted and actual market basket amounts for FY 2008.

TABLE 1—DIFFERENCE BETWEEN THE FORECASTED AND ACTUAL MARKET BASKET INCREASES FOR FY 2008

Index	Forecasted FY 2008 increase *	Actual FY 2008 increase **	FY 2008 difference ***
SNF	3.3	3.6	0.3

* Published in **Federal Register**; based on second quarter 2007 IHS Global Insight Inc. forecast (2004-based index).
** Based on the first quarter 2009 IHS Global Insight forecast (2004-based index).
*** The FY 2008 forecast error correction for the PPS Operating portion will be applied to the FY 2010 PPS update recommendations. Any forecast error less than 0.5 percentage points will not be reflected in the update recommendation.

II. FY 2010 Annual Update of Payment Rates Under the Prospective Payment System for Skilled Nursing Facilities

A. Federal Prospective Payment System

This proposed rule sets forth a schedule of Federal prospective payment rates applicable to Medicare Part A SNF services beginning October 1, 2009. The schedule incorporates per diem Federal rates that provide Part A payment for almost all costs of services furnished to a beneficiary in a SNF during a Medicare-covered stay.

1. Costs and Services Covered by the Federal Rates

In accordance with section 1888(e)(2)(B) of the Act, the Federal rates apply to all costs (routine, ancillary, and capital-related) of covered SNF services other than costs associated with approved educational activities as defined in § 413.85. Under section 1888(e)(2)(A)(i) of the Act, covered SNF services include post-hospital SNF services for which benefits are provided under Part A (the hospital insurance program), as well as all items and services (other than those services excluded by statute) that, before July 1, 1998, were paid under Part B (the supplementary medical insurance program) but furnished to Medicare beneficiaries in a SNF during a Part A covered stay. (These excluded service categories are discussed in greater detail in section V.B.2. of the May 12, 1998 interim final rule (63 FR 26295 through 26297)).

2. Methodology Used for the Calculation of the Federal Rates

The proposed FY 2010 rates would reflect an update using the full amount of the latest market basket index. The proposed FY 2010 market basket increase factor is 2.1 percent. A complete description of the multi-step process used to calculate Federal rates initially appeared in the May 12, 1998 interim final rule (63 FR 26252), as further revised in subsequent rules. We note that in accordance with section 101(c)(2) of the BBRA, the previous temporary increases in the per diem adjusted payment rates for certain designated RUGs, as specified in section 101(a) of the BBRA and section 314 of the BIPA, are no longer in effect due to the implementation of case-mix refinements as of January 1, 2006. However, the temporary increase of 128 percent in the per diem adjusted payment rates for SNF residents with AIDS, enacted by section 511 of the MMA, remains in effect.

We used the SNF market basket to adjust each per diem component of the Federal rates forward to reflect cost increases occurring between the midpoint of the Federal FY beginning October 1, 2008, and ending September 30, 2009, and the midpoint of the Federal FY beginning October 1, 2009, and ending September 30, 2010, to which the payment rates apply. In accordance with section 1888(e)(4)(E)(ii)(IV) of the Act, we would update the payment rates for FY 2010 by a factor equal to the full market basket index percentage increase. We further adjust the rates by a wage index budget neutrality factor, described later in this section. Tables 2 and 3 reflect the updated components of the unadjusted Federal rates for FY 2010.

TABLE 2—FY 2010 UNADJUSTED FEDERAL RATE PER DIEM URBAN

Rate component	Nursing—case-mix	Therapy—case-mix	Therapy—non-case-mix	Non-case-mix
Per Diem Amount	$155.08	$116.82	$15.38	$79.15

TABLE 3—FY 2010 UNADJUSTED FEDERAL RATE PER DIEM RURAL

Rate component	Nursing—case-mix	Therapy—case-mix	Therapy—non-case-mix	Non-case-mix
Per Diem Amount	$148.16	$134.70	$16.43	$80.61

B. Case-Mix Adjustments

1. Background

Section 1888(e)(4)(G)(i) of the Act requires the Secretary to make an adjustment to account for case-mix. The statute specifies that the adjustment is to reflect both a resident classification system that the Secretary establishes to account for the relative resource use of different patient types, as well as resident assessment and other data that the Secretary considers appropriate. In first implementing the SNF PPS (63 FR 26252, May 12, 1998), we developed the Resource Utilization Groups, version III (RUG–III) case-mix classification system, which tied the amount of payment to resident resource use in combination with resident characteristic information. Staff time measurement (STM) studies conducted in 1990, 1995, and 1997 provided information on resource use (time spent by staff members on residents) and resident characteristics that enabled us not only to establish RUG–III, but also to create case-mix indexes.

Although the establishment of the SNF PPS did not change Medicare's fundamental requirements for SNF coverage, there is a correlation between level of care and provider payment. One of the elements affecting the SNF PPS per diem rates is the RUG–III case-mix adjustment classification system based on beneficiary assessments using the MDS 2.0. RUG–III classification is based, in part, on the beneficiary's need for skilled nursing care and therapy. As discussed previously in section I.F.1 of this proposed rule, the SNF PPS final rule for FY 2006 (70 FR 45026, August 4, 2005) refined the case-mix classification system effective January 1, 2006, by adding nine new Rehabilitation Plus Extensive Services RUGs at the top of the original, 44-group system, for a total of 53 groups. This nine-group addition was designed to better account for the higher costs of beneficiaries requiring both rehabilitation and certain high intensity medical services. When we developed the refined RUG–53 system, we constructed new case-mix indexes, using the Staff Time Measurement (STM) study data that was collected during the 1990s and originally used in creating the SNF PPS case-mix classification system and case-mix indexes. In addition, the RUG–III system was standardized with the intent of ensuring parity in payments under the 44-group and 53-group models. In section II.B.2 of this proposed rule, we discuss further adjustments to those new case-mix indexes.

The RUG–III case-mix classification system uses clinical data from the MDS 2.0, and wage-adjusted staff time measurement data, to assign a case-mix group to each patient record that is then used to calculate a per diem payment under the SNF PPS. The existing RUG–III grouper logic was based on clinical data collected in 1990, 1995, and 1997. As discussed in section III.A.1, we have recently completed a multi-year data collection and analysis under the Staff Time and Resource Intensity Verification (STRIVE) project to update the RUG–III case-mix classification system for FY 2011. As discussed later in this preamble, we are proposing to introduce a revised case-mix classification system, the RUG–IV, based on the data collected in 2006–2007 during the STRIVE project. At the same time, we plan to introduce an updated new resident assessment instrument, the MDS 3.0, to collect the clinical data that will be used for case-mix classification under RUG–IV. We believe that the coordinated introduction of the RUG–IV and MDS 3.0 reflects current medical practice and resource use in SNFs across the country, and will enhance the accuracy of the SNF PPS. Further, we are proposing to defer implementation of the RUG–IV and MDS 3.0 until October 1, 2010, to allow all stakeholders adequate time for the systems updates and staff training needed to assure a smooth transition. We discuss the RUG–IV methodology

and the MDS 3.0 in greater detail in sections III.B. and IV.A., respectively.

Under the BBA, each update of the SNF PPS payment rates must include the case-mix classification methodology applicable for the coming Federal FY. As indicated in section I.F.1 of this proposed rule, the payment rates set forth herein reflect the use of the refined RUG–53 system that we discussed in detail in the proposed and final rules for FY 2006.

2. Development of the Case-Mix Indexes

In the SNF PPS final rule for FY 2006 (70 FR 45032, August 4, 2005), we introduced two incremental refinements to the case-mix classification system:

- The addition of nine new case-mix groups at the top of the original 44-group hierarchy, designed to account for the care needs of beneficiaries requiring both extensive medical and rehabilitation services; and
- An adjustment to reflect the variability in the use of non-therapy ancillaries (NTAs).

We made these refinements by using the resource minute data from the original 44-group RUG–III model to create a new set of relative weights, or case-mix indexes (CMIs), for the 53 group RUG–III model. We then compared the CMIs for the two models in a way that was intended to ensure that estimated total payments under the 53-group model would be equal to those payments that would have been made under the 44-group model.

In conducting this analysis, we used FY 2001 claims data (the most current claims data available at the time) to compare the distribution of payment days by RUG category in the 44-group model with the anticipated payments by RUG category in the refined 53-group model. Using the FY 2001 claims data, our initial projections of future utilization patterns under the refined case-mix system indicated that the new 53-group model would produce lower overall payments than under the original 44-group model. As the purpose of the refinements was to allocate payments more accurately rather than reduce overall expenditures, we adjusted the new case-mix indexes (CMIs) upward in order to ensure that our implementation of the case-mix refinements would achieve ''parity'' between the old and new models (that is, would not cause any change in overall payment levels). However, as noted in the SNF PPS proposed rule for FY 2009 (73 FR 25923, May 7, 2008), our continued monitoring of claims data subsequently showed that actual utilization patterns under the refined case-mix system differed significantly from the previous projections. As a consequence, rather than simply achieving parity, the 2006 adjustment inadvertently triggered a significant increase in overall payment levels, representing substantial overpayments to SNFs.

Accordingly, the FY 2009 proposed rule included a proposal to recalibrate the parity adjustment in order to restore the intended budget neutrality to the 2006 case-mix refinements. While many of the commenters on this proposal characterized it as an unwarranted reduction in the level of SNF payments, the actual purpose of the recalibration proposal was not to reduce overall SNF payments below their appropriate level, but rather, to restore those payments to their appropriate level by correcting the inadvertent increase in overall payments that had resulted from the original parity adjustment. Moreover, our intent was to establish a more accurate baseline for SNF expenditures under the SNF PPS even as we were evaluating broader health care initiatives that could affect payment to SNFs. Thus, the recalibration was proposed as a prospective adjustment, and did not require recovery of any SNF PPS expenditures that had already been made. Commenters also expressed concern about the potential impact of the proposed recalibration on beneficiaries, providers, and the overall economy. As explained in the FY 2009 final rule (73 FR 46422, August 8, 2008), even though our analysis did not substantiate the commenters' concerns, we concluded that it nevertheless would be prudent to take additional time to evaluate the proposal, in order to allow for further consideration of any consequences that might result from it. For that reason, we did not proceed with the proposed recalibration at that time, but instead continued to evaluate this issue with the full expectation of implementing such an adjustment in the future.

In the course of this further evaluation, we conducted a thorough review of the recalibration methodology that we had proposed, and determined that it is, in fact, correct and appropriate to achieve the intended result of establishing parity in overall payments between the 44-group and 53-group models. In addition, as we stated in the FY 2009 final rule (73 FR 46424, August 8, 2008), we further considered the effects of the proposed recalibration on beneficiaries, SNF clinical staff, and quality of care. As discussed above, while the purpose of the original parity adjustment was to maintain the same overall payments under the 44-group and 53-group models, the effect of the adjustment was an inadvertent increase in overall payments under the 53-group model, resulting in overpayments to SNFs. By recalibrating the CMIs under the 53-group model, we expect to restore SNF payments to their appropriate level by correcting this inadvertent increase in overall payments. Because the recalibration would simply remove an unintended overpayment rather than decrease an otherwise appropriate payment amount, we do not believe that the recalibration should negatively affect beneficiaries, clinical staff, or quality of care, or create an undue hardship on providers. The purpose of the FY 2006 refinements was to reallocate payments so that they more accurately reflect resources used, not to increase or decrease overall expenditures. Thus, we believe that it is appropriate to proceed with the recalibration in order to ensure that we correctly accomplish the purpose of the FY 2006 case-mix refinements (that is, reallocating payments, rather than increasing or decreasing overall payments) and restore payments to their appropriate level. In addition, we believe that it is imperative that we proceed with this recalibration for FY 2010 so that the proper baseline can be established before we move to the RUG-IV model, as discussed previously in the SNF PPS proposed rule for FY 2009 (73 FR 25938, May 7, 2008).

Accordingly, we are now proposing to proceed with the recalibration using the methodology described in the FY 2009 proposed and final rules (73 FR 25923, 73 FR 46421–24). As we explained in the FY 2009 proposed rule, we would use actual 2006 claims data to recalibrate both of the adjustments to the CMIs: The parity adjustment designed to make the change from the 44-group model to the 53-group model in a budget neutral manner, and the factor used to recognize the variability in NTA utilization. A detailed description of the method proposed to recalibrate the two adjustments appears in the FY 2009 SNF PPS proposed and final rules (73 FR 25923, 73 FR 46421–24). Under this proposed recalibration, the parity and NTA adjustments to the CMIs (which had initially produced a combined increase of 17.9 percent in the FY 2006 refinement), would instead result in an overall 9.68 percent increase for FY 2010. Thus, for FY 2010, the aggregate impact of this proposed recalibration of the CMIs would be the difference between payments calculated using the original FY 2006 total CMI increase of 17.9 percent and payments calculated using the recalibrated total CMI increase of 9.68 percent. The

difference is a decrease of $1.05 billion (on an incurred basis) in payments for FY 2010.

Again, we want to emphasize that, by proposing to implement the recalibration on a prospective basis, we have chosen the correction strategy that best mitigates the potential impact on providers. However, we believe that our responsibility for maintaining the fiscal integrity of the SNF PPS requires that we proceed with the adjustment. By using the actual claims data that are now available (rather than the projections upon which we had initially relied in estimating the impact of the case-mix refinements), the SNF PPS would better reflect the resources used, resulting in more accurate payment. To that end, we have developed our proposed recalibration of the parity and NTA adjustments to the CMIs using actual claims distribution data. Although the 2001 data were the best source available at the time the FY 2006 refinements were introduced, the calendar year (CY) 2006 data represent actual RUG–53 utilization for the first full year after implementation (that is, the data that we were trying to project). Therefore, we believe the CY 2006 data provide the most accurate source of RUG–53 utilization for this parity adjustment. We also note that the negative $1.05 billion adjustment described above would be partially offset by the FY 2010 market basket adjustment factor of 2.1 percent, or $660 million, with a net result of a negative annual update of approximately $390 million. Moreover, this proposed recalibration would further the overall objective of the refinement provision implemented in January 2006; that is, to have PPS payments account more accurately for resource utilization in SNFs. We also note that after MedPAC conducted a thorough review of SNF profit margins, it concluded that, in the aggregate, SNFs are operating on a sound financial basis. MedPAC's recent recommendation for a zero percent update for SNFs in FY 2010 (see section 2.D (''Skilled Nursing Facility Services'') of its Report to the Congress on Medicare Payment Policy (March 2009), available online at *http://www.medpac.gov/chapters/Mar09_Ch02D.pdf*) supports our assessment that this recalibration could be made without creating undue hardship on providers.

We list the case-mix adjusted payment rates separately for urban and rural SNFs in Tables 4 and 5, with the corresponding case-mix values. These tables do not reflect the AIDS add-on enacted by section 511 of the MMA, which we apply only after making all other adjustments (wage and case-mix).

TABLE 4—RUG–53 CASE-MIX ADJUSTED FEDERAL RATES AND ASSOCIATED INDEXES URBAN

RUG–III category	Nursing index	Therapy index	Nursing component	Therapy component	Non-case mix therapy comp	Non-case mix component	Total rate
RUX	1.77	2.25	274.49	262.85		79.15	616.49
RUL	1.31	2.25	203.15	262.85		79.15	545.15
RVX	1.44	1.41	223.32	164.72		79.15	467.19
RVL	1.24	1.41	192.30	164.72		79.15	436.17
RHX	1.33	0.94	206.26	109.81		79.15	395.22
RHL	1.27	0.94	196.95	109.81		79.15	385.91
RMX	1.80	0.77	279.14	89.95		79.15	448.24
RML	1.57	0.77	243.48	89.95		79.15	412.58
RLX	1.22	0.43	189.20	50.23		79.15	318.58
RUC	1.20	2.25	186.10	262.85		79.15	528.10
RUB	0.92	2.25	142.67	262.85		79.15	484.67
RUA	0.78	2.25	120.96	262.85		79.15	462.96
RVC	1.14	1.41	176.79	164.72		79.15	420.66
RVB	1.01	1.41	156.63	164.72		79.15	400.50
RVA	0.77	1.41	119.41	164.72		79.15	363.28
RHC	1.13	0.94	175.24	109.81		79.15	364.20
RHB	1.03	0.94	159.73	109.81		79.15	348.69
RHA	0.88	0.94	136.47	109.81		79.15	325.43
RMC	1.07	0.77	165.94	89.95		79.15	335.04
RMB	1.01	0.77	156.63	89.95		79.15	325.73
RMA	0.97	0.77	150.43	89.95		79.15	319.53
RLB	1.06	0.43	164.38	50.23		79.15	293.76
RLA	0.79	0.43	122.51	50.23		79.15	251.89
SE3	1.72		266.74		15.38	79.15	361.27
SE2	1.38		214.01		15.38	79.15	308.54
SE1	1.17		181.44		15.38	79.15	275.97
SSC	1.14		176.79		15.38	79.15	271.32
SSB	1.05		162.83		15.38	79.15	257.36
SSA	1.02		158.18		15.38	79.15	252.71
CC2	1.13		175.24		15.38	79.15	269.77
CC1	0.99		153.53		15.38	79.15	248.06
CB2	0.91		141.12		15.38	79.15	235.65
CB1	0.84		130.27		15.38	79.15	224.80
CA2	0.83		128.72		15.38	79.15	223.25
CA1	0.75		116.31		15.38	79.15	210.84
IB2	0.69		107.01		15.38	79.15	201.54
IB1	0.67		103.90		15.38	79.15	198.43
IA2	0.57		88.40		15.38	79.15	182.93
IA1	0.53		82.19		15.38	79.15	176.72
BB2	0.68		105.45		15.38	79.15	199.98
BB1	0.65		100.80		15.38	79.15	195.33
BA2	0.56		86.84		15.38	79.15	181.37
BA1	0.48		74.44		15.38	79.15	168.97

TABLE 4—RUG–53 CASE-MIX ADJUSTED FEDERAL RATES AND ASSOCIATED INDEXES URBAN—Continued

RUG–III category	Nursing index	Therapy index	Nursing component	Therapy component	Non-case mix therapy comp	Non-case mix component	Total rate
PE2	0.79		122.51		15.38	79.15	217.04
PE1	0.77		119.41		15.38	79.15	213.94
PD2	0.72		111.66		15.38	79.15	206.19
PD1	0.70		108.56		15.38	79.15	203.09
PC2	0.66		102.35		15.38	79.15	196.88
PC1	0.65		100.80		15.38	79.15	195.33
PB2	0.52		80.64		15.38	79.15	175.17
PB1	0.50		77.54		15.38	79.15	172.07
PA2	0.49		75.99		15.38	79.15	170.52
PA1	0.46		71.34		15.38	79.15	165.87

TABLE 5—RUG–53 CASE-MIX ADJUSTED FEDERAL RATES AND ASSOCIATED INDEXES RURAL

RUG–III category	Nursing index	Therapy index	Nursing component	Therapy component	Non-case mix therapy comp	Non-case mix component	Total rate
RUX	1.77	2.25	262.24	303.08		80.61	645.93
RUL	1.31	2.25	194.09	303.08		80.61	577.78
RVX	1.44	1.41	213.35	189.93		80.61	483.89
RVL	1.24	1.41	183.72	189.93		80.61	454.26
RHX	1.33	0.94	197.05	126.62		80.61	404.28
RHL	1.27	0.94	188.16	126.62		80.61	395.39
RMX	1.80	0.77	266.69	103.72		80.61	451.02
RML	1.57	0.77	232.61	103.72		80.61	416.94
RLX	1.22	0.43	180.76	57.92		80.61	319.29
RUC	1.20	2.25	177.79	303.08		80.61	561.48
RUB	0.92	2.25	136.31	303.08		80.61	520.00
RUA	0.78	2.25	115.56	303.08		80.61	499.25
RVC	1.14	1.41	168.90	189.93		80.61	439.44
RVB	1.01	1.41	149.64	189.93		80.61	420.18
RVA	0.77	1.41	114.08	189.93		80.61	384.62
RHC	1.13	0.94	167.42	126.62		80.61	374.65
RHB	1.03	0.94	152.60	126.62		80.61	359.83
RHA	0.88	0.94	130.38	126.62		80.61	337.61
RMC	1.07	0.77	158.53	103.72		80.61	342.86
RMB	1.01	0.77	149.64	103.72		80.61	333.97
RMA	0.97	0.77	143.72	103.72		80.61	328.05
RLB	1.06	0.43	157.05	57.92		80.61	295.58
RLA	0.79	0.43	117.05	57.92		80.61	255.58
SE3	1.72		254.84		16.43	80.61	351.88
SE2	1.38		204.46		16.43	80.61	301.50
SE1	1.17		173.35		16.43	80.61	270.39
SSC	1.14		168.90		16.43	80.61	265.94
SSB	1.05		155.57		16.43	80.61	252.61
SSA	1.02		151.12		16.43	80.61	248.16
CC2	1.13		167.42		16.43	80.61	264.46
CC1	0.99		146.68		16.43	80.61	243.72
CB2	0.91		134.83		16.43	80.61	231.87
CB1	0.84		124.45		16.43	80.61	221.49
CA2	0.83		122.97		16.43	80.61	220.01
CA1	0.75		111.12		16.43	80.61	208.16
IB2	0.69		102.23		16.43	80.61	199.27
IB1	0.67		99.27		16.43	80.61	196.31
IA2	0.57		84.45		16.43	80.61	181.49
IA1	0.53		78.52		16.43	80.61	175.56
BB2	0.68		100.75		16.43	80.61	197.79
BB1	0.65		96.30		16.43	80.61	193.34
BA2	0.56		82.97		16.43	80.61	180.01
BA1	0.48		71.12		16.43	80.61	168.16
PE2	0.79		117.05		16.43	80.61	214.09
PE1	0.77		114.08		16.43	80.61	211.12
PD2	0.72		106.68		16.43	80.61	203.72
PD1	0.70		103.71		16.43	80.61	200.75
PC2	0.66		97.79		16.43	80.61	194.83
PC1	0.65		96.30		16.43	80.61	193.34
PB2	0.52		77.04		16.43	80.61	174.08
PB1	0.50		74.08		16.43	80.61	171.12
PA2	0.49		72.60		16.43	80.61	169.64

TABLE 5—RUG–53 CASE-MIX ADJUSTED FEDERAL RATES AND ASSOCIATED INDEXES RURAL—Continued

RUG–III category	Nursing index	Therapy index	Nursing component	Therapy component	Non-case mix therapy comp	Non-case mix component	Total rate
PA	0.46		68.15		16.43	80.61	165.19

C. Wage Index Adjustment to Federal Rates

Section 1888(e)(4)(G)(ii) of the Act requires that we adjust the Federal rates to account for differences in area wage levels, using a wage index that we find appropriate. Since the inception of a PPS for SNFs, we have used hospital wage data in developing a wage index to be applied to SNFs. We propose to continue that practice for FY 2010, as we continue to believe that in the absence of SNF-specific wage data, using the hospital inpatient wage index is appropriate and reasonable for the SNF PPS. As explained in the update notice for FY 2005 (69 FR 45786, July 30, 2004), the SNF PPS does not use the hospital area wage index's occupational mix adjustment, as this adjustment serves specifically to define the occupational categories more clearly in a hospital setting; moreover, the collection of the occupational wage data also excludes any wage data related to SNFs. Therefore, we believe that using the updated wage data exclusive of the occupational mix adjustment continues to be appropriate for SNF payments.

Finally, we propose to continue using the same methodology discussed in the SNF PPS final rule for FY 2008 (72 FR 43423) to address those geographic areas in which there are no hospitals and, thus, no hospital wage index data on which to base the calculation of the FY 2010 SNF PPS wage index. For rural geographic areas that do not have hospitals and, therefore, lack hospital wage data on which to base an area wage adjustment, we would use the average wage index from all contiguous CBSAs as a reasonable proxy. This methodology is used to construct the wage index for rural Massachusetts. However, we would not apply this methodology to rural Puerto Rico due to the distinct economic circumstances that exist there, but instead would continue using the most recent wage index previously available for that area. For urban areas without specific hospital wage index data, we would use the average wage indexes of all of the urban areas within the State to serve as a reasonable proxy for the wage index of that urban CBSA. The only urban area without wage index data available is CBSA (25980) Hinesville-Fort Stewart, GA.

To calculate the SNF PPS wage index adjustment, we would apply the wage index adjustment to the labor-related portion of the Federal rate, which is 70.017 percent of the total rate. This percentage reflects the labor-related relative importance for FY 2010, using the revised and rebased FY 2004-based market basket. The labor-related relative importance for FY 2009 was 69.783, as shown in Table 16. We calculate the labor-related relative importance from the SNF market basket, and it approximates the labor-related portion of the total costs after taking into account historical and projected price changes between the base year and FY 2010. The price proxies that move the different cost categories in the market basket do not necessarily change at the same rate, and the relative importance captures these changes. Accordingly, the relative importance figure more closely reflects the cost share weights for FY 2010 than the base year weights from the SNF market basket.

We calculate the labor-related relative importance for FY 2010 in four steps. First, we compute the FY 2010 price index level for the total market basket and each cost category of the market basket. Second, we calculate a ratio for each cost category by dividing the FY 2010 price index level for that cost category by the total market basket price index level. Third, we determine the FY 2010 relative importance for each cost category by multiplying this ratio by the base year (FY 2004) weight. Finally, we add the FY 2010 relative importance for each of the labor-related cost categories (wages and salaries, employee benefits, non-medical professional fees, labor-intensive services, and a portion of capital-related expenses) to produce the FY 2010 labor-related relative importance. Tables 6 and 7 below show the Federal rates by labor-related and non-labor-related components.

TABLE 6—RUG–53 CASE-MIX ADJUSTED FEDERAL RATES FOR URBAN SNFS BY LABOR AND NON-LABOR COMPONENT

RUG–III category	Total rate	Labor portion	Non-labor portion
RUX	616.49	431.65	184.84
RUL	545.15	381.70	163.45
RVX	467.19	327.11	140.08
RVL	436.17	305.39	130.78
RHX	395.22	276.72	118.50
RHL	385.91	270.20	115.71
RMX	448.24	313.84	134.40
RML	412.58	288.88	123.70
RLX	318.58	223.06	95.52
RUC	528.10	369.76	158.34
RUB	484.67	339.35	145.32
RUA	462.96	324.15	138.81
RVC	420.66	294.53	126.13
RVB	400.50	280.42	120.08
RVA	363.28	254.36	108.92
RHC	364.20	255.00	109.20
RHB	348.69	244.14	104.55
RHA	325.43	227.86	97.57
RMC	335.04	234.58	100.46
RMB	325.73	228.07	97.66

TABLE 6—RUG–53 CASE-MIX ADJUSTED FEDERAL RATES FOR URBAN SNFS BY LABOR AND NON-LABOR COMPONENT—Continued

RUG–III category	Total rate	Labor portion	Non-labor portion
RMA	319.53	223.73	95.80
RLB	293.76	205.68	88.08
RLA	251.89	176.37	75.52
SE3	361.27	252.95	108.32
SE2	308.54	216.03	92.51
SE1	275.97	193.23	82.74
SSC	271.32	189.97	81.35
SSB	257.36	180.20	77.16
SSA	252.71	176.94	75.77
CC2	269.77	188.88	80.89
CC1	248.06	173.68	74.38
CB2	235.65	165.00	70.65
CB1	224.80	157.40	67.40
CA2	223.25	156.31	66.94
CA1	210.84	147.62	63.22
IB2	201.54	141.11	60.43
IB1	198.43	138.93	59.50
IA2	182.93	128.08	54.85
IA1	176.72	123.73	52.99
BB2	199.98	140.02	59.96
BB1	195.33	136.76	58.57
BA2	181.37	126.99	54.38
BA1	168.97	118.31	50.66
PE2	217.04	151.96	65.08
PE1	213.94	149.79	64.15
PD2	206.19	144.37	61.82
PD1	203.09	142.20	60.89
PC2	196.88	137.85	59.03
PC1	195.33	136.76	58.57
PB2	175.17	122.65	52.52
PB1	172.07	120.48	51.59
PA2	170.52	119.39	51.13
PA1	165.87	116.14	49.73

TABLE 7—RUG–53 CASE-MIX ADJUSTED FEDERAL RATES FOR RURAL SNFS BY LABOR AND NON-LABOR COMPONENT

RUG–III category	Total rate	Labor portion	Non-labor portion
RUX	645.93	452.26	193.67
RUL	577.78	404.54	173.24
RVX	483.89	338.81	145.08
RVL	454.26	318.06	136.20
RHX	404.28	283.06	121.22
RHL	395.39	276.84	118.55
RMX	451.02	315.79	135.23
RML	416.94	291.93	125.01
RLX	319.29	223.56	95.73
RUC	561.48	393.13	168.35
RUB	520.00	364.09	155.91
RUA	499.25	349.56	149.69
RVC	439.44	307.68	131.76
RVB	420.18	294.20	125.98
RVA	384.62	269.30	115.32
RHC	374.65	262.32	112.33
RHB	359.83	251.94	107.89
RHA	337.61	236.38	101.23
RMC	342.86	240.06	102.80
RMB	333.97	233.84	100.13
RMA	328.05	229.69	98.36
RLB	295.58	206.96	88.62
RLA	255.58	178.95	76.63
SE3	351.88	246.38	105.50
SE2	301.50	211.10	90.40
SE1	270.39	189.32	81.07
SSC	265.94	186.20	79.74
SSB	252.61	176.87	75.74
SSA	248.16	173.75	74.41
CC2	264.46	185.17	79.29

TABLE 7—RUG–53 CASE-MIX ADJUSTED FEDERAL RATES FOR RURAL SNFS BY LABOR AND NON-LABOR COMPONENT—Continued

RUG–III category	Total rate	Labor portion	Non-labor portion
CC1	243.72	170.65	73.07
CB2	231.87	162.35	69.52
CB1	221.49	155.08	66.41
CA2	220.01	154.04	65.97
CA1	208.16	145.75	62.41
IB2	199.27	139.52	59.75
IB1	196.31	137.45	58.86
IA2	181.49	127.07	54.42
IA1	175.56	122.92	52.64
BB2	197.79	138.49	59.30
BB1	193.34	135.37	57.97
BA2	180.01	126.04	53.97
BA1	168.16	117.74	50.42
PE2	214.09	149.90	64.19
PE1	211.12	147.82	63.30
PD2	203.72	142.64	61.08
PD1	200.75	140.56	60.19
PC2	194.83	136.41	58.42
PC1	193.34	135.37	57.97
PB2	174.08	121.89	52.19
PB1	171.12	119.81	51.31
PA2	169.64	118.78	50.86
PA1	165.19	115.66	49.53

Section 1888(e)(4)(G)(ii) of the Act also requires that we apply this wage index in a manner that does not result in aggregate payments that are greater or less than would otherwise be made in the absence of the wage adjustment. For FY 2010 (Federal rates effective October 1, 2009), we would apply an adjustment to fulfill the budget neutrality requirement. We would meet this requirement by multiplying each of the components of the unadjusted Federal rates by a budget neutrality factor equal to the ratio of the weighted average wage adjustment factor for FY 2009 to the weighted average wage adjustment factor for FY 2010. For this calculation, we use the same 2007 claims utilization data for both the numerator and denominator of this ratio. We define the wage adjustment factor used in this calculation as the labor share of the rate component multiplied by the wage index plus the non-labor share of the rate component. The proposed budget neutrality factor for this year is 1.0010. The wage index applicable to FY 2010 is set forth in Tables A and B, which appear in the Addendum of this proposed rule.

In the SNF PPS final rule for FY 2006 (70 FR 45026, August 4, 2005), we adopted the changes discussed in the Office of Management and Budget (OMB) Bulletin No. 03–04 (June 6, 2003), available online at *http://www.whitehouse.gov/omb/bulletins/b03–04.html*, which announced revised definitions for Metropolitan Statistical Areas (MSAs), and the creation of Micropolitan Statistical Areas and Combined Statistical Areas. In addition, OMB published subsequent bulletins regarding CBSA changes, including changes in CBSA numbers and titles. As indicated in the FY 2008 SNF PPS final rule (72 FR 43423, August 3, 2007), this and all subsequent SNF PPS rules and notices are considered to incorporate the CBSA changes published in the most recent OMB bulletin that applies to the hospital wage data used to determine the current SNF PPS wage index. The OMB bulletins may be accessed online at *http://www.whitehouse.gov/omb/bulletins/index.html*.

In adopting the OMB Core-Based Statistical Area (CBSA) geographic designations, we provided for a 1-year transition with a blended wage index for all providers. For FY 2006, the wage index for each provider consisted of a blend of 50 percent of the FY 2006 MSA-based wage index and 50 percent of the FY 2006 CBSA-based wage index (both using FY 2002 hospital data). We referred to the blended wage index as the FY 2006 SNF PPS transition wage index. As discussed in the SNF PPS final rule for FY 2006 (70 FR 45041), subsequent to the expiration of this 1-year transition on September 30, 2006, we used the full CBSA-based wage index values, as now presented in Tables A and B in the Addendum of this proposed rule.

D. Updates to the Federal Rates

In accordance with section 1888(e)(4)(E) of the Act, as amended by section 311 of the BIPA, the proposed payment rates in this proposed rule reflect an update equal to the full SNF market basket, estimated at 2.1 percentage points. We would continue to disseminate the rates, wage index, and case-mix classification methodology through the **Federal Register** before the August 1 that precedes the start of each succeeding FY.

E. Relationship of RUG-III Classification System to Existing Skilled Nursing Facility Level-of-Care Criteria

As discussed in § 413.345, we include in each update of the Federal payment rates in the **Federal Register** the designation of those specific RUGs under the classification system that represent the required SNF level of care, as provided in § 409.30. This designation reflects an administrative presumption under the refined RUG–53 system that beneficiaries who are correctly assigned to one of the upper 35 of the RUG–53 groups on the initial 5-day, Medicare-required assessment are automatically classified as meeting the SNF level of care definition up to and including the assessment reference date on the 5-day Medicare required assessment.

A beneficiary assigned to any of the lower 18 groups is not automatically classified as either meeting or not meeting the definition, but instead

receives an individual level of care determination using the existing administrative criteria. This presumption recognizes the strong likelihood that beneficiaries assigned to one of the upper 35 groups during the immediate post-hospital period require a covered level of care, which would be less likely for those beneficiaries assigned to one of the lower 18 groups.

In this proposed rule, we are continuing the designation of the upper 35 groups for purposes of this administrative presumption, consisting of all groups encompassed by the following RUG–53 categories:

- Rehabilitation plus Extensive Services;
- Ultra High Rehabilitation;
- Very High Rehabilitation;
- High Rehabilitation;
- Medium Rehabilitation;
- Low Rehabilitation;
- Extensive Services;
- Special Care; and,
- Clinically Complex.

A discussion of the relationship of the proposed RUG-IV classification system to existing SNF level of care criteria appears in section III.D. of this proposed rule.

F. Example of Computation of Adjusted PPS Rates and SNF Payment

Using the hypothetical SNF XYZ described in Table 8 below, the following shows the adjustments made to the Federal per diem rate to compute the provider's actual per diem PPS payment. SNF XYZ's 12-month cost reporting period begins October 1, 2009. SNF XYZ's total PPS payment would equal $30,619. We derive the Labor and Non-labor columns from Table 6 of this proposed rule.

TABLE 8—RUG–53 SNF XYZ: LOCATED IN CEDAR RAPIDS, IA (URBAN CBSA 16300) WAGE INDEX: 0.8992

RUG group	Labor	Wage index	Adj. labor	Non-labor	Adj. rate	Percent adj.	Medicare days	Payment
RVX	$327.11	0.8992	$294.14	$140.08	$434.22	$434.22	14	$6,079.00
RLX	223.06	0.8992	200.58	95.52	296.10	296.10	30	8,883.00
RHA	227.86	0.8992	204.89	97.57	302.46	302.46	16	4,839.00
CC2	188.88	0.8992	169.84	80.89	250.73	*571.67	10	5,717.00
IA2	128.08	0.8992	115.17	54.85	170.02	170.02	30	5,101.00
							100	30,619.00

*Reflects a 128 percent adjustment from section 511 of the MMA.

III. Resource Utilization Groups, Version 4 (RUG–IV)

A. Staff Time and Resource Intensity Verification (STRIVE) Project

As noted previously in section II.B.1 of this proposed rule, section 1888(e)(4)(G)(i) of the Act requires the Secretary to make an adjustment to account for case-mix. The statute specifies that the adjustment is to reflect both a resident classification system that the Secretary establishes to account for the relative resource use of different patient types, as well as resident assessment and other data that the Secretary considers appropriate. In first implementing the SNF PPS (63 FR 26252, May 12, 1998), we developed the RUG–III case-mix classification system, which tied the amount of payment to resident resource use in combination with resident characteristic information. Staff time measurement (STM) studies conducted in 1990, 1995, and 1997 provided information on resource use (time spent by staff members on residents) and resident characteristics that enabled us not only to establish RUG–III, but also to create case-mix indexes.

Since that time, we have become concerned that incentives created by the SNF PPS, the public reporting of nursing home quality measures, and the changing beneficiary population using SNF services likely have altered industry practices, and have affected the nursing resources required to treat different types of patients. Changes to technology might also have affected care methods, while more choices in housing alternatives (such as assisted living and community housing) may have altered the population mix served by nursing homes.

In considering changes to the classification system, we considered alternative models. Since the inception of the SNF PPS, we have investigated ways of developing a predictive model for therapy that could replace the existing methodology. During the demonstration that led to the development of the SNF PPS, we considered a therapy model based on need. However, there was a great deal of concern that by separating payment from the actual provision of services, the system, and more importantly, the beneficiaries would be vulnerable to underutilization. In work that the Urban Institute did for CMS, it developed a model that focused on hospital diagnosis and level of function to predict the need for therapy. That proposal was discussed in a CMS Report to the Congress issued in December 2006, which is available online at *http://www.cms.hhs.gov/SNFPPS/Downloads/RC_2006_PC-PPSSNF.pdf*.

While the model had possibilities, it added a level of complexity without increasing the model's predictive power beyond that of the existing RUG–III methodology. In addition, we were concerned about the reliance on data from the prior hospital stay (which is not currently available to SNFs), and the use of hospital diagnosis to predict post-acute therapy needs. MedPAC has retained the Urban Institute researchers to develop the model further, and has presented a refined methodology in its June 2008 Report to the Congress: Reforming the Delivery System, available online at *http://MedPAC.gov/chapters/Jun08_Ch07.pdf*. While we will continue to study this model, we believe it would be premature to include it in the RUG–IV model being proposed in this rule for two reasons.

First, in accordance with section 115 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA, Pub. L. 110–173), the Congress has asked us to look at alternatives to a diagnosis-based model for evaluating facility compliance under the IRF PPS. During the past 3 months, we have spoken with a large number of clinicians and other stakeholders who have expressed strong reservations about using diagnosis as a predictor of therapy need. We have contracted with the Research Triangle, Inc. (RTI) to investigate alternatives, and want to review the results of this research before proceeding with a diagnosis-linked model for therapy in SNFs.

Second, we are working closely with CMS staff on the Post Acute Care (PAC) Payment Reform demonstration project. Data are currently being collected from SNFs, IRFs, home health agencies, and

long-term care hospitals that we believe will help us predict the need for post-hospital care across these four settings. We believe that the results of the PAC Payment Reform demonstration project will assist us in developing a more effective model for therapy reimbursement.

We believe that significant changes in the SNF PPS therapy payment model would be most appropriately considered after the conclusion of research on diagnosis-based models and the PAC demonstration described above. Therefore, the STRIVE therapy model utilizes the same basic structure as the current RUG–III model and relies on updated staff time data collected during STRIVE.

1. Data Collection

To help ensure that the SNF PPS payment rates reflect current practices and resource needs, CMS sponsored a national nursing home time study, STRIVE, which began in the Fall of 2005. Information collected in STRIVE includes the amount of time that staff members spend on residents and information on residents' physical and clinical status derived from MDS assessment data.

Two hundred and five nursing homes from the following 15 States and jurisdictions volunteered to participate in STRIVE: the District of Columbia, Nevada, Florida, Illinois, Iowa, Kentucky, Louisiana, Michigan, Montana, New York, Ohio, South Dakota, Texas, Virginia, and Washington. Once the States were identified, we selected a sample of nursing homes using the procedures set forth in the document entitled ''Sampling Methodology'' available on the SNF PPS Web site at *http://www.cms.gov/snfpps/10_timestudy.asp*, and analyzed staff time and MDS assessment data for approximately 9,700 residents. The STRIVE sample is 40 percent greater than the 1994 sample used initially to develop RUG–III, and is 2.5 times larger than the 1995/1997 sample used to revise RUG–III and establish the current CMIs that are the basis for current Medicare rates.

Identifying the level of staff resources needed to provide quality care to nursing home patients was a primary objective. For this reason, nursing homes with poor survey histories or pending enforcement actions were excluded from the sample. In addition, nursing homes with poor quality measure (QM) scores, low occupancy rates, or large proportions of private pay or pediatric patients were also excluded.

Using the procedures set forth in the document entitled ''Sampling Methodology'' that appears on the SNF PPS Web site at *http://www.cms.gov/snfpps/10_timestudy.asp*, nursing homes were recruited within the following five strata: Hospital-based facilities; facilities with high concentrations of residents on ventilators; facilities with high concentrations of residents with Human Immunodeficiency Virus (HIV); facilities with high concentrations of residents on Medicare Part A stays; and all other facilities. Facilities with large concentrations of residents on ventilators, residents with HIV, or residents on Part A stays were over-sampled in order to assure sufficient numbers of residents in those populations. Nursing homes were voluntarily recruited in random order until enough facilities in each targeted category agreed to participate.

Participating facilities included both not-for-profit entities and corporations, chains and independent operators, nursing homes with populations small to large in size, freestanding and hospital-based facilities, and facilities situated in urban and rural locations. STRIVE began on-site data collection at both SNFs and Medicaid nursing facilities (NFs) in the spring of 2006. STRIVE collected data from both types of facilities because almost half of the States use a version of the RUG–III system for their Medicaid reimbursement systems.

Participating facilities submitted both time and MDS assessment data. Nursing staff recorded their time over 48 hours. Nursing staff included registered nurses, licensed practical nurses, and nursing aides. Therapy staff recorded their time over 7 consecutive days. Therapy staff included physical therapists and aides; occupational therapists and aides; and speech-language pathologists. Each nursing home staff member recorded his or her time at the facility in different categories (for example, resident-specific time (RST), non-resident-specific time (NRST), unpaid time, and non-study time).

Additional detailed information on the STRIVE sampling and data collection process has been posted on the SNF PPS Web site at *http://www.cms.hhs.gov/SNFPPS/10_TimeStudy.asp*. In addition, more information on the STRIVE data collection process appears at the following Web site: *https://www.qtso.com/strive.html*. Items posted there include: Assessment forms distributed by STRIVE; ''train the trainer'' materials used to teach the data monitors who, in turn, instructed nursing home staff members on how to record their time; and materials from State teleconferences. Slides presented at STRIVE technical expert panels (TEPs) can also be found on this Web site.

2. Developing the Analytical Data Base

To date, STRIVE has benefited from stakeholder input, starting with the December 2005 Open Door Forum to which the public was invited. The educators, researchers, beneficiary advocates, clinicians, consultants, government experts, and representatives from health care, nursing home, and other related industry associations serving on the STRIVE TEP have provided valuable insights on topics such as sample populations. Beginning in 2005 until its most recent March 2009 meeting, the TEP has met three times and held three teleconferences. Additionally, our contractor established a smaller Analytic Panel consisting of various stakeholders who have met with our researchers to discuss the analysis of the STRIVE data.

In addition, we worked closely with the States to recruit State Medicaid agencies as partners in the data collection process. We held numerous phone conferences with the State agencies to organize the data collection and get State input on potential focus areas for the research. For example, we received suggestions to look at special populations including the ventilator/respirator population, HIV/AIDS, Alzheimers patients and individuals with behavioral problems. We also investigated differences in relative resource costs for the younger population that would typically be reimbursed through Medicaid rather than Medicare, and for patients with long-term chronic conditions such as deafness and/or blindness. We were able to incorporate the results of some of these analyses into the RUG–IV model. For example, we found that the relative resource use for respiratory conditions such as ventilator/respirator use have increased. Reimbursement for these conditions increases under the RUG–IV model. However, the data did not support a change to the RUG–IV model for other patient populations, such as the bariatric population or residents with behavioral issues. However, we plan to share our findings with the States so that they can consider the STRIVE data in evaluating changes to Medicaid payment systems.

Finally, we have been working closely with colleagues in the Canadian government to broaden our data collection effort. CAN–STRIVE (a recent Canadian time study using the same methodology as the STRIVE project described in this proposed rule) has just

begun its data analysis, using some of the preliminary STRIVE data to focus its data collection efforts. We will continue to work with our Canadian colleagues to confirm our findings and, if possible, to continue our analysis of special populations. For example, the CAN–STRIVE population includes a much larger sample of patients with behavior problems than the STRIVE sample, and the Canadian data may be helpful for future policy analysis.

The STRIVE analyses have shown that the RUG–III model is still effective in determining relative nursing resource use generally across a broad range of conditions for which beneficiaries are treated. At the same time, however, we have found that the resource times associated with specific conditions or service categories, such as diabetes and the use of intravenous fluids or medications, has changed significantly. These analyses have confirmed our initial expectations that the RUG–III model needed to be updated to reflect significant changes in SNF care patterns during the past decade. Therefore, in constructing the analytical data base, we have proposed the changes to the RUG–IV model that are discussed below.

a. Concurrent Therapy

Almost 90 percent of patients in a Medicare Part A SNF stay are receiving therapy services. Under the current RUG–III model, therapy services are case mix-adjusted based on the therapy minutes reported on the MDS. When the RUG–III model was developed, most therapy services were furnished on a one-on-one basis, and the minutes reported on the MDS served as a proxy for the staff resource time needed to provide the therapy care. However, we have long been concerned that the incentives of the current RUG–III classification model have created changes in the way therapy services are delivered in SNFs. Specifically, we have been concerned that, as discussed below, there has been a shift from one-on-one therapy to concurrent therapy that may not represent optimal clinical practice.

Concurrent therapy is the practice of one professional therapist treating multiple patients at the same time while the patients are performing different activities. In the SNF Part A setting, concurrent therapy is distinct from group therapy, where one therapist provides the same services to everyone in the group. In a concurrent model, the therapist works with multiple patients at the same time, each of whom can be receiving different therapy treatments. For concurrent therapy, there are currently no MDS coding restrictions regarding either the number of patients that may be treated concurrently, or the amount or percentage of concurrent therapy time that can be included on the MDS, whereas with group therapy there are limitations, as discussed in the July 30, 1999 SNF PPS final rule (64 FR 41662).

There are specific MDS coding instructions that limit the amount of group therapy that can be reported on the MDS, and used to calculate the appropriate payment level. For MDS reporting purposes, in order to report the full time as therapy for each participant, the supervising therapist (or assistant) may treat no more than four participants at a time, and may not be supervising any additional patients outside the group. Group therapy minutes may be counted in the MDS, but are limited to no more than 25 percent of the total weekly minutes per discipline for a particular patient.

In the SNF Part A setting, concurrent therapy can be a legitimate mode of delivering therapy services when used properly based on individual care needs as determined by the therapist's professional judgment. Given that Medicare and Medicaid patients are among the most frail and vulnerable populations in nursing homes, we believe that the most appropriate mode of providing therapy would usually be individual and not concurrent therapy. We believe it is in the beneficiary's best interest that concurrent therapy should never be the sole mode of delivering therapy care to any individual in a SNF setting; rather, it should be used as an adjunct to individual therapy when clinically appropriate, as determined by the individual's current medical and physical status based on a therapist's clinical judgment.

Our concern is that concurrent therapy has become the standard of practice rather than a way to supplement needed individual therapy care. The STRIVE data show that approximately two-thirds of all Part A therapy provided in SNFs is now being delivered on a concurrent basis rather than on the individual basis that we believe to be the most clinically appropriate mode of therapy for SNF and NF patients. We are also concerned that the current method for reporting concurrent therapy on the MDS creates an inappropriate payment incentive to perform concurrent therapy in place of individual therapy, because the current method permits concurrent therapy time provided to a patient to be counted in the same manner as individual therapy time. For example, under the current method of reporting, if a therapist furnishes 60 minutes of therapy time to a group of patients concurrently, then a separate 60 minutes of therapy time is counted for each patient. To test the impact of changing the method of reporting concurrent therapy, we designed the STRIVE analytical data base to distinguish between concurrent and individual therapy minutes. We were also able to identify the number of patients treated under the concurrent model, and allocated the total minutes evenly among the total number of patients receiving concurrent therapy care from the same therapist at the same time.

The data showed that under our current RUG–III methodology, which does not allocate time, patients treated concurrently are typically assigned to higher therapy groups (with higher payments) than appropriate based on the therapy resources actually used to provide care for those patients. In order to eliminate this inappropriate incentive, and to better reflect our policy that individual therapy is usually the most appropriate mode of therapy for SNF residents, we are proposing to use allocated concurrent therapy minutes in developing the RUG–IV therapy model. Thus, a therapist who is treating patients concurrently would allocate the total minutes among the patients based on the therapist's clinical judgment of how much therapist time was actually provided to each patient. We note that this change is consistent with our longstanding policy for payment of timed codes (that is, codes that are billed per time unit rather than per visit) for Part B therapy services. As stated in the *Medicare Benefit Policy Manual*, Pub. 100–2, chapter 15, section 230, ''Contractors pay for outpatient physical therapy services (which includes outpatient speech-language pathology services) and outpatient occupational therapy services provided simultaneously to two or more individuals by a practitioner as group therapy services (97150). The individuals can be, but need not be performing the same activity.'' Therefore, in outpatient settings, concurrent therapy is billed the same way as group treatment (and the therapist would bill the HCPCS code for group therapy, not individual therapy, for each individual involved).

Consistent with this policy and with our initiative ''to improve consistency in the standards and conditions for Part A and Part B therapy services'' (as discussed in the Medicare Physician Fee Schedule final rule with comment period for CY 2008, 72 FR 66222, 66332, November 27, 2007), effective with the introduction of RUG–IV, concurrent therapy time provided in a Part A SNF

setting would no longer be counted as individual therapy time for each of the patients involved. However, we note that, unlike the Part B policy described above, in the SNF setting we are not proposing to treat concurrent therapy minutes the same way we treat group therapy minutes, and instead are proposing to allocate concurrent therapy minutes among the patients being treated (as stated above, the full therapy time can be reported for each group therapy participant as long as no more than four participants are being treated at a time). As discussed above, we believe that with the frail and vulnerable population in SNFs and NFs, concurrent therapy is appropriate only as an adjunct to individual therapy and that individual therapy is the most appropriate mode of therapy for this population. Therefore, unlike our policy for group therapy, we do not believe it is appropriate to count the full therapy time for each patient being treated concurrently. In a group setting, the patients are performing similar activities. By interacting with one another, the patients observe and learn from each other. They then apply this new information into their own therapy program to progress and, thus, benefit from the group setting. By contrast, during concurrent therapy, the patients are not performing similar activities and often do not interact at all with each other. Therefore, the patients are not benefiting from each other's therapy intervention. Furthermore, as discussed above, we believe that allowing concurrent therapy to be counted as individual therapy would create an inappropriate incentive to replace individual therapy with concurrent therapy.

As we stated previously, in the SNF Part A setting, concurrent therapy can be a legitimate mode of delivering therapy services when used properly based on individual care needs as determined by the therapist's professional judgment. CMS requires that the actual total therapy time be documented on the MDS. However, we have not to date required that the facility staff separately report the amount of time for each individual therapy technique or delivery mode (individual, concurrent, and group). Without this documentation, it is difficult for CMS to evaluate the appropriateness of reimbursement.

As discussed above, we are proposing that, for each discipline, concurrent therapy minutes must be allocated before reporting total therapy minutes on the MDS 3.0. For this reason, we are soliciting comments concerning whether therapy data need to be reported separately by therapy mode (that is, individual, concurrent, or group) on the MDS or whether it will be sufficient to include a record of therapy usage by therapy mode in the medical record. While we are not prescribing the specific facility process for the documentation of therapy services (for example, therapy log, therapy daily progress note), we note that, in the absence of further changes to the MDS 3.0, the amount of time for each mode of therapy would need to be distinguished in the individual's clinical record effective with the MDS 3.0, and it would be up to facility staff to make the correct time allocations for reporting on the MDS.

We want to reiterate that concurrent therapy—

- Can represent a legitimate mode of delivering therapy services when used properly, based on individual care needs as determined by the therapist's professional judgment;
- Should be an adjunct to individual therapy, not the primary mode of delivery of care; and,
- Should represent an exception rather than the standard of care.

As discussed above, while we limit the percentage of group therapy minutes that may be counted on the MDS, and limit the number of patients that may be treated simultaneously in group therapy for purposes of counting therapy minutes in full for each patient (64 FR 41662), we have not, to date, placed a limit on the percentage of concurrent therapy that may be coded on the MDS or on the number of patients that can be treated concurrently. Therefore, we are also inviting public comments on whether there should be other restrictions relating to concurrent therapy such as a limit to the percentage of concurrent therapy minutes that may be counted on the MDS for any individual or to the number of people that can be treated concurrently by the same therapist.

Finally, we are concerned that placing limits on the use of concurrent therapy could result in an inappropriate substitution of therapy aides for therapists and assistants. We note that therapy aides are expected to provide support services to the therapists and cannot be used to provided skilled therapy services. We also note that, under Part B, services rendered by therapy aides are not considered outpatient therapy services. In our analysis of the STRIVE data, it appears that therapy aides are being used appropriately; that is, for supportive services and not for the provision of skilled therapy services. However, we intend to monitor the use of therapy aides and, if necessary, to propose changes to MDS reporting requirements in the future.

b. Adjustments to STRIVE Therapy Minutes

The STRIVE analysis also included an examination of therapy services reimbursed under RUG–III. While nursing services are fully reimbursed using a prospective case-mix adjusted algorithm, payment for therapy services is more closely linked to the amount of therapy actually received at a particular time. In the RUG–III model, there are five levels of therapy services: Ultra High, Very High, High, Medium, and Low therapy. Each of these levels is assigned based on the actual minutes of therapy care provided to a beneficiary as reported on the MDS assessment. Each level of therapy is assigned a CMI. Payment is determined by multiplying the CMI by the therapy portion of the SNF PPS rate. This therapy payment is then included in the SNF PPS bundled per diem payment.

We are aware that there are some inherent limitations associated with the voluntary collection of data at a facility site. During the STRIVE time study, we collected nursing staff time for two weekdays, primarily with hand-held computers called personal data assistants (PDAs). We collected therapy staff time for 7 days, generally with PDAs only for the first three weekdays and then with a paper tool for the remaining 4 days, including weekends. We needed to clean the PDAs of all data and ship them to a new facility for availability at the beginning of the next week, which restricted PDA usage to only 3 days. In addition, during weekend days, different therapy staff were present and received substantially less oversight for the therapy data collection using the paper tools.

There were three different data collection schedules: Therapy data collection on Schedules A and B both began on Tuesday continuing through the following Monday. With Schedule C, data collection began on Wednesday continuing through the following Tuesday. In all cases, the therapy data collection continued for a complete one-week period. Table 9 below shows the percentage of weekly therapy time for the three data collection schedules.

TABLE 9—DATA COLLECTION SCHEDULES WITH PERCENTAGE OF WEEKLY THERAPY BY DAY

Collection schedule	N	Tues.	Wed.	Thur.	Fri.	Sat.	Sun.	Mon.	Tues.
A	8012	26%	25%	22%	12%	2%	1%	12%	.....
B	1193	25%	27%	26%	12%	1%	0%	10%	.....
C	516	.....	30%	26%	21%	1%	1%	12%	9%
Total	9721	24%	26%	23%	13%	2%	1%	12%	1%

Shaded cells indicate days where therapy data were collected using the paper tool.

Including only residents present for the full week of therapy data collection, Schedule A and Schedule B show similar percentages of reported weekly therapy across the seven days. Tuesday, Wednesday, and Thursday each had between 22 percent and 27 percent of the total weekly reported therapy, and together had between 73 and 78 percent of the total weekly reported therapy. Of the remaining total, 12 percent occurred on Friday, 10–12 percent on Monday, and very little (zero to two percent) occurred on weekend days.

For Schedules A and B, Tuesday, Wednesday, and Thursday therapy time was collected by PDA; the paper tool was utilized Friday through Monday. For Schedule C, PDAs were used Wednesday through Friday, with paper tools utilized Saturday through Tuesday. While utilizing a PDA, all three schedules reported similar percentages: 22 to 30 percent, for Wednesdays and Thursdays, and 21 percent on Friday for Schedule C. In contrast, utilizing paper tools, Friday therapy time was 12 percent for Schedules A and B, and 9 percent on Tuesday for Schedule C. These observations lead us to believe that it was possible that therapy was being underreported when the paper tool was utilized.

In order to determine if the therapy data collected seemed reasonable, we compared the STRIVE Medicare Part A data to the national distribution of RUG-III rehabilitation groups as reported on Medicare claims. The STRIVE data had fewer patients in the Ultra High, Very High, and High rehabilitation groups and more patients in the Medium rehabilitation groups. This Medicare Part A claims comparison indicated that STRIVE therapy time was probably being underreported. Possible explanations of the underreporting include both the use of paper forms and the less intense oversight on weekends.

In order to mitigate potential paper tool shortfalls with respect to therapy times, we developed a methodology to determine adjusted weekly therapy time based on the PDA time. Our proposed methodology allows us to avoid direct use of the potentially underreported therapy minutes from the paper tools and best match the Medicare Part A claims information.

As discussed in detail in section III.A.2.a. of this proposed rule, we adjusted the therapy minutes to allocate concurrent therapy time; that is, divide the total therapy minutes between the number of patients receiving therapy service from the same therapist at the same time. We then performed separate calculations using the resident time for each of the three therapy disciplines (physical therapy, occupational therapy and speech-language pathology). The steps for making the therapy time adjustment included:

- Totalling each resident's time for each discipline by adding times across the several practitioners of that discipline (for example, for physical therapy we had therapists, assistants, and aides.)
- Computing the resident's average therapy session for each separate discipline computed as the sum of the therapy time reported on PDA days and divided by the count of PDA days. There had to be 15 minutes or more of therapy for inclusion in the computation.
- Estimating the total adjusted number of days the resident received that therapy discipline. We considered it a day of therapy only if 15 minutes or more of therapy time was reported on the PDA or the paper tool.

To determine the number of weekdays where therapy was provided, we adjusted the data as follows:

- Three of three PDA days reported: We treated that resident as if there were five weekdays of therapy for that discipline. A resident receiving therapy on all data collection days would most likely indicate a pattern typical of a person receiving daily therapy.
- Two of three PDA days reported: We treated that resident as if there were three weekdays of therapy for that discipline. We note that residents can only qualify for a therapy group if they have had at least 3 days of therapy per week. Thus, facilities typically provide therapy services for at least 3 days per week, in order to qualify the resident for a therapy group. Accordingly, when therapy was reported on 2 of 3 PDA days, we believed that it was likely that the patient actually received 3 days of therapy during the week. If the paper tool indicated there were 15 or more minutes of a specific therapy on either or both of the remaining weekdays, then an additional day was added for each day with 15 or more minutes; a maximum of two additional weekdays was possible.
- One of three PDA days: We treated that resident as if they had one weekday of that discipline but added additional days for each of the other two weekdays where therapy time of 15 or more minutes was indicated on the paper tool for that discipline.
- No PDA days: We counted any weekday or weekend days reported on a paper tool where there were 15 or more minutes for that discipline.

Generally, therapy was not given on weekends and weekend data collection was always done by the paper tool. We accounted for therapy time on the weekends by counting the days reported on a paper tool where there were 15 or more minutes of therapy for that discipline.

Following the steps described above, we calculated an adjusted number of days for each discipline, for each resident. Then, for each discipline and for each resident, we adjusted the reported therapy minutes by multiplying the average therapy session time for each resident by the adjusted days of therapy to obtain adjusted weekly therapy minutes.

After adjusting the therapy minutes, we performed a similar adjustment to add the estimated amount of therapy staff time that had not been captured during the data collection process. First, we divided the adjusted weekly therapy minutes by the reported weekly therapy minutes to calculate an inflation factor. Then, we applied the inflation factor to the reported per diem staff time resulting in the adjusted per diem therapy staff time. The adjusted staff time was then wage weighted (see discussion in II.G.1.b.v of this proposed rule) to produce the final wage-weighted staff time (WWST) for therapy. The WWST was then used as the dependent

(or cost) variable in the subsequent analyses of therapy staff time and also to derive the therapy CMIs.

TABLE 10—ADJUSTED THERAPY TIME CALCULATION EXAMPLE

Therapy data	Tues.	Wed.	Thurs.	Fri.	Sat.	Sun.	Mon.	Total time	Average therapy session	Days with 15+ minutes
Observed	45	40	40	0	0	0	0	125	42	3
Assumed	×	×	×	×	0	0	×	210	42	5

3 days of PDA data with estimated days of therapy = 5.
Adjusted weekly minutes = 5 × 42 = 210 minutes.

When group therapy was reported, we applied the existing 25 percent group time limitation for each discipline, excluding any group time exceeding 25 percent of total time, as follows: First, we calculated the amount of group time exceeding the 25 percent limitation. In order to achieve agreement with the adjusted therapy times, we multiplied the excess group time by the inflation factor before subtracting from the adjusted total time.

This therapy time adjustment provides a better fit to the national RUG–III distribution for rehabilitation groups, and better accounts for all reported therapy staff times. We give the maximum credit possible for any day that therapy time was recorded for 15 or more minutes to avoid underestimating the actual amounts of therapy furnished to patients.

We used the adjusted therapy time to determine the number of residents classifying into the ''Rehabilitation'' and ''Rehabilitation plus Extensive Services'' categories in the RUG–IV model and to calculate the CMIs. Though we propose to adjust for therapy time by developing the inflation factor described above, we evaluated the effect of two alternatives. The first alternative we considered was using the reported (unadjusted) times from the PDAs and paper tools. We also looked at therapy CMIs for nursing facilities where the therapy time data collection appeared consistent across the entire week, and examined the wage-weighted unadjusted times from only those 50 facilities. We evaluated the alternatives by determining whether the alternative produced a substantial difference in the CMI computation for the ''Rehabilitation'' and ''Rehabilitation plus Extensive Services'' categories compared to the proposed adjusted therapy time methodology.

The three different scenarios produce roughly the same CMIs because the RUG therapy groups use therapy time cutoffs, for example, the High rehabilitation groups require 325 minutes of therapy per week and the Very High rehabilitation groups require 500 minutes of therapy per week. While the therapy adjustment will not significantly influence the CMIs, it will change our estimated distribution of residents by increasing the number of residents in the higher level rehabilitation RUG groups.

This adjustment methodology benefits providers that provide a substantial quantity of rehabilitation. Without taking this into consideration, we run the risk of undercounting the actual amount of therapy provided. Therefore, we propose the adjustment methodology because the RUG distribution after application of the adjustment of therapy time more closely matches the expected therapy RUGs national distribution. The adjustment methodology is described in detail in the slides presented at the March 2009 TEP posted on *http://www.qtso.com/strive.html*.

We then included the adjusted therapy minutes in the STRIVE analytic database used to construct the RUG–IV classification structure and CMIs. We are confident that the STRIVE sample gave us the information we needed to evaluate changes we are proposing in this rule to the existing RUG–III model and to the therapy CMIs for RUG–IV. Still, as we discussed above, we believe that it would be premature to recommend a comprehensive restructuring of the SNF PPS therapy methodology based on a predictive model for therapy services. Thus, in this rule, we are proposing incremental, targeted changes that we believe will improve the accuracy of the existing RUG model. We plan to revisit alternatives to the current methodology used to reimburse therapy as additional information from the Post Acute Care demonstration and the analysis of IRF utilization patterns becomes available.

c. ADL Adjustments

RUG–IV, like RUG–III, uses a scale measuring Activities of Daily Living (ADLs) to identify residents with similar levels of physical function. This scale is used to sub-divide (''split'') each of the major hierarchical categories except Extensive Services. It is also used as part of the qualification criteria for many of the RUG–IV hierarchical categories (Extensive Services, Special High, Special Low, and Cognitive Performance and Behavioral Symptoms), and is used as part of the specific criteria for classifying patients to RUGs within certain categories.

As discussed below, we are proposing revisions to the RUG–IV ADL Index that reflect both clinical and statistical considerations, with the aim of scoring similarly those residents with similar function. As discussed further below, we changed component scores to make the scale more proportional to physical function (linear). In addition, we increased the range of the RUG–IV ADL Index (17 points), as compared to the RUG–III ADL Index (15 points), to allow somewhat greater distinction in physical function. An improvement of the categorization of the RUG–IV ADL scale is suggested by the results of the regression of the ADL scale (linear) after adjusting for the RUG–IV major hierarchical categories (R^2 = 11.1 percent for the RUG–IV ADL Index versus R^2 = 10.5 percent for the RUG–III ADL Index).

In addition, as discussed further below, we made certain revisions in the eating component score to achieve better categorization of residents receiving assistance in feeding. The RUG–III ADL Index used component scores of 1, 2, and 3 with artificial feeding mechanisms; that is, Parenteral Feeding/IV Feeding or the use of feeding tubes, used to classify patients into the most dependent category. In the STRIVE analysis, we found that patients receiving One Person Physical Assist or more needed comparable staff resources to those patients who were being fed by artificial means. During RUG–IV development, we found that the inclusion of artificial feeding services in the ADL Index slightly reduced the effectiveness of the model fit. In fact, the regressions discussed immediately above dropped slightly from an R^2 of 11.1 percent to 11.0 percent for the best alternative model (with the eating

component score = 2). Therefore, we modified the ADL component for eating so that the RUG–IV ADL component score for eating does not use Parenteral/IV feeding or feeding tube items. In addition, we made certain other revisions to the ADL component for eating as discussed below.

As in RUG–III, in the RUG–IV model an ''ADL Index'' is determined by combining the ''component ADL scores'' for certain items. The RUG–IV ADL Index, like the RUG–III ADL Index, combines ''component ADL scores'' based on the MDS ADL items for bed mobility, transfer, eating, and toilet use. A higher score represents a greater functional dependence and a need for more assistance. However, in contrast with the RUG–III ADL scale which ranges from 4 to 18, the RUG–IV scale ranges from 0 to 16. Starting the RUG–IV ADL Index at 0 is intended to improve ease of use and interpretation, and the addition of 2 ADL levels is intended to capture a patient's functional status more effectively.

TABLE 11A—ADL VALUES: BED MOBILITY, TOILET, TRANSFER

Bed Mobility, Toilet, Transfer ADL			
Performance	Support		
	None/setup	1-person	2-person
Independent/Supervision	0		
Limited Assistance	1		
Extensive Assistance	2		4
Total Dependence	3		

TABLE 11B—ADL VALUES: EATING

Eating ADL			
Performance	Support		
	None/setup	1-person	2-person
Independent/Supervision	0	2	
Limited Assistance			
Extensive Assistance	2	3	
Total Dependence		4	

To compute the RUG–IV ADL Index, we sum the component ADL scores for bed mobility, transfer, eating, and toilet use. We obtain each component ADL score by using both the Self-Performance and Support Provided for all four of the MDS items. This is a minor change from the RUG–III ADL Index (which did not use the Support Provided item for eating), intended to capture a patient's functional status more effectively. In addition, RUG–IV ADL Index component ADL scores range from 0 to 4 for all four areas, whereas RUG–III ADL Index scores ranged from 1 to 5 for bed mobility, transfer, and toilet use, and 1 to 3 for eating. Thus, although many specific combinations of MDS items remain the same, the corresponding component scores are slightly different.

As with the RUG–III ADL Index, in RUG–IV, bed mobility, transfer, and toilet use are treated identically. The ADL for eating had a different relationship with resource use than the toileting, transfer, and bed mobility ADLs. Therefore, we chose to develop a separate eating ADL scale, consistent with the current ADL system.

For the ADL Index component for bed mobility, transfer, and toilet use, when a Self-Performance item (for example, G1aa—Bed Mobility Self-Performance) indicates Independent (0) or Supervision (1), the component ADL score is 0, regardless of the level of support provided (for example, G1ab—Bed Mobility Support Provided). The data indicated that there was no significant change in resource use when the level of support provided increased, until the Extensive Assistance and Total Dependence levels. When the Self-Performance item indicates Limited Assistance (2), the component score is 1 (again, regardless of the level of support provided). For Self-Performance levels that indicate greater functional dependence than Limited Assistance (that is, Extensive Assistance and Total Dependence), the component ADL score is based on the level of support provided. When the Self-Performance item indicates Extensive Assistance (3) and the Support Provided is One Person Physical Assist or less (0, 1, 2), the component score is 2; when a Two+ Persons Physical Assist (3) is indicated, the component score is 4. Finally, when a Self-Performance item indicates Total Dependence (4) and the corresponding Support Provided item indicates One Person Physical Assist or less (0, 1, 2), the corresponding component score is 3; when a Two+ Persons Physical Assist (3) is indicated, the component score is 4. When the ADL Activity Did Not Occur During the Entire 7-day Period, Self-Performance (8) or Support Provided (8), the component ADL score is 0.

As mentioned previously, in the RUG–IV model, the eating component ADL score is obtained by using the Self-Performance and Support Provided items for eating. At each Self-Performance level, component scores differ by the level of Support Provided: Setup Help Only or less (0, 1) versus One Person Physical Assist or more (2, 3). When the Self-Performance item indicates Independent (0), Supervision (1), or Limited Assistance (2) and the Support Provided indicates Setup Help Only or less (0, 1), the eating component ADL score is 0. For the same three values of eating Self-Performance (that is, 0–2) where the Support Provided is One Person Physical Assist (2) or Two+ Persons Physical Assist (3), the eating component ADL score is 2. When the Self-Performance item indicates Extensive Assistance (3) or Total Dependence (4) and the Support Provided is Setup Help Only or less (0, 1), the component ADL score is 2. When the Self-Performance is Extensive Assistance (3) and the Support Provided is either a One Person Physical Assist (2) or Two+ Persons Physical Assist (3), the component ADL score is 3. When the Self-Performance is Total Dependence (4) and the Support Provided is One Person Physical Assist or more (2, 3), the component ADL score is 4. The component ADL score of 1 is not used for eating. The pattern is similar to the ADL scores in RUG–III for bed mobility, transfer, and toileting, which have values of 1, 3, 4, and 5, but not 2. The STRIVE data indicate that not every ADL level is correlated with the same increase in resource time. We found that using a scale without an ADL level of 1 for eating provided slightly higher variance explanation and a closer relationship between the final RUG–IV ADL Scale and nursing WWST.

As with the other 3 ADLs, when the eating items indicate Activity Did Not Occur During the Entire 7-Day Period, Self-Performance (8) or Support Provided (8), the component ADL score is 0. The RUG–IV eating ADL component score differs from the RUG–III in 2 ways. First, as discussed above, the RUG–III ADL component score does not use the Support Provided item, whereas the RUG–IV ADL component score does. Second, the RUG–IV eating ADL component score does not use the Parenteral/IV feeding or the Feeding tube items, as discussed above.

The ADL levels used to subdivide patients classified in each major category of the RUG–IV hierarchy into the actual RUG–IV groups is shown below in Table 12. We invite comments

on the proposed changes to the ADL index.

Table 12. RUG-IV Category Level ADL Splits

RUG Category	Rehab Level	ADL Levels				
		0-1	2-5	6-10	11-14	15-16
Rehabilitation+ Extensive	Ultra High		RUL		RUX	
	Very High		RVL		RVX	
	High		RHL		RHX	
	Medium		RML		RMX	
	Low		RLX			
Rehabilitation	Ultra High	RUA		RUB	RUC	
	Very High	RVA		RVB	RVC	
	High	RHA		RHB	RHC	
	Medium	RMA		RMB	RMC	
	Low	RLA			RLB	
Extensive Services			ES1, ES2, ES3			
Special High			HB	HC	HD	HE
Special Low			LB	LC	LD	LE
Clinically Complex		CA	CB	CC	CD	CE
Behavioral Symptoms and Cognitive Performance		BA	BB			
Reduced Physical Function		PA	PB	PC	PD	PE

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d. ''Look-Back'' Period

The RUG–III case-mix classification system includes items in the MDS 2.0 that may be coded for services provided to the resident prior to admission into the SNF. When RUG–III was developed, these items were deemed to be a proxy for medical complexity. In the SNF PPS final rule for FY 2000 (64 FR 41668–69, July 30, 1999), a commenter suggested that we eliminate the ''look-back'' period for completion of items in the MDS, as its use could trigger a RUG assignment based on services that occurred solely during the prior acute hospital stay and were no longer being furnished by the time of SNF admission. This would result in SNF coverage even though the resident was no longer receiving any skilled care at that point. While we did not have the data needed to evaluate the impact of making this change to the RUG–III model, we continued to monitor how the inclusion of pre-admission services affected the RUG–III classification model.

In the FY 2000 SNF final rule (64 FR 41668 through 41669, July 30, 1999), we stated that

> * * * the use of the 'look-back' period in making RUG–III assignments is essentially a clinical proxy that is designed to serve as an indicator of situations that involve a high probability of the need for skilled care. Thus, our expectation is that the occurrence of one of the specified events during the 'look-back' period, when taken in combination with the characteristic tendency * * * for an SNF resident's condition to be at its most unstable and intensive state at the outset of the SNF stay, should make this a reliable indicator of the need for skilled care upon SNF admission in virtually all instances * * *. If it should become evident in actual practice that this is not the case, it may become appropriate at that point to reassess the validity of the RUG–III system's use of the 'look-back' period in making assignments.

We subsequently discussed changing the ''look-back'' period on specific items in the MDS in the SNF PPS proposed and final rules for FY 2006 (70 FR 29079 through 29080 and 70 FR 45034 through 45035). Some commenters stated that changing the look-back period for some items in the MDS would negatively affect the care planning process for individuals. Many recommended that any changes should be coordinated with other CMS initiatives, such as MDS 3.0 and the STRIVE project. We agreed to address the issue of the look-back period within the broader context of the MDS 3.0 and the STRIVE project.

In addition, MedPAC, in its reports (for example, Report to the Congress: Promoting Greater Efficiency in Medicare, June 2007; *http://www.medpac.gov/documents/Jun07_EntireReport.pdf*), recommended that we eliminate the look-back period for specific treatments and that we include in the RUG payment system only those services that are provided after admission to the SNF.

As part of the STRIVE project, we expanded the data collection by adding a STRIVE addendum that allowed us to distinguish between preadmission and postadmission utilization of a specific set of MDS items that serve as qualifiers to classify residents into the highest levels of the RUG–III hierarchy. In order to minimize burden on the nursing homes participating in the study, we limited the number of additional data

items collected, and concentrated on those special treatments that are often provided in a hospital but are not often provided in a SNF after hospital discharge. For these reasons, we concentrated on the use of IV medications, tracheostomy care, suctioning and ventilator/respirator services, and transfusions (which are rarely performed in SNFs). We did not collect pre- and post-admission data on those special treatments we expected to require longer term care such as dialysis, IV feeding, radiation therapy and chemotherapy. However, in all cases, the staff time data collected through STRIVE reflects the care furnished after admission to the facility.

Analysis of the STRIVE data shows that: (1) the ''look-back'' period does in fact capture services that are provided solely prior to admission to the SNF; and (2) there is a much lower utilization of staff resources for individuals who received certain treatments solely prior to the SNF stay (that is, during the qualifying acute hospital stay) compared to those who received these services while a resident of the SNF. In fact, the STRIVE data showed that those patients who received specific services solely prior to admission to the SNF have similar resource utilization to those who never received the service (prior to admission or during the SNF stay). Therefore, the capture of preadmission services by the ''look-back'' does not provide an effective proxy for medical complexity for SNF residents. Instead, it results in payments that are inappropriately high for many non-complex medical cases.

Accordingly, we now propose to modify the look-back period under RUG–IV for those items in section P1a of the MDS 2.0, Special Treatments and Procedures, to include only these services that are provided after admission (or readmission) to the SNF. The modified look-back would apply to all treatments and procedures that are currently listed in section P1a of MDS 2.0. As discussed above, in order to reduce the burden on facilities, the STRIVE study looked at preadmission and postadmission utilization for a subset of P1a services. Because the STRIVE project data showed that the capture of preadmission services by the ''look-back'' does not provide an effective proxy for medical complexity and thus is not an effective predictor of subsequent resource intensity during the SNF stay, we believe that it would be appropriate, and consistent with the STRIVE data, to modify the look-back period for all P1a services. Thus, the proposed change to the look-back period is supported by the STRIVE data. In addition, the proposed change to the look-back period is consistent with the policy that has been in effect for reporting therapy services, another critical component of the RUG model, since the start of the SNF PPS in July 1998.

On the MDS 3.0 item set, there will be two ways to code for each of these procedures and treatments. In the first column (while not a resident) the provider would mark each treatment and procedure that was provided to the patient within the last 14 days while not a resident of the facility and would only be required to complete this column if the patient were admitted within the last 14 days. In the second column (while a resident) the provider would mark those procedures and treatments that have been performed while a resident of the facility within the last 14 days.

We agree that information regarding the resident's status prior to admission to the SNF is important to develop a comprehensive care plan. We note that the MDS collects information on numerous clinical items that affect a person's condition (medical, physical, psychological, etc.), which need to be taken into account in developing care plans but do not significantly alter the staff resources needed to provide quality care to that patient. It is the responsibility of all providers to properly assess, care for, and provide treatment for all patient care needs regardless of whether these needs/services are specifically included in the case-mix classification model used for payment. Furthermore, to make sure that comprehensive information is available to facility staff for the care planning process, as noted above, we have expanded the MDS 3.0 for the Special Treatments and Procedures items to 2 columns instead of only one. The first column allows the provider to code those services that were provided prior to the individual being admitted to the facility, while the second would be completed for only those services that are provided to the patient after admission/readmission to the facility. In this way, we capture information that may be important for care planning while continuing to provide adequate and appropriate payments for those patients who actually receive these services while a SNF resident. At the same time, modifying the look-back period eliminates inappropriately high reimbursement for services that are solely provided prior to admission to the SNF. We solicit comments on our proposed changes to the look-back period.

e. Organizing the Nursing and Therapy Minutes

The proposed RUG–IV model uses the same basic methodology that was used to develop the RUG–III model that is in use today. A detailed description of the RUG–III model is included in the May 1998 interim final rule with comment period (63 FR 26252). In addition, a detailed comparison between the RUG–II and RUG–IV models has been included in the Addendum to this proposed rule, in Table C.

In developing the RUG model, we look for clinical conditions that show a difference in mean staff time resource use (that is, wage weighted staff time or WWST) between residents with a clinical characteristic and residents without the condition. For a detailed description of the methods used to calculate the WWST for nursing and therapy, please see section III.C. of this proposed rule. In the STRIVE study, we linked nursing and therapy staff time collected on site at 205 facilities with contemporaneous MDS data for those same residents. Facility staff generally completed the STRIVE MDS during the same week as the time study was being collected. In the STRIVE study, we did have certain advantages that were not available when the RUG–III staff time measurement study was conducted. At that time, there was no national MDS data collection process. We now have a repository of MDS data covering the same period as each of the STRIVE time studies. Thus, we were able to use the national MDS data base to correct for missing data or other minor discrepancies in the ''as reported'' STRIVE MDSs.

In addition, in the STRIVE study, we were able to assign average hourly wage rates more appropriately to the different staff categories (as explained below), and use this data to construct the wage-weighted staffing time (WWST) used to compare the resource intensity of different conditions and services during the analysis discussed below, and to establish the CMIs or relative weights for each group in the proposed RUG–IV hierarchy.

For STRIVE, we used the 2006 U.S. Department of Labor, Bureau of Labor Statistics Occupational Employment Statistics survey (North American Industry Classification System 623100—Nursing Care facilities) wage data to determine the relative wages for the staff types participating in the STRIVE study. The RUG–III model relied primarily on data furnished by industry sources that provided fewer staff categories and wage weights. Thus, the WWST used in the STRIVE study better represents actual

staffing and wage rates in SNFs across the country.

The purpose of linking the clinical and staff resource data is to identify differences in relative resource use for those conditions and sets of conditions treated in Medicare SNFs and Medicaid nursing facilities. Thus, we sorted each record by each of the RUG–III qualifying items reported on the MDS, summed the WWST minutes, and calculated an average number of nursing and therapy minutes for each condition. For example, we identified and summed the WWST resource minutes associated with providing suctioning. We then divided the total WWST minutes by the number of MDS records on which suctioning was reported to obtain average WWST minutes for the service. As part of the analysis, we looked at comorbidities commonly associated with the condition as well as records where suctioning was the only RUG qualifier reported on the MDS. We then used the WWST minutes and the mean minutes for each current or potential payment qualifier to examine and ultimately update the RUG–III model.

The current RUG–III model was created as a hierarchy from highest to lowest resource use. Clinical conditions and services were assigned to a hierarchy level based on similarity of staff time required to treat a beneficiary with that condition. Thus, while there might be no direct clinical relationship between items assigned to the same level of the RUG hierarchy, SNFs will generally incur similar costs for providing nursing and therapy services within that RUG. The RUG–III hierarchy consists of eight levels: Rehabilitation plus Extensive Services, Rehabilitation, Extensive Services, Special Care, Clinically Complex Services, Impaired Cognition, Behavior Problems, and Reduced Physical Function. For detailed information on the development of the RUG–III classification system, please see the May 12, 1998 interim final rule with comment period (63 FR 26252). A comprehensive list of the MDS items used to classify patients into a RUG–III grouper is included in Chapter 6 of the MDS 2.0 Manual and can also be found on the SNF PPS Web site at *www.cms.hhs.gov/NursingHomeQualityInits/20_NHQIMDS20.asp*.

As a first step, we examined the current RUG–III structure in a hierarchical manner starting with the Rehabilitation plus Extensive Services category. We evaluated each category by first looking at the current qualifiers for that category and determining if the average WWST based on the STRIVE data for any RUG–III qualifier was either significantly higher or significantly lower than the average WWST for that category. If a condition had significantly higher or lower WWST, it could indicate that the condition would better fit into the category above or below in the hierarchy. The second step was to evaluate potential items to add to each category based on the WWST for that item by considering qualifying conditions from the category below or investigating conditions that had not previously been included in the classification system.

Then, we evaluated other major components of the RUG–III model to determine where enhancements could be made. The STRIVE research confirmed findings of CMS's multi-year RUG–III demonstration that showed the importance of patient functional deficits, that is, the ability to perform activities of daily living (ADLs), in assessing patient care needs and total staff time needed to provide care. We found that ADL levels have a significant impact for specific conditions and across the group of conditions included in almost every level of the hierarchy. Therefore, the RUG–III model includes an ADL scale that is used to create secondary classification splits within each level of the hierarchy.

For RUG–IV, the ADL scale remains a critical part of the model. We are proposing two modifications to the existing ADL methodology. First, in RUG–IV, we will standardize the ADL categories across the various levels of the hierarchy. Second, we revised the ADL scale to make it more sensitive to differences in functional levels. The proposed ADL changes are discussed in section III.B. of this proposed rule.

In addition, we reassessed the effectiveness of the incremental refinement implemented in the FY 2006 final rule that added nine new RUG–III groups effective January 2006. We also looked at changes in the delivery of therapy services, and its impact on the classification system. Our findings and recommendations in this regard are set forth in section IV.D. of this proposed rule.

The RUG–IV model presented in this proposed rule incorporates both the results of the STRIVE analysis and the stakeholder input received during the course of the project. A detailed description of proposed changes to the RUG classification structure, and the introduction of proposed new FY 2011 case-mix weights are presented later in this section.

B. The RUG–IV Classification System

As discussed above, we are proposing to implement changes in FY 2011 to the RUG classification structure and relative weights. In the proposed RUG–IV classification system, patient characteristics and health status information from the proposed MDS 3.0 (discussed in section IV. of this proposed rule) would be used to assign the patient to a resource group for payment. Like RUG–III, the new RUG–IV system is a hierarchy of major patient types, and reflects current medical practice and staff resource use in SNFs across the country. We believe that the RUG–IV model is more sensitive to differences in patient complexity and the SNF resources needed to provide quality care than the existing RUG-III model. In the RUG–IV model, we propose modifying the eight levels of the hierarchy and increasing the number of case-mix groups from 53 to 66. Expanding the model allows us to better distinguish between relative resource use both within and between RUG groups. For example, the RUG–IV model is more sensitive to the high level of resources associated with those medically complex conditions involving respiratory illness and infections.

In addition, RUG–IV allows us to capture a patient's functional status more effectively. Functional status is a key component of both the existing RUG–III model and the proposed RUG–IV, and is used to distinguish the level of resource need between patients with similar conditions. Thus, if a patient is assigned to a RUG group at the Clinically Complex level of the hierarchy, we use that patient's level of functional status as a secondary classifier (commonly referred to as a secondary split) to assign a more precise classification into one of the 8 proposed Clinically Complex groups.

RUG–IV, like RUG–III, uses a scale measuring Activities of Daily Living (ADLs) to identify residents with similar levels of physical function. This scale is used to sub-divide (''split'') each of the major hierarchical categories except Extensive Services. It is also used as part of the qualification criteria for many of the RUG–IV hierarchical categories (Extensive Services, Special High, Special Low, and Cognitive Performance and Behavioral Symptoms), and is used as part of the specific criteria for classifying patients to RUGs within certain categories. A complete description of the methodology used to develop the RUG–IV ADL Index is included in section III.A.2.c. of the proposed rule.

The RUG–IV model reflects changes in how particular clinical conditions or services are assigned to the 66 levels of the RUG hierarchy. Since the CMIs assigned to each RUG group are based on average resource time for the conditions and services included in that RUG group, it is very important to make the individual RUG groups as homogeneous as possible with respect to the resource times associated with the conditions and services included in each RUG group. In this way, we enhance the accuracy of the payment structure and maximize the relationship between the RUG hierarchy and the accuracy of the payments made for each of the conditions included in a particular level of the hierarchy. Therefore, we are proposing to move certain existing conditions and/or services currently used to assign patients to RUG–III groups up or down within the RUG hierarchy (as described in more detail later in this section) to better reflect the average resource time for those conditions, and to enhance the accuracy of RUG payments.

Finally, we have evaluated a broad range of clinical services and conditions, and are recommending several additions and deletions to the existing RUG–III model based on the results of the STRIVE research, and described in more detail later in this section. Since approximately 90 percent of the days of service for Medicare Part A SNF stays include the provision of therapy, we looked carefully at utilization patterns and changes in the practice of therapy identified through the STRIVE research. We also carefully evaluated the methodology used to assign patients to the Rehabilitation plus Extensive Services category that was implemented in January 2006. This category was established to promote access for a small group of high-cost beneficiaries with both extensive medical and rehabilitation needs. The STRIVE analysis has shown us that the RUG–III model for classifying patients into Extensive Services, a prerequisite for placement in one of the nine combined Rehabilitation plus Extensive Services groups, is no longer effective in identifying the type of patient for whom these groups were created. Instead, the STRIVE data showed that most of the patients classifying into these nine new groups had some type of IV treatment in the hospital that was neither needed nor provided after admission to the SNF. Thus, most of the beneficiaries who were classified into one of these nine groups were actually treated in the SNF for less complex medical conditions than had been expected. We believe that the large percentage of SNF patients receiving IV services during the hospital stay prior to SNF admission reflects changes in hospital care practices since the development of the RUG–III system that are unrelated to increased patient severity in the subsequent SNF stay. Accordingly, as discussed in detail in section III.A.2.d., the proposed RUG–IV Extensive Services category would include only those nursing services actually received during the SNF stay itself. By correcting for this unanticipated effect, the RUG–IV model would more effectively distribute payment to patients with greater care needs. The proposed new RUG–IV groups are included in Table 12.

The RUG–IV classification model is an iterative process where patients are assigned first to one of eight major categories which indicate the primary patient nursing and/or therapy needs. Each case is assigned to the highest major category for which it qualifies. In hierarchical order, from highest to lowest, the categories are Rehabilitation plus Extensive Services, Rehabilitation, Extensive Services, Special Care High, Special Care Low, Clinically Complex, Behavioral Symptoms and Cognitive Performance, and Reduced Physical Function. These major categories are further differentiated into more specific patient groupings; that is, secondary splits. Except for the Extensive Services category, we use a secondary split based on the patient's Activities of Daily Living (ADL) score discussed earlier in this section. As described below, the RUG–IV groups may be further differentiated based on nursing rehabilitation services and signs of depression. Thus, a record for a patient who is admitted to a SNF for treatment that qualifies for the Special Care High major category will be further evaluated to assign the most appropriate of the eight Special Care High groups. The final group selection will be made based on the patient's ADL level and on the existence of signs/symptoms of depression.

The initial RUG–IV category of Rehabilitation plus Extensive Services is used to classify residents who both qualify for Extensive Services and need rehabilitation therapy. In RUG–IV, changes made to either the Extensive Services or Rehabilitation major categories affect the number and type of patients who can qualify for this group. We discuss changes to the Extensive Services and Rehabilitation major categories below.

The second RUG–IV category is Rehabilitation. This includes residents receiving a certain number of physical or occupational therapy or speech language pathology service minutes per week. In RUG–IV, we are proposing to maintain the existing RUG–III rehabilitation category, as well as the existing subcategories and criteria as described below. We note that, as discussed in greater detail in section III.A.2.a. of this proposed rule, we are proposing to require the allocation of concurrent therapy minutes. While this allocation proposal would affect the number of therapy minutes reported on the MDS, it does not affect the construction of the RUG–IV model. In addition, similar to the methodology used for RUG–III, the RUG–IV model we are proposing would not use ADL limitations to qualify for the Rehabilitation category. In the Rehabilitation category, ADLs are only used as a threshold for assignment into the sub-category.

There are five subcategories within the Rehabilitation category. They are Ultra High, Very High, High, Medium, and Low, which require 720, 500, 325, 150, or 45 minutes of rehabilitation therapy per week, respectively. In addition, Ultra High, Very High, and High subcategories also require at least 1 rehabilitation discipline 5 days per week. The Ultra High subcategory requires a second rehabilitation discipline 3 days per week. The Medium and Low Rehabilitation subcategories require 5 and 3 days per week, respectively, of any combination of 3 rehabilitation disciplines. In addition, the Low Rehabilitation subcategory requires nursing rehabilitation 6 days per week, 2 services (see Reduced Physical Function category below for nursing rehabilitation services count).

The third RUG–IV category is Extensive Services. Under the current RUG–III model, patients are classified into the Extensive Services category if they exhibit one of the following five conditions: ventilator care, tracheostomy care, suctioning, IV medications, and IV feeding. Then, comorbidities are identified and used to subdivide the case into one of the three Extensive Services groups. Comorbidities are determined by identifying whether an Extensive Services patient also has one of the conditions needed to qualify for a Special Care, Clinically Complex Care, or Impaired Cognition group. All of the existing Extensive Services qualifying conditions were examined as part of the STRIVE project.

We found that, while ventilator care and tracheostomy care still require intensive staff resources, the remaining RUG–III qualifiers are no longer appropriate for the Extensive Services

category. Our analysis showed significant differences between services furnished in the prior hospital stay and the same types of services provided in the SNF. In fact, we found no statistical difference between resources needed to treat patients who had an Extensive Services qualifying service in the prior hospital stay (but not in the SNF) and patients who did not have the service in either the hospital or the SNF. In addition, the resource minutes were considerably lower when services were only provided during the prior hospital stay. Similarly, we found that the existence of comorbidities (additional clinical conditions that qualified the patient for inclusion in the Special Care, Clinically Complex, or Impaired Cognition groups) did not change the nursing resources associated with the Extensive Services qualifiers in any meaningful way. Specifically, we did not find that the inclusion of comorbidities increased the staff time necessary to treat Extensive Services residents who also have conditions qualifying them for treatment in the other categories. Consistent with the proposed changes discussed in section III.A.2.d. of this proposed rule, in the RUG–IV model, ventilator/respirator care, and tracheostomy care qualify only when they are administered post-admission to the SNF. The same post-admit time constraint will apply for the new infection/isolation addition to Extensive Services. Some prior Extensive Services qualifiers have been moved to a new location in RUG–IV, in order to better reflect the average resource time for these conditions (as discussed above): the parenteral/IV feeding qualifier moves to the Special Care High category and the IV medications qualifier moves to the Clinically Complex category. Furthermore, for the reasons discussed above, the inclusion of comorbidities has been eliminated as a secondary split. In addition, suctioning has been dropped as a qualifier in RUG–IV because the use of suctioning is highly correlated with the other two Extensive Services, ventilators and tracheostomies. Generally, in the STRIVE study, suctioning was associated with some type of respiratory condition coded on the MDS. In those few instances where suctioning had been coded without any other indication of a respiratory condition (such as respiratory therapy or oxygen therapy), the nursing WWST minutes were much lower than suctioning furnished with other respiratory conditions. Based on the low resource use for suctioning independent of any respiratory condition, and the absence of any other non-respiratory RUG qualifier associated with suctioning, we believe it is appropriate to exclude suctioning as an independent qualifier. Finally, we retain the ADL qualifier for inclusion in the Extensive Services category. We have modified the ADL qualifier from 7 to 2 in order to reflect the change in calculating ADLs described above.

For RUG–IV, we have divided the RUG–III Special Care category into Special Care High and Special Care Low categories to better reflect the differences in resource use. The Special Care High category includes residents receiving complex care or those with serious medical conditions, including the following: quadriplegia, respiratory therapy for 7 days, and fever in combination with dehydration, or pneumonia, or vomiting, or weight loss. Added to this category are the following: the parenteral/IV feedings qualifier, which has moved from the Extensive Services category; septicemia, which has moved from the Clinically Complex category; diabetes with injections and physician order changes on 2 or more days, which have moved from the Clinically Complex category; and, the comatose qualifier, which has moved from the Clinically Complex category. As discussed above, we moved these qualifiers based on the results of our STRIVE study so that the RUG–IV model better reflects the average resource use for these conditions. In addition, the Special Care High category includes a minimum ADL requirement of *2*. We dropped fever with tube feeding with food/fluid requirements as a qualifier because in the STRIVE study, tube feeding resource use fell below that of fever. Therefore, based on resource use, we believe it is no longer appropriate to include tube feeding with fever.

The RUG–IV Special Care Low category includes residents receiving complex care or those with significant medical conditions, including the following: multiple sclerosis; cerebral palsy; ulcers (2 or more stage II or one or more stage III or IV pressure ulcers) with treatment; surgical wounds or open lesions with treatment; and tube feeding with requirements. In the RUG–III model, aphasia was used as a qualifier when linked to the use of feeding tubes. The aphasia requirement has been dropped because, based on the results of our STRIVE analysis, aphasia no longer correlates with tube feeding. For this reason, we have retained tube feeding as a qualifier, but have dropped aphasia. In addition, the following conditions are moved to this category from the Clinically Complex category so that the RUG–IV model better reflects the average resource times associated with these conditions: dialysis, burns, pneumonia, and oxygen therapy; shortness of breath with emphysema/chronic obstructive pulmonary disease (COPD); and Parkinson's disease. In addition, the Special Care Low category includes a minimum ADL requirement of 2. We ran Mean Nursing WWST and variance explanations for all possible ADL thresholds for all hierarchy categories. After balancing the statistical results with the relative ease of understanding the system, we determined that a relatively consistent ADL threshold from the Extensive Services category down through the Special Care Low category would be most appropriate. Also, the ADL cut-off value of 2 for Special Care Low is close to the cut-off used in RUG–III.

RUG–III had included radiation therapy in the Special Care category; however, for the reasons discussed below, in RUG–IV, this has been moved to the Clinically Complex category. Internal Bleeding is no longer a qualifier in any category because of its unreliability. The RAND Corporation recently completed an analysis of MDS 2.0 items, and recommended changes for use in the MDS 3.0 as shown at *http://www.cms.hhs.gov/NursingHomeQualityInits/25_NHQIMDS30.asp*. RAND found that there were no standardized definitions of internal bleeding, and that the item was vulnerable to misinterpretation, that is, inappropriately coding routine situations (such as minor nosebleeds) as ''internal bleeding.''

The sixth RUG–IV category is Clinically Complex. This includes residents receiving complex clinical care who do not meet the minimum ADL requirement for classification in the Extensive Services or the Special Care categories, or residents with conditions requiring skilled nursing management and interventions for conditions and treatments, such as: foot infections/wounds with treatment; transfusions; hemiplegia; and chemotherapy. This category also includes radiation therapy, which moved from the Special Care category, and post-admit IV medications. These qualifiers were moved because the average resource times for these conditions, as determined in the STRIVE analysis, are more reflective of conditions in the Clinically Complex category than for the higher levels of the hierarchy in which they classified under the RUG–III model. Dehydration was dropped as a qualifier in any category, based on the American Medical

Association's finding (see Faes, MC, ''Dehydration in Geriatrics,'' *Geriatric Aging*, 2007: 10(9): 590–596, available online at *http://www.medscape.com/viewarticle/567678* that there is no standard definition of dehydration among providers, and that the signs and symptoms of dehydration may be vague and even absent in older adults. We believe that this qualifier is subject to a wide range of interpretation (and, therefore, is unreliable as a standard for RUG classification), as borne out by our MDS review, which showed instances of patients being coded for dehydration for long periods of time, that is, far beyond the time period in which we would expect the issue to be resolved through treatment. Thus, we believe continuing to use dehydration as a qualifier could result in inaccuracy in RUG classification. (This is not to minimize the potentially serious nature of dehydration and the need for prompt medical attention in some cases, but rather to improve coding accuracy). Finally, physician orders were dropped as a qualifier. Because of the lack of specificity and the variable nature of this qualifier, we do not believe that the presence of physician orders is a reliable predictor of resource use.

The seventh RUG–IV category is Behavioral Symptoms and Cognitive Performance. Residents in this category display cognitive impairment in decision-making, recall, and short-term memory. They score above the threshold amount on the MDS 3.0 with respect to the brief interview for mental status. Alternatively, or in addition, these residents display one of the following behavior patterns: wandering; verbal abuse; physical abuse; socially inappropriate traits; resistance to care on 4 or more days; hallucinations or delusions. In addition, these residents may not exceed a maximum ADL cut-off of *5*. In the RUG–III model, Impaired Cognition and Behavior represented separate levels in the hierarchy. However, the STRIVE data showed that the same level of resources is needed to treat patients in either the cognitive or behavioral groups. Thus, we combined the groups into a single level of the RUG hierarchy.

The final RUG–IV category is Reduced Physical Function. This category includes residents whose needs are primarily for ADLs and general supervision. For the Reduced Physical Function major category, all records are sorted into subgroups by ADL level. Once this secondary split has been done, the records are sorted into still more discrete groups using a tertiary split that identifies residents who are receiving restorative nursing. Restorative nursing services are coded on the MDS, and include passive and/or active range of motion (ROM); amputation/prosthesis training; splint or brace assistance; dressing or grooming training; transfer training; bed mobility and/or walking training; communication training; scheduled toileting plan and/or bladder retraining program.

We believe that restorative nursing programs benefit all nursing home patients, and consider the use of a tertiary split for restorative nursing to be a positive incentive in fostering quality care. However, in the STRIVE analysis, we found that, for approximately half the Reduced Physical function groups, the nursing minutes were lower for patients where restorative nursing was reported on the MDS than for patients who were not receiving the service as shown in Table 13. While we are proposing to retain the tertiary split for restorative nursing in the RUG–IV model, we are soliciting comments that may shed light of the discrepancy between the reported service and the nursing minutes.

TABLE 13

RUG category	Nursing rehabilitation	N	Average nursing WWST
Physical E	Yes	82	157.7
	No	396	159.0
Physical D	Yes	153	129.6
	No	691	125.5
Physical C	Yes	17	105.4
	No	88	100.5
Physical B	Yes	14	73.1
	No	117	82.6
Physical A	Yes	24	60.7
	No	462	62.2

The RUG–IV classification system shown in Table 14 is being proposed for use in the national Medicare SNF PPS. State Medicaid agencies are not required to adopt the RUG–IV model. However, we believe that most States will give the model careful consideration because it includes features that will promote accurate payment. For example, based on our STRIVE study results, inclusion of services furnished prior to the SNF/NF admission when assigning a RUG payment group has resulted in excess payments by both Medicare and Medicaid for services that were not actually furnished to the patient during the SNF stay. Similarly, as discussed in section IV.D. of this proposed rule, the RUG–III classification into the therapy groups overstates in some cases the actual staff time needed and used to provide therapy services. Further, most State Medicaid agencies have been using the same RUG–III model currently used by Medicare. While many of the high-acuity patients are covered under Medicare Part A for all or part of their nursing home stays, Medicaid has its share of this same high-acuity population. By identifying current nursing home practices and resource use, the RUG–IV model more closely ties payments to the relative severity and needs of the Medicaid as well as Medicare populations. We intend to work closely with State Medicaid agencies during the next year to assist them in evaluating the RUG–IV model for Medicaid use.

We expect that most States will continue their existing payment systems until they have more time to evaluate the RUG–IV model. For this reason, we have already started work on support systems that will allow States to convert or crosswalk the MDS 3.0 data to the current MDS 2.0 structure for use in the State Medicaid payment systems. These crosswalks contain the data specifications that States will need to continue running their MDS 2.0/RUG–III-based systems after October 1, 2010. Our Center for Medicaid and State Operations has initiated monthly calls with State Medicaid agencies and has established an ongoing dialogue to

address the States' systems support needs. Representatives from the MDS 3.0 team in the Office of Clinical Standards and Quality and the RUG–IV development team in the Center for Medicare Management participate on these calls. All three Centers for Medicare & Medicaid Services (CMS) components are working together to support the State agencies and assist them in making the transition to the MDS 3.0 and, where applicable, to the RUG–IV system.

In this proposed rule, we are soliciting comments from State Medicaid agencies on their preferred method(s) of transferring MDS 3.0 data between CMS and the State Medicaid agency, and on any new systems developments needed to run their RUG–based payment systems. In addition, for those States that wish to adopt the proposed RUG–IV model in FY 2011, we are soliciting comments on the type of detailed RUG–IV specifications and technical support they will need in order to prepare for an October 2010 implementation. To assist in this effort, we have prepared a detailed RUG–IV/RUG–III comparison that can be found in the Addendum (Table C) to this rule. We invite comment on these proposed changes.

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Table 14
Crosswalk of MDS 3.0 Items and RUG-IV Groups

CATEGORY	ADL INDEX	END SPLITS	MDS RUG-IV CODES
ULTRA HIGH REHABILITATION PLUS EXTENSIVE SERVICES **Rehabilitation Rx 720 minutes/week minimum** **AND** At least 1 rehabilitation discipline 5 days/week AND A second rehabilitation discipline 3 days/week AND Tracheostomy care, ventilator/respirator, or isolation for active infectious disease while a resident AND ADL score of 2 or more	11-16 2-10	Not Used Not Used	RUX RUL
VERY HIGH REHABILITATION PLUS EXTENSIVE SERVICES: **Rehabilitation Rx 500 minutes/week minimum** AND **At least 1 rehabilitation discipline 5 days/week** AND Tracheostomy care, ventilator/respirator, or isolation for active infectious disease while a resident AND ADL score of 2 or more	11-16 2-10	Not Used Not Used	RVX RVL
HIGH REHABILITATION PLUS EXTENSIVE SERVICES **Rehabilitation Rx 325 minutes/week minimum** AND **At least 1 rehabilitation discipline 5 days/week;** AND Tracheostomy care, ventilator/respirator, or isolation for active infectious disease while a resident AND ADL score of 2 or more	11-16 2-10	Not Used Not Used	RHX RHL
MEDIUM REHABILITATION PLUS EXTENSIVE SERVICES **Rehabilitation Rx 150 minutes/week minimum** AND **5 days any combination of 3 rehabilitation disciplines;** AND Tracheostomy care, ventilator/respirator, or isolation for active infectious disease while a resident AND ADL score of 2 or more	11-16 2-10	Not Used Not Used	RMX RML
LOW REHABILITATION PLUS EXTENSIVE SERVICES **Rehabilitation Rx 45 minutes/week minimum** **AND** **3 days any combination of 3 rehabilitation disciplines;** AND **Restorative nursing 6 days/week, 2 services (see Reduced Physical Function (below) for**	2-16	Not Used	RLX

CATEGORY	ADL INDEX	END SPLITS	MDS RUG-IV CODES
restorative nursing services); AND Tracheostomy care, ventilator/respirator, or isolation for active infectious disease while a resident AND ADL score of 2 or more			
ULTRA HIGH REHABILITATION Rehabilitation Rx 720 minutes/week minimum AND At least 1 rehabilitation discipline 5 days/week AND A second rehabilitation discipline 3 days/week	11-16 6-10 0-5	Not Used Not Used Not Used	RUC RUB RUA
VERY HIGH REHABILITATION Rehabilitation Rx 500 minutes/week minimum AND At least 1 rehabilitation discipline 5 days/week	11-16 6-10 0-5	Not Used Not Used Not Used	RVC RVB RVA
HIGH REHABILITATION **Rehabilitation Rx 325 minutes/week minimum** AND At least 1 rehabilitation discipline 5 days/week	11-16 6-10 0-5	Not Used Not Used Not Used	RHC RHB RHA
MEDIUM REHABILITATION **Rehabilitation Rx 150 minutes/week minimum** AND 5 days any combination of 3 rehabilitation disciplines	11-16 6-10 0-5	Not Used Not Used Not Used	RMC RMB RMA
LOW REHABILITATION **Rehabilitation Rx 45 minutes/week minimum** **AND** **3 days any combination of 3 rehabilitation disciplines;** AND Restorative nursing 6 days/week, 2 services (see Reduced Physical Function for restorative nursing services)	11-16 0-10	Not Used Not Used	RLB RLA
EXTENSIVE SERVICES Tracheostomy care, ventilator/respirator, or isolation for active infectious disease while a resident AND ADL score of 2 or more	2-16 2-16 2-16	Tracheostomy care and ventilator/respirator Tracheostomy care or ventilator/respirator Isolation for active infectious disease	ES3 ES2 ES1
SPECIAL CARE HIGH **Comatose; septicemia; diabetes with daily injections and order change on 2 or more days; quadriplegia with ADL score >=5; chronic obstructive pulmonary disease and shortness of breath when lying flat; fever with pneumonia, vomiting, dehydration, or weight loss; parenteral/IV feedings; respiratory therapy for 7 days** AND ADL score of 2 or more	15-16 15-16 11-14 11-14 6-10 6-10 2-5 2-5	Signs of Depression No Signs Signs of Depression No Signs Signs of Depression No Signs Signs of Depression No Signs	HE2 HE1 HD2 HD1 HC2 HC1 HB2 HB1

CATEGORY	ADL INDEX	END SPLITS	MDS RUG-IV CODES
SPECIAL CARE LOW	15-16	Signs of Depression	LE2
Cerebral palsy, multiple sclerosis, or Parkinson's disease with ADL score >=5; feeding tube (calories >= 51% or calories = 26-50% and fluid >= 501cc); ulcers (2 or more stage II or 1 or more stage III or IV pressure ulcers) with 2 or more skin care treatments; foot infection/diabetic foot ulcer/open lesions of foot with treatment; radiation therapy while a resident; oxygen therapy while a resident; dialysis while a resident	15-16	No Signs	LE1
	11-14	Signs of Depression	LD2
	11-14	No Signs	LD1
	6-10	Signs of Depression	LC2
AND	6-10	No Signs	LC1
ADL score of 2 or more	2-5	Signs of Depression	LB2
	2-5	No Signs	LB1
CLINICALLY COMPLEX	15-16	Signs of Depression	CE2
Extensive Services, Special Care High or Special Care Low qualifier and ADL score of 0 or 1	15-16	No Signs	CE1
	11-14	Signs of Depression	CD2
	11-14	No Signs	CD1
OR	6-10	Signs of Depression	CC2
Pneumonia; hemiplegia with ADL score >=5; surgical wounds or open lesions with treatment; burns; chemotherapy while a resident; IV medications while a resident; transfusions while a resident	6-10	No Signs	CC1
	2-5	Signs of Depression	CB1
	2-5	No Signs	CB2
	0-1	Signs of Depression	CA2
	0-1	No Signs	CA1
BEHAVIORAL SYMPTOMS and COGNITIVE PERFORMANCE	2-5	2 or more restorative nursing on 6+ days/wk	BB2
Cognitive impairment BIMS score <=9 or CPS >=3	2-5	Less restorative nursing	BB1
OR			
hallucinations or delusions	0-1	2 or more restorative nursing on 6+ days/wk	BA2
OR			
physical or verbal behavioral symptoms toward others, other behavioral symptoms, rejection of care, or wandering	0-1	Less restorative nursing	BA1
AND			
ADL score <=5			
See Reduced Physical Function for restorative nursing services			
REDUCED PHYSICAL FUNCTION	15-16	2 or more restorative nursing on 6+ days/wk	PE2
Restorative nursing services:			
• Urinary and/or bowel training program	15-16	Less restorative nursing	PE1
• passive and/or active ROM	11-14	2 or more restorative nursing on 6+ days/wk	PD2
• amputation/prosthesis care training			
• splint or brace assistance	11-14	Less restorative nursing	PD1
• dressing or grooming training	6-10	2 or more restorative nursing on 6+ days/wk	PC2
• eating or swallowing training			
• transfer training	6-10	Less restorative nursing	PC1
• bed mobility and/or walking training	2-5	2 or more restorative nursing on 6+ days/wk	PB2
• communication training			
NOTES:	2-5	Less restorative nursing	PB1
No clinical variables used	0-1	2 or more restorative nursing on 6+ days/wk	PA2
	0-1	Less restorative nursing	PA1
Default			AAA

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C. Development of the FY 2011 Case-Mix Indexes

As indicated previously, section 1888(e)(4)(G)(i) of the Act requires that the Federal rates be adjusted for case mix. Pursuant to the statute, such adjustment must be based on a resident classification system, established by the Secretary, that accounts for the relative resource utilization of different patient types. The case-mix adjustment must be based on resident assessment data and other data the Secretary considers appropriate.

As discussed previously, the RUG–III system uses clinical data from the MDS, and wage-adjusted staff time measurement data, to assign a case-mix group to each record that is then used to calculate a per diem payment under the SNF PPS. The existing RUG–III grouper logic was based on clinical data collected in 1995 and 1997. We are proposing to implement in FY 2011 a RUG–IV update that uses data collected in 2006–2007 during the STRIVE project, and reflects current medical practice and resource use in SNFs across the country.

The proposed RUG–IV classification is a patient classification system that accounts for the relative resource utilization of different patient types. To adjust for the relative resource utilization of patients (that is, the case mix), direct patient care would be represented by an index score (case-mix index) that is based on the amount of staff time, weighted by salary levels, associated with each group. That is, each RUG–IV group would be assigned an index score that represents the amount of nursing time and rehabilitation treatment time associated with caring for the patients who qualify

for the group. The nursing weight would include both patient-specific time spent daily on behalf of each patient type by registered nurses, licensed practical nurses, and aides, as well as patient non-specific time spent by these staff members on other necessary functions such as staff education, administrative duties, and other tasks associated with maintenance of the caregiving environment.

The case-mix indexes would be applied to the unadjusted rates resulting in 66 separate rates, each corresponding with one of the 66 RUG–IV classification groups. To determine the appropriate payment rate, SNFs would classify each of their patients into a RUG–IV group based on assessment data from the MDS 3.0. The design and structure of RUG–IV and the methodology and policy associated with the classification of patients into RUG–IV groups, including the completion of assessments (MDS 3.0) for Medicare patients under the SNF PPS, are described in sections III.B. and IV.A. of this proposed rule.

As explained in sections III.A. and III.B. of this proposed rule, we collected measures of the staff time required to care for nursing home patients and used them to identify specific clinical characteristics that are predictive of patient resource use. In order to do this, we combined and analyzed characteristics of the patients in the STRIVE study and the time it took to care for them. We then used these analyses to identify the patient characteristics that best explain weighted patient-specific time. From this, we created the 66 RUG–IV groups and calculated separate nursing and rehabilitation therapy case-mix indexes for each group. In determining the case-mix indexes for each group, we first obtained the salaries of all staff types from the 2006 U.S. Department of Labor, Bureau of Labor Statistics Occupational Employment Statistics survey. Next, we computed the ratio of median salaries for different nursing and rehabilitation therapy staff to the median salary of a certified nurse aide. These ratios were used as the salary weights for each staff category. The basic calculation performed for each patient was to take the minutes spent providing patient care and multiply them by the weight that represents the staff person's salary. Thus, we multiplied the registered nurse's minutes by 2.58, the licensed practical nurse's minutes by 1.65 and the aide's minutes by 0.85, 1.0, or 1.20 (depending on the specific aide's job title) and then summed to yield salary-weighted nursing time for the patient.

For example, to compute the WWST for the ES3 RUG–IV group, we use the mean minutes per day for each of the nursing staff roles providing staff time for the ES3 group.

For the ES3 group, we collected staff time from the following staff types: Registered Nurses (RNs)—97.83, Licensed Practical Nurses (LPNs)—39.35, Certified Nursing Assistants (CNA)—108.84, and Restorative Aides—0.88.

We then multiplied the minutes for each of these roles by the relative wage weight for the respective role, standardized by the wage rate for CNA. The standardized weights are as follows:

RN—$27.52/$10.67 = 2.58, LPN—$17.57/$10.67 = 1.65, CNA—1.0, and Restorative Aide—$12.80/$10.67 = 1.2. Standardizing to the rate of a CNA allows us to refer to the wage rates relative to the staff role generally providing the most minutes.

The wage-weighted staff time for the ES3 group would be computed as follows:

$$(97.83*2.58) + (39.35*1.65) + (108.84*1) + (0.88*1.2) = 427.22$$

For therapy, we multiplied the physical therapist's time by 2.98, the occupational therapist's time by 2.72, the speech pathologist's time by 2.60, the licensed physical therapy assistant's time by 1.86, the licensed occupational therapy assistant's time by 1.90, and the therapy aide's time by 0.99 (physical therapy aide), 1.13 (occupational therapy aide), or 1.06 (therapy aide or therapy transport aide) and then summed to yield salary-weighted therapy time for the patient. We then averaged the salary-weighted nursing time for each group to yield an array of 66 nursing case-mix index scores and averaged the salary-weighted therapy time for the five different levels of therapy (Ultra High, Very High, High, Medium, and Low) to yield therapy case-mix indexes for those levels. These indexes comprise the unadjusted nursing and therapy weights for RUG–IV.

Our intent in implementing RUG–IV is to allocate payments more accurately based on current medical practice and updated staff resource data obtained during the STRIVE study, and not to decrease or increase overall expenditures. Thus, consistent with the policy in place when we transitioned to the RUG–III 53-group model in FY 2006 (as discussed in section II.B.2), we believe that overall expenditures under the RUG–IV model should maintain parity with overall expenditures under the RUG–III 53-group model. Therefore, we simulated payments under the RUG–III 53-group model and the RUG–IV 66-group model to ensure that the change in classification systems did not result in greater or lesser aggregate payments.

We used the resource minute data collected from STRIVE to create a new set of unadjusted relative weights, or case-mix indexes (CMIs), for the RUG–IV model as described above. We then compared the CMIs for the RUG–53 and RUG–66 models in a way that was intended to ensure that estimated total payments under the 66-group RUG–IV model would be equal to those payments that would have been made under the 53-group RUG–III model. We used STRIVE data with sample weights applied and FY 2007 claims data (the most recent final claims data available at the time) to compare the distribution of payment days by RUG category in the 53-group model with the anticipated payments by RUG category in the new 66-group RUG–IV model. Our projections of future utilization patterns under the new case-mix system indicated that the 66-group RUG–IV model would produce lower overall payments than under the original RUG–III 53-group model. Therefore, consistent with the policy in place when we transitioned to the RUG–III 53-group model in FY 2006 (as discussed in section II.B.2 of this proposed rule), we propose to provide for an adjustment to the nursing CMIs that would achieve ''parity'' between the old and new models (that is, would not cause any change in overall payment levels). The adjustment to the nursing weights necessary to achieve ''parity'' is an upward adjustment of 52.6 percent.

The parity adjustment relies on projecting the utilization for a new classification system, RUG–IV, based on a new assessment instrument, MDS 3.0. Our calculation of the parity adjustment uses the most recent data available to estimate RUG–IV utilization for FY 2011. In the absence of actual RUG–IV utilization data for this timeframe, we believe the most recent data is the best source available, as it is closest to the FY 2011 timeframe. As actual data for RUG–IV utilization becomes available, we intend to assess the effectiveness of the parity adjustment in maintaining budget neutrality and, if necessary, to recalibrate the adjustment in future years.

The final RUG–IV CMIs reflecting the parity adjustment are displayed in Table 15 and, as discussed above, we are proposing to apply them beginning in FY 2011.

TABLE 15—RUG–IV CASE-MIX INDEXES

RUG	Nursing index	Therapy index
RUX	3.42	1.90
RUL	3.07	1.90
RVX	3.40	1.34
RVL	2.85	1.34
RHX	3.27	0.91
RHL	2.75	0.91
RMX	3.20	0.58
RML	2.72	0.58
RLX	2.79	0.30
RUC	2.00	1.90
RUB	2.00	1.90
RUA	1.30	1.90
RVC	1.98	1.34
RVB	1.43	1.34
RVA	1.43	1.34
RHC	1.83	0.91
RHB	1.57	0.91
RHA	1.21	0.91
RMC	1.79	0.58
RMB	1.56	0.58
RMA	1.13	0.58
RLB	1.95	0.30
RLA	0.92	0.30
ES3	3.43	
ES2	2.56	
ES1	2.21	
HE2	2.09	
HE1	1.68	
HD2	1.91	
HD1	1.53	
HC2	1.77	
HC1	1.42	
HB2	1.75	
HB1	1.40	
LE2	1.82	
LE1	1.45	
LD2	1.62	
LD1	1.30	
LC2	1.48	
LC1	1.19	
LB2	1.27	
LB1	1.01	
CE2	1.62	
CE1	1.45	
CD2	1.42	
CD1	1.28	
CC2	1.31	
CC1	1.18	
CB2	1.10	
CB1	0.99	
CA2	0.82	
CA1	0.73	
BB2	0.93	
BB1	0.87	
BA2	0.66	
BA1	0.61	
PE2	1.45	
PE1	1.34	
PD2	1.31	
PD1	1.24	
PC2	1.05	
PC1	0.98	
PB2	0.79	
PB1	0.75	
PA2	0.56	
PA1	0.52	

We intend to actively monitor the changes in beneficiary access and utilization patterns as a response to the proposed implementation of RUG–IV. For example, we anticipate that the changes to the Extensive Services category could result in increased beneficiary access for patients with severe respiratory conditions. In addition, we intend to monitor utilization for any potential coding changes that could occur as a result of the proposed changes to the SNF PPS. If, in future years, evidence becomes available that indicates that a change in aggregate payments are a result of changes in the coding or classification of residents that do not reflect real changes in case mix, CMS will consider the authority given to the Secretary under Section 1888(e)(4)(F) of the Act to provide for an adjustment to the unadjusted federal per diem rates so as to eliminate the effect of such coding and classification changes.

a. Relationship of RUG–IV Classification System to Existing Skilled Nursing Facility Level-of-Care Criteria

As discussed previously in section I.A of this proposed rule, the establishment of the SNF PPS did not change Medicare's fundamental requirements for SNF coverage. However, because the case-mix adjustment aspect of the SNF PPS is based, in part, on the beneficiary's need for skilled nursing care and therapy, we have utilized it to coordinate claims review procedures with the existing resident assessment process and case-mix classification system. Under RUG–III, this approach includes an administrative presumption that utilizes a beneficiary's initial classification in one of the upper 35 RUGs of the RUG–III 53-group system to assist in making certain SNF level of care determinations (see section *II.E.* of this proposed rule for a discussion of the relationship between the case-mix classification system and SNF level of care determinations). As discussed in § 413.345, we include in each update of the Federal payment rates in the **Federal Register** the designation of those specific RUGs under the classification system that represent the required SNF level of care, as provided in § 409.30. In addition, in the July 30, 1999 final rule (64 FR 41670), we indicated that we would announce any changes to the guidelines for Medicare level of care determinations related to modifications in the RUG–III classification structure.

Under RUG–IV, we propose to adopt this same approach, by including an administrative presumption that utilizes a beneficiary's initial classification in one of the upper 52 RUGs of the refined RUG–IV 66-group system to assist in making certain SNF level of care determinations. This designation reflects an administrative presumption under the refined RUG–IV 66 group system that beneficiaries who are correctly assigned to one of the upper 52 of the RUG–66 groups on the initial 5-day, Medicare-required assessment are automatically classified as meeting the SNF level of care definition up to and including the assessment reference date on the 5-day Medicare required assessment.

A beneficiary assigned to any of the lower 14 groups is not automatically classified as either meeting or not meeting the definition, but instead receives an individual level of care determination using the existing administrative criteria. This presumption recognizes the strong likelihood that beneficiaries assigned to one of the upper 52 groups during the immediate post-hospital period require a covered level of care, which would be less likely for those beneficiaries assigned to one of the lower 14 groups. For purposes of this administrative presumption, the upper 52 RUG–IV groups would consist of all groups encompassed by the following categories:

- Rehabilitation Plus Extensive Services;
- Ultra High Rehabilitation;
- Very High Rehabilitation;
- High Rehabilitation;
- Medium Rehabilitation;
- Low Rehabilitation;
- Extensive Services;
- Special Care High;
- Special Care Low; and,
- Clinically Complex.

E. Prospective Payment for SNF Nontherapy Ancillary Costs

1. Previous Research

We have conducted several studies since 1999 to refine the SNF PPS's reimbursement methodology for nontherapy ancillary (NTA) services. At the inception of the SNF PPS, payment for NTA services was included in the 44-group RUG system of case-mix groups. Analysis showed that there is only a weak correlation between NTA services costs and the RUG–III classification group. In addition, within the same RUG–III group, the NTA costs vary greatly. Thus, the data show that our present methodology of using the nursing CMIs to case-mix adjust the NTA payment amount may not be an accurate predictor of NTA costs. We are particularly concerned that the present system could underestimate NTA costs for the patients with the highest NTA needs, and that inadequate reimbursement could lead to restricted access to care for those patients who require them.

As a result of research conducted in the late 1990s, one proposal included in the FY 2001 proposed rule was to modify the RUG system by adding 14 additional groups (65 FR 19103 through 19194, 19203, April 10, 2000). These additional groups were designed to recognize that patients qualifying for both a Rehabilitation RUG and an Extensive Services RUG incurred NTA costs estimated to be as much as three times higher than those for patients qualifying solely for a rehabilitation RUG.

As noted in the 2006 Report to Congress on case-mix refinements (available online at *http://www.cms.hhs.gov/SNFPPS/Downloads/RC_2006_PC-PPSSNF.pdf*), additional research conducted by Abt Associates in the late 1990s experimented with several mathematical models of NTA costs. Results from this work could have practical application as an ancillary ''add-on'' index based on the beneficiary's predicted, per-diem NTA costs. As discussed in the FY 2001 SNF PPS proposed rule (65 FR 19195, April 10, 2000), NTA index models (both weighted and unweighted) were tested after exploring MDS variables that appeared to be predictive of NTA costs. In the unweighted model, cost predictions were based on counts of qualifying patient characteristics (characteristics such as respiratory infection or skin wounds). In the weighted models, a small set of payment groups were defined from ''index models'' that weighted the predictors, where the weights were proportional to the marginal impact of a patient characteristic on estimated NTA costs. The array of predicted costs generated by the equation could be subdivided into ranges of cost, or intervals, in order to define a small number of payment groups. As discussed in the Technical Appendix to the FY 2001 proposed rule (65 FR 19240, 19248, April 10, 2000), variations were created by applying the index models to alternative sets of RUG groups. As further discussed in the FY 2001 proposed rule (65 FR 19196), we proposed a separate unweighted NTA index to be applied to certain RUG categories based on clinical variables on the MDS. In addition, to facilitate the incorporation of this proposed refinement into the case-mix classification system, we proposed to create a new component of the payment rates to account for NTA services (65 FR 19192).

As explained in the FY 2001 SNF PPS final rule (65 FR 46773, July 31, 2000), while the expanded RUG groups approach and the NTA index approach initially appeared to improve payment accuracy in comparison to the existing case-mix system, attempts to validate the results on a later national PPS data set did not confirm the initial findings. As a result, we did not finalize the proposals made in April 2000.

We sponsored subsequent research by the Urban Institute using claims samples from 2001. This work led to the FY 2006 final rule (70 FR 45026, 45030–34, August 4, 2005), which implemented a variation on the 58-group RUG proposal developed by Abt Associates. In that rule, we finalized a system composed of 53 groups, by augmenting the original 44-group system with nine additional groups identifying patients simultaneously qualifying for the Extensive Services and Rehabilitation groups. This incremental change to the grouping system was accompanied by an across-the-board increase in the case-mix weights for the payment component that includes NTA costs. Both of these modifications were designed to enable the original RUG–III payment system to account more accurately for variation in NTA costs.

Using the 2001 data set, the Urban Institute also experimented with prediction models that were extensions of the original Abt Associates NTA index approaches. A small number of additional variables (for example, age) and improvements to the methodology for measuring independent variables in the data base led to potential improvements over the earlier Abt Associates models. The Urban Institute also explored substantially more complex models that incorporated variables derived from qualifying hospital stay claims; these models were estimated separately for patients after subdividing them into one of three groups: acute, chronic, or rehabilitation.

In 2008, the Medicare Payment Advisory Commission (MedPAC) sponsored analyses by researchers from the Urban Institute extending some of the Institute's earlier work. This led to a MedPAC proposal that was based on the most promising results of the Institute's earlier work. The study used 2003 Medicare data. It resulted in a prediction equation for NTA services that used a large number of variables derived from the MDS assessment and hospital claims (for example, diagnosis), a measure of length of stay, as well as patient age (Bowen Garrett and Douglas A. Wissoker, ''Modeling Alternative Designs for a Revised PPS for Skilled Nursing Facilities: A study conducted by staff from the Urban Institute for the Medicare Payment Advisory Commission,'' June, 2008; available online at *http://www.urban.org/UploadedPDF/411706_revised_pps.pdf*). MedPAC did not propose a system of NTA case-mix groups based on the prediction equation. However, the basic equation could be used to generate an array of predictions in the population and to group the predictions into cost intervals for defining a smaller number of payment groups. This is the same approach that Abt Associates took with its index model.

2. Conceptual Analysis

We believe an administratively feasible approach to prospective payments for NTA costs would incorporate the following criteria:

- Uses information from available administrative data (data currently required on claims or on the MDS);
- Is case-mix adjusted, using predictor variables that represent clinically meaningful correlates of NTA services and that do not promote undesirable incentives for providers;
- Is developed from recent data in the National Claims History, in order to assure it reflects current care patterns and practices;
- Results in an add-on NTA index to the refined RUG case-mix groups that we are proposing based on the STRIVE project;
- Uses a minimal number of payment groups, or levels, to limit the complexity of the SNF PPS as a whole; and
- Ideally, uses payment groups that are clinically intuitive and readily understandable.

We solicit comment on the proposed criteria specified above. To meet the aforementioned criteria, we have created a large analytic data file that combines Medicare SNF claims, cost reports, and MDS assessments from CY 2007. The MDS assessments were linked to the SNF claims by Stepwise Systems of Austin, Texas. Typically, more than one assessment is linked to a claim, because there is more than one reported RUG–III group. The file will be used to study relationships between reported claims charges for NTA-related revenue centers and predictor variables defined from items on the MDS.

3. Analytic Sample

The data file is designed to minimize measurement error in the dependent variable (NTA costs) to the extent feasible. SNF cost reports pertinent to FY 2007 are linked to the SNF's Medicare claims covering services delivered during the SNF's cost reporting period. The actual cost of NTA services is determined by adjusting claims charges for NTA services in accordance with cost-to-charge ratios (CCRs) from cost reports. The NTA costs

are then used as the dependent variable in all subsequent analyses. We collected all claims (and only those claims) submitted within the reporting period for the cost reports available. Requiring a matched cost report eliminates some SNFs represented in the 2007 National Claims History. The SNFs that do not meet this threshold tend to be smaller SNFs, but in other respects this requirement does not adversely affect the representativeness of the SNFs in the sample.

Previous research described above generally studied three categories of NTA costs: respiratory-related costs, drug-related costs, and other nontherapy ancillary (ONTA) costs. We intend to use the same three categories. We derive category-specific CCRs for each facility's cost report remaining in the sample. An additional requirement for a SNF to be in the sample is that it reports some drug and ONTA charges on the claims. If the SNF does not report any such charges, there is concern about whether the facility's data are sufficiently accurate for our study. Most SNFs do not report respiratory-related charges on claims, so we do not require positive respiratory charges for the facility to remain in the sample. One reason is that some charges related to respiratory care (for example, oxygen-related supplies) are expected to be in the ONTA category under some SNFs' reporting practices. The sample was further culled to ensure that CCRs are reasonable. Consistent with previous research, cost reports that did not show CCRs within three standard deviations from the mean were dropped. Finally, we compared the cost report charges and claims charges for drugs and ONTA services to ensure consistency. We were particularly concerned that claims charges far below cost report charges may be an indication of incomplete reporting. For our analysis, charges reporting is critical for the measurement of our dependent variable. SNF cost reports that did not conform to consistency standards (with tolerances we defined) were dropped from the sample.

The analytic file does not include claims data from the qualifying hospital stay, in accordance with our criterion that the payment methodology be administratively feasible for SNFs and Medicare. At this time, we believe that such information is worth testing after data infrastructures develop with sufficient breadth and scope to ensure easy and accurate retrieval by SNFs of hospital stay information.

For this study, we have linked SNF claims with the associated cost report to form the analytic file. That file will be divided between a development sample and a validation sample, and we will randomly assign beneficiaries to each sample.

4. Approach to Analysis

The NTA charges adjusted by CCRs form the dependent variable in our analysis. The independent variables come from the matched MDS assessments. The following sections from the MDS contribute variables to be tested for their predictive value:

E: Mood and Behavior Patterns
G: Physical Functioning and Structural Problems
H: Continence in Last 14 Days
I: Disease Diagnoses
J: Health Conditions
K: Oral/Nutritional Status
L: Oral/Dental Status
M: Skin Condition
O: Medications
P: Special Treatments and Procedures

Our study of the ability of MDS items to predict CCR-adjusted NTA charges builds on previous research and adheres to criteria outlined earlier in this section. Work by Abt Associates and the Urban Institute suggested that a relatively small set of readily available predictor variables might explain as much as approximately 20 percent of the variation in CCR-adjusted NTA charges. However, these analyses were performed on claims files that either predate the Medicare SNF PPS or are at least 5 years old. It is uncertain whether the more recent data in our analytic file will exhibit the same systematic relationships discovered in earlier work, due to the potential for changes in practice patterns and in quality of the reporting on claims and cost reports. Our approach is first to replicate versions of the simpler prediction models studied in previous work, because these lead directly to administratively feasible systems of NTA payment groups. We will then create more elaborate models with larger sets of variables to see how much improvement in predictive accuracy might be attainable.

Larger sets of variables complicate the task of designing a simple, clinically intuitive set of payment groups. In the SNF PPS proposed rule for FY 2001 (65 FR 19188, April 10, 2000), we proposed as one alternative an index model in which predictions are arrayed and then subdivided into fixed ranges of cost values to form five payment groups. This type of alternative is more likely as the number of items needed to predict NTA costs increases.

5. Payment Methodology

Currently, payment for NTA costs is included in the nursing component of the SNF PPS. The nursing component is case-mix adjusted using relative weights specific to nursing. As the NTA payment component is currently integrated into the nursing component, the creation of a separate NTA component would require that we remove an appropriate amount from total nursing component payments for distribution among the NTA payment groups that we anticipate would be billed by SNFs in the payment year. In determining the amount to isolate from the nursing component, we will consider the impact on the reimbursement for nursing, consistent with available data on NTA costs, as well as the ability to redistribute funds from other elements within SNF PPS system outlays. We will also consider the possibility of an outlier policy for NTA payment, but recognize that we do not currently have authority under the statute to introduce an outlier policy. We anticipate that we will be able to complete our NTA research by Spring 2010, and expect to present the results of the research and any recommendations in future rule-making.

6. Temporary AIDS Add-On Payment Under Section 511 of the MMA

As noted previously in section III.A.1. of this proposed rule, in the STRIVE study, five strata of nursing homes were recruited, including facilities with high concentrations of residents with HIV. It has been suggested that this population requires exceptionally costly care and intensive staff resources. As discussed previously in section I.E. of this proposed rule, section 511 of the MMA amended section 1888(e)(12) of the Act to provide for a temporary increase of 128 percent in the PPS per diem payment for any SNF residents with Acquired Immune Deficiency Syndrome (AIDS), effective with services furnished on or after October 1, 2004. This special AIDS add-on was to remain in effect until "* * * the Secretary certifies that there is an appropriate adjustment in the case mix * * * to compensate for the increased costs associated with [such] residents * * *." During the course of the STRIVE study, we examined alternatives to this 128 percent add-on. Using available MDS data, we identified facilities in which 10 percent or more of the residents had HIV. These facilities fell into the Hi-HIV stratum.

As discussed in section III.A.1. of this proposed rule, units in facilities with residents in the Hi-HIV special population were over-sampled in the STRIVE study in order to maximize the number of residents in the sample belonging to this population. Therefore,

in this respect, random selection of nursing units within facilities was not performed. Instead, a standard protocol was developed for the selection of units within facilities and project staff followed this protocol in consultation with nursing home management. This procedure minimized the use of judgment-based selection, which might impose unknown biases.

Residents are identified as having HIV infections based upon MDS item I2d. This data has limitations, however, because some State Medicaid systems have MDS flags prohibiting the reporting of HIV status. Consequently, prevalence statistics based upon this item are known to be low. However, this is the only source of information available for nursing home residents nationally. Based upon item I2d, 2,566 (0.2 percent) out of 1,428,993 residents in certified facilities nationally have HIV infections. There were 758 facilities (4.8 percent) that reported at least one HIV resident. Many of these facilities had only a handful of HIV residents, necessitating the 10 percent cutoff, for the designation of Hi-HIV facility. Nationally, 27 facilities (3.6 percent of the 758 facilities with one or more HIV residents) qualified for this Hi-HIV stratum. These 27 facilities had 1,107 (43.1 percent) of the 2,566 residents nationally who were reported to have HIV.

In the STRIVE study, facilities falling within the Hi-HIV stratum were quite rare, comprising only 15 facilities (2 in Florida, 1 in Louisiana, 11 in New York, and 1 in Ohio). This represents only 0.3 percent of eligible facilities. As discussed above, at the time of the STRIVE study, data limitations existed due to electronic flags within State reporting systems that prevented the collection of HIV status data. As of April, 2009, 19 State systems still had these flags in place for reporting of HIV status, and 14 States had flags in place blocking access to sexually transmitted disease (STD) data. Accordingly, although we have not yet identified an approach that would account directly for the special care needs of AIDS patients in accordance with the provisions of section 511 of the MMA, we will continue to study the relationship of non-therapy ancillary costs and staff resource use within the broad spectrum of initial positive HIV status through the terminal stages of AIDS, in order to develop an alternative to the MMA's add-on payment of 128 percent in the PPS per diem payment for any SNF residents with AIDS.

IV. Minimum Data Set, Version 3.0 (MDS 3.0)

Sections 1819(f)(6)(A)–(B) and 1919(f)(6)(A)–(B) of the Act, as amended by the Omnibus Budget Reconciliation Act of 1987 (OBRA 1987), require the Secretary to specify a Minimum Data Set (MDS) of core elements and common definitions for use by nursing homes in conducting assessments of their residents, and to designate one or more instruments which are consistent with these specifications. As stated in § 483.20, Medicare- and Medicaid-participating nursing homes must conduct initially and periodically ''a comprehensive, accurate, standardized, reproducible assessment'' of each nursing home resident's functional capacity.

A. Description of the MDS 3.0

CMS has developed a new version of the MDS, MDS 3.0, to reflect more accurately each resident's clinical, cognitive, and functional status as well as the care that nursing homes provide residents. The regulations at § 483.20(b)(1)(i) through (xviii) list the clinical domains that must be included in the Resident Assessment Instrument (RAI). These domains have been incorporated into the MDS 2.0 and have been included in MDS 3.0. Effective October 1, 2010, MDS 3.0 will become the required version of the MDS for all Medicare SNFs and Medicaid-certified nursing facilities (NFs). MDS 3.0, like MDS 2.0, will focus on the clinical assessment of each nursing home resident to screen for common, often unrecognized or unevaluated, conditions and syndromes. We made clinical revisions to the instrument based on input from subject-area experts, feedback from MDS users, resident advocates and families, and new knowledge and evidence about resident assessment. With the implementation of MDS 3.0, we aim to increase the clinical relevance, accuracy, and efficiency of assessments; require assessors to record direct resident responses on some items; include assessment items used in other care settings; and move items toward future electronic health record formats.

On January 24, 2008, CMS hosted a special Open Door Forum (ODF) providing details about MDS 3.0 (materials from the ODF are available at *http://www.cms.hhs.gov/OpenDoorForums/05_ODF_SpecialODF.asp*).

Based on preliminary research presented at the ODF, some of the advances that MDS 3.0 provides include:

- Gives residents a stronger voice
- Increases clinical relevance
- Increases accuracy (validity & reliability)
- Increases clarity
- Substantially reduces time to complete

In order to achieve the advances outlined above, the MDS 3.0 incorporates revisions to many items, making the instrument a more valuable tool.

The April 2008 RAND Corporation report to CMS titled, ''Development & Validation of a Revised Nursing Home Assessment Tool: MDS 3.0,'' which was posted at *http://www.cms.hhs.gov/NursingHomeQualityInits/25_NHQIMDS30.asp*, showed that the new items are more resident-centered and more useful for care planning.

The Brief Interview for Mental Status (BIMS) is a new structured test that will replace the MDS 2.0 staff assessment for residents who can be understood. The BIMS directly tests domains common to most cognitive tests that are used in other settings, including registration, temporal orientation, and recall. The BIMS uses a resident interview and gives partial credit for answers to make it more relevant and specific to the SNF population. The MDS 2.0 cognitive evaluation relied solely on caregiver observation and unstructured interview with results that may be difficult to ascertain accurately.

The Confusion Assessment Method (CAM) will replace the MDS 2.0 items for delirium. The CAM is cited as the appropriate validated tool to use for delirium by the Royal College of Physicians of London and the National Committee for Quality Assurance (NCQA). It improves sensitivity and specificity for detecting delirium as compared to the MDS 2.0 items for delirium. Changes in Mood items for MDS 3.0 will include the use of a new resident interview entitled the 9-Item Patient Health Questionnaire (PHQ–9© Pfizer Inc.) for residents who can report mood symptoms. The PHQ–9-OV (Staff Assessment of Resident Mood) will be used for residents that are not able to self report. The PHQ–9© is based on the Diagnostic and Statistical Manual of Mental Disorders, 4th Revision (DSM–IV) criteria and its validity is well established. The PHQ–9© is a more useful tool for screening because it allows for a defined threshold score that triggers attention and a summed score that can track changes over time.

Other changes from MDS 2.0 to 3.0 involve the behavior items. ''Alterability'' questions will be replaced by questions that more specifically address the impact of the

behavior on the resident and staff. Wandering items are separated from the other behavioral symptoms and worded to address the impact on the resident and others around the resident.

Preferences for Customary Routine, Activities and Community Setting are also significantly altered from MDS 2.0 to 3.0. The MDS 3.0 includes a new interview that asks residents to rate the importance of specific customary routines as well as activities.

Active Disease Diagnosis items also are revised in the MDS 3.0 version. The revisions provide a more direct focus on active diseases. Additional directions will guide clinicians in determining whether a disease is active and is affecting a resident's functional status and course.

In addition, pain items under Health Conditions have major changes in the MDS 3.0 version. The new items rely on a resident interview with the 0–10 scale. The items include the effect of pain on function and treatment items. We believe these changes will allow for a more accurate assessment of the severity of a resident's pain and its effect on function and treatment.

The final major change for MDS 3.0 affects skin conditions. This version eliminates reverse staging of pressure ulcers. In MDS 3.0, data will establish whether the ulcer was present on admission and will include dimensions and tissue type for the most advanced staged ulcer. These changes will allow for a more accurate assessment of a patient's pressure ulcers.

Minor changes set forth in MDS 3.0 are in functional status and bowel and bladder items. In MDS 3.0, new items regarding the resident's previous functional mobility and the presence of a hip fracture or joint replacement will establish a baseline. Balance items now focus on movement and transitions. Also, the use of a catheter is no longer scored as continent, and an improved toileting program item is added.

Other items that have minor changes in the MDS 3.0 version include swallowing, restraints, oral/dental items, participation in assessment and goal setting, medications, and special treatments and procedures, as further described below. Swallowing items include a checklist of observable signs and symptoms. The restraint items separate use in bed and chair. Oral/dental items include six possible pathology groups of findings from staff examination of the oral cavity that would be clear to nursing home staff members, who are likely to vary in levels of training regarding oral health. Participation in goal setting includes the resident's goals and asks residents if they want to talk to someone about the possibility of returning to living in the community. Medication and special treatments questions are reduced in number and are incorporated in more appropriate sections. Finally, in MDS 3.0, we will collect information that distinguishes between special treatments furnished after admission to the SNF (that will be considered for purposes of RUG–IV classification as well as care planning, as discussed above) and special treatments provided prior to admission that should be considered in care planning. We believe that the above changes will enhance the efficiency, accuracy, and clarity of the assessment instrument.

We have completed our analysis of the impact of these MDS 3.0 changes on the RUG–III resident classification system used in the Medicare payment structure. In addition, we have adapted the proposed RUG–IV case-mix model (as described in section III.B. of this proposed rule) to use the clinical data collected on the MDS 3.0 assessment instrument. We expect to implement the MDS 3.0 and the updated RUG–IV classification system nationally in FY 2011. As discussed in section II.B.1 of this proposed rule, we propose to defer implementation of the RUG–IV and MDS 3.0 until October 1, 2010, to allow all stakeholders adequate time for the systems updates and staff training needed to assure a smooth transition.

We are very much aware that the transition to a new MDS instrument in conjunction with the possible release of a new RUG grouper requires careful planning and extensive provider training. CMS staff are already working on training plans that will include a new MDS 3.0 manual, documents explaining the updated RUG grouper methodology, data specifications for providers and vendors, training materials, a help desk call and e-mail center, and train-the-trainer conferences tentatively scheduled for Spring 2010. However, we realize that the most effective training will require coordination between CMS and its key stakeholders, including provider and professional associations, Fiscal Intermediaries and Part A and Part B Medicare Administrative Contractors (MACs), and State agencies. We want to encourage stakeholders to work with CMS staff to provide additional training opportunities at the local level to ensure a smooth transition. In 2008, we published draft MDS 3.0 specifications for stakeholders.

CMS is aware of concerns by States and other key stakeholders that the MDS 3.0 should conform to current industry standards for the exchange of health information. To that end, CMS studied three domain areas and associated clinical standards that had been adopted through the Consolidated Health Informatics (CHI) initiative. This initiative, which began in October 2001 as one of 24 E-Government initiatives, sought to adopt Federal government-wide health information interoperability standards to be implemented by Federal agencies in order to enable the Federal government to exchange health information electronically. The standards identified in the CHI initiative have also been considered within the broader context of Healthcare Information Technology Standards Panel (HITSP) activities, which have resulted on occasion in formal recognition by the Secretary of certain interoperability standards. HITSP has attempted to harmonize and integrate standards that will meet identified clinical and business needs for the electronic sharing of health information.

CMS will implement MDS 3.0 using one of the CHI-adopted standards for Disability and Assessments, the Logical Observation Identifiers Names and Codes (LOINC®) representation and codes for questions and answers as an attribute to our MDS 3.0 dataset. This standard was adopted for use in Federal government health information systems, as explained in a notice that appeared in the **Federal Register** on December 17, 2007 (72 FR 71413). In that Notice, LOINC® is referenced as the vocabulary for representation and codes for questions and answers on Federally required assessment forms.

In addition, the MDS 3.0 will use Extensible Markup Language (XML) text formatting standards to increase flexibility of the MDS 3.0 dataset and database. XML will enable users and developers to define the content of the MDS 3.0 separately from its formatting, thereby allowing for simplified reuse of MDS 3.0 data elements. In addition, XML will assist CMS in leveraging new interoperability standards that arise.

CMS also considered the Health Level Seven Clinical Document Architecture (HL7® CDA) from the CHI-adopted standard for Disability and Assessments as one of the standard methods to specify data coding, semantics, and structure in electronically exchanging clinical data. CMS did not identify any large scale uses of HL7® CDA for exchanging standardized assessment content. While there are some low level data exchanges among Regional Health Information Organizations (RHIOs) and Health Information Exchanges (HIEs) using CDA for approximately 100 submissions per month, MDS currently receives approximately 30 million

submissions a year. Therefore at this time, it is difficult to gauge the implications of the use of CDA on such a large scale without further study. At this time, CMS is reviewing the CDA, but has no immediate plans to include the CDA in the upcoming MDS 3.0 release. From the CHI-adopted Allergy Messaging and Vocabulary Standard, CMS studied the use of the Systematized Nomenclature of Medicine Clinical Terms (SNOMED CT®), which has been identified as a source of standardizing medical terminology for like or similar associations. These associations, although very close, may not represent the exact data matches. The semantic matching to MDS data elements does not give CMS the level of match confidence required for our intended uses of the data: Namely, payment, survey, and quality measurement. ''Usefully-related'' matches do not serve the purposes of CMS and ''exact'' matches are rare. We are currently reviewing avenues where SNOMED CT® could be leveraged, but have no current plans to include SNOMED CT® in the current MDS 3.0 release in October, 2010.

CMS is studying the use of the Health Level 7 (HL7®) messaging standards in the pilots for our CARE (Continuity Assessment Record and Evaluation) tool, but HL7® is currently not under consideration for MDS 3.0 because there are a limited number of MDS 3.0 data fields that are defined in HL7® at this time. The HL7® messaging standards provide the framework and standards for the exchange, integration, sharing and retrieval of electronic health care information. We are soliciting comments on the most appropriate clinical standards to use for clinical assessment instruments.

Additional information on MDS 3.0 is available online at *www.cms.hhs.gov* via the following links:

- MDS 3.0 information: *http://www.cms.hhs.gov/NursingHomeQualityInits/25_NHQIMDS30.asp.*
- October, 2008 version of the MDS 3.0 instrument: *http://www.cms.hhs.gov/NursingHomeQualityInits/Downloads/MDS30DraftVersion.pdf.*

B. MDS Elements, Common Definitions, and Resident Assessment Protocols (RAPs) Used Under the MDS

Sections 1819(f)(6)(A)–(B) and 1919(f)(6)(A)–(B) of the Act, as amended by OBRA 1987, require that the Secretary specify an MDS of core elements and common definitions for use by Medicare- and Medicaid-participating nursing homes (long-term care (LTC) facilities) in conducting required assessments of their residents. These provisions also require the Secretary to establish guidelines for the use of these data elements. These guidelines consist of instructions for (1) the elements the MDS must include; (2) using the RAI; and (3) directing facilities to conduct further assessment of any care area triggered by the MDS. The care areas represent clinical conditions that are known to affect the LTC population.

Sections 1819(e)(5) and 1919(e)(5) of the Act require that a State specify the RAI to be used by LTC facilities in the State when conducting initial and periodic assessments of each resident's functional capacity. This requirement is codified at § 483.20. The State has two options in specifying an RAI. The first option is to utilize the instrument designated by CMS. The second option is to utilize an alternate instrument, specified by the State and approved by CMS, using the criteria specified in the State Operations Manual (SOM) issued by CMS (CMS Pub. 100–07) (*http://www.cms.hhs.gov/nursinghomequalityinits/20_NHQIMDS20.asp*). These requirements are codified at § 483.315.

The CMS-designated RAI is published in the SOM, and consists of: (1) The MDS and common definitions; (2) RAPs necessary to assess residents accurately; (3) the quarterly review, based on a subset of the MDS specified by CMS; and, (4) the requirements for the use of the RAI that appear at § 483.20 and § 483.315.

One component of the CMS-designated RAI is a set of core elements (domains) and common definitions that represent care areas that an MDS assessment must include. Examples of MDS domains include cognitive patterns, disease diagnoses/health conditions, and discharge potential. Currently, the MDS must, at a minimum, address 18 domains and their common definitions, which are listed in the requirements at §§ 483.315(e)(1) through (18). Since the domains are already listed in the requirements at §§ 483.20(b)(i) through (xviii), and the common definitions are included in the RAI manual, as part of the SOM issued by CMS, we now propose to remove the listing of the specific MDS domains and common definitions from the regulations at §§ 483.315(e)(1) through (18) and instead reference the requirements at §§ 483.20(b)(1)(i) through (xviii) and the RAI manual, as part of the SOM issued by CMS, for specifics regarding the MDS domains and common definitions. This will afford CMS the flexibility to make any future changes in the common definitions of the MDS domains through manual revisions rather than rulemaking.

Another component of the CMS-designated RAI is a set of 18 RAPs, which are problem-oriented frameworks for organizing MDS information and additional, clinically relevant information about an individual's health problems or functional status. Examples of RAPs include visual function, mood state, and psychotropic drug use. Currently, the RAPs must, at a minimum, address 18 domains, which are listed in the requirements at §§ 483.315(f)(1) through (18). Since the RAPs were introduced, there have been several modifications to the standards of care for LTC facility residents. Further, there will likely be additional changes to the standards of care in the future. We need to be able to incorporate current standards of care into the guidance tools we provide to facilities to ensure that they continue to assess and provide care to residents appropriately. Accordingly, instead of continuing to specify the domains within the regulations, we now propose to utilize references to resources for current standard clinical practices through manual revisions rather than rulemaking, to assist LTC facilities in completing this additional assessment of triggered care areas.

The references would be as specified in the RAI manual as part of the SOM issued by CMS (*http://www.cms.hhs.gov/nursinghomequalityinits/20_NHQIMDS20.asp*). The SOM would also reference: (1) The regulations at § 483.20(b), Resident Assessment, as specified by the Secretary; and (2) additional resources for current clinical standards of practice. To this end, we propose revising the name of these guidance tools from RAPs to Care Area Triggers (CATs) and to delete the listing of the specific domains for the RAPs from the regulations text and instead reference the RAI manual, as part of the SOM issued by CMS, for specifics regarding the domains.

C. Data Submission Requirements Under the MDS 3.0

Section 1888(e)(6) of the Act requires nursing facilities to provide the Secretary, in a manner and within the time-frames prescribed by the Secretary, the resident assessment data necessary to develop and implement SNF payment rates.

Currently, submission of MDS data to CMS for all residents of long-term care (LTC) facilities is required, regardless of payer source. LTC facilities electronically transmit MDS data to the

States within 30 days after a facility completes a resident's assessment on a monthly basis for all assessments conducted during the previous month.

At the time of the national implementation of this requirement, CMS did not have a system in place that could receive and validate the required data and report back to the facility effectively. CMS did, however, develop a plan to install a CMS-owned system at each of the (53) State Survey Agencies (SAs) for collecting survey information. After further analysis, it was determined that this was in fact a viable option in order to receive both MDS and survey data, which could then be replicated to CMS, as required by the regulation.

Although this process met the requirement for LTC facilities submitting MDS data to CMS (albeit indirectly through the SA), it was not an optimal solution. This process requires fifty-three separate assessment editing and reporting processing modules, which entails overhead, maintenance, and support expenses. The pending implementation of MDS 3.0 has presented CMS with an opportunity to reevaluate the current environment. As CMS's systems capability evolved, it was determined that a single assessment processing system would reduce the overhead, maintenance, and support expenses for assessment processing without affecting any other processes or user needs. It would also allow CMS to move the assessment data to a fully secure and controlled CMS-managed environment which would meet HHS, CMS, and Federal Information Security Management Act (FISMA) requirements.

In summary, each LTC facility is required to submit resident assessment data to CMS. Initially, an intermediate step was necessary in order to have the data submitted to the CMS-owned system residing at the SA, which was then copied to a CMS national database. With the evolution of the CMS data platform, we believe that this intermediary step is no longer needed, allowing for direct submission to CMS.

To this end, and to afford CMS the ability to receive MDS data in a more timely, efficient, and effective manner, for use by CMS quality measurement and payment programs, we now propose to require LTC facilities to transmit MDS data to the national CMS System, instead of the States, within 14 days after the facility completes a resident's assessment. We seek comments on the appropriateness and practical implications of a 14-day timeframe for the transmission of MDS data. The specific instructions would be specified in the RAI manual, as part of the SOM issued by CMS (CMS Pub 100–07), and in the regulations at § 483.20 and § 483.315.

At the same time, we are aware that in the 10 years since the introduction of the SNF PPS, States have developed a variety of MDS-related system applications to support their survey, payment, and quality programs. Although our systems analysis showed that the transition to a national CMS data collection system would retain all existing functionality, we have been working closely with the SAs to verify that the transition will be seamless for the States. We are developing a comprehensive list of all State functions currently using the MDS so we can test and document the ways SAs will be able to access the data once we adopt the MDS 3.0 format and the national data collection structure. We are interested in stakeholder comments on the MDS 3.0 data transmission process, and we are specifically soliciting comments from SAs on the effect the MDS 3.0 transition is expected to have on State programs.

D. Proposed Change to Section T of the Resident Assessment Instrument (RAI) Under the MDS 3.0

As discussed previously, sections 1819(f)(6)(A)–(B) and 1919(f)(6)(A)–(B) of the Act require the Secretary to specify a minimum data set of core elements and common definitions for use by nursing homes in conducting assessments of their residents, and to designate one or more instruments which are consistent with these specifications. Since the beginning of the SNF PPS, a SNF has been required to record the rehabilitative therapy services (physical therapy, occupational therapy, and speech-language pathology services) that have been ordered and are scheduled to occur during the early days of the patient's SNF stay. This was done because rehabilitation services often are not initiated until after the first MDS assessment's observation period ends. Therefore, we believed it was appropriate to permit a SNF to record on the Medicare-required 5-day assessment therapy services that are scheduled to occur but have not yet been provided.

Section T of the Resident Assessment Instrument (RAI), version 2.0, provides information on special treatments and therapies not reported elsewhere in the patient assessment. Items T1.b, T1.c, and T1.d apply only to the Medicare-required 5-day assessment. Item T1.b allows the SNF to recognize therapy services ordered or scheduled to begin in the first 14 days of a patient's SNF stay. Item T1.c allows the SNF to calculate the total number of days that at least one therapy service is expected to be delivered through the resident's 15th day of admission based on the initial evaluation and subsequent treatment plan. Item T1.d allows the SNF to estimate the total number of minutes of therapy expected to be delivered through the resident's 15th day of admission. This allows the SNF to receive payment for therapy services that it plans to provide to a beneficiary in the first 15 days of the stay.

In August 2002, the Government Accountability Office (GAO) issued Report No. GAO–02–841, entitled ''Skilled Nursing Facilities: Providers Have Responded to Medicare Payment System by Changing Practices'' (available online at *www.gao.gov/new.items/d02841.pdf*), which found that SNFs increasingly used estimates of therapy needed, rather than actual therapy delivered, to assign patients into the High, Medium, and Low therapy categories for the first 14 days of care. The GAO found that because payments are based on these estimates, payments for some patients were higher than they would have been if the payments were based on actual therapy provision (because some patients did not actually receive the amount of therapy estimated). Moreover, if a patient is classified into one of these rehabilitation categories using an estimate, but actually receives less than the amount of therapy necessary to qualify into that group, payments to the SNF for the initial assessment period are not reduced. As a result of its analysis, the GAO found that of the patients who could be evaluated (that is, patients who stayed long enough to have a second assessment where the actual minutes of therapy during the last 7 days were recorded), one-quarter of the patients classified using estimated minutes of therapy did not receive the amount of therapy they were assessed as needing, while three-quarters eventually did. Furthermore, the GAO found that in 2001, half of the patients initially categorized in the Medium and High groups did not actually receive the minimum amount of therapy required to be classified into those groups, due in part to the use of estimated therapy minutes for classification. CMS's response to this report indicated that it would examine whether therapy provided is consistent with payment levels and ADL coding accuracy through its program safeguard contractor (PSC) project known as the Data Assessment and Verification Program (DAVE).

The original DAVE PSC contract was awarded in September 2001 to Computer Sciences Corporation. Under DAVE, the contractor conducted both on

and off-site medical record review and analysis of MDS data in order to support improvements to the accuracy of nursing home resident assessment data, largely for payment-related purposes. The results from the DAVE project were consistent with those found by the GAO.

Industry groups have also commented on prior rules that they are not properly reimbursed for the provision of therapy services that begin in between Medicare-required assessments, as there is no mechanism to change the payment group due to the onset of therapy services (for example, the use of a Significant Change in Status Assessment (SCSA) is limited to the situations set forth in Chapter 2 of the RAI Version 2.0 Manual). For example, the patient begins therapy services on day 9 of the covered stay. Days 1 through 14 of the covered stay are generally paid based on a Medicare-required 5-day assessment. The assessment window for the Medicare-required 5-day assessment (in other words, the day on which the ARD must be set to receive payment) is day 1 though 8 of the covered stay. Day 9 is outside of the assessment window and, therefore, therapy services provided from day 9 through day 14 will not be reflected in the SNF's payment for days 1 through 14 if such therapy services were not recorded on the assessment as ordered and scheduled to occur during the first 15 days of the patient's SNF stay.

Thus, in order to address the concerns brought to light by the GAO report, the DAVE PSC project, and industry groups, and to ensure that SNFs are receiving accurate payments for therapy services provided to Medicare beneficiaries, we are proposing to revise the manner in which therapy services are reported effective with the MDS 3.0 (that is, effective October 1, 2010), as discussed below. In addition, because basing payments on therapy services ordered and scheduled to occur (but not yet provided) can lead to inaccurate RUG classifications and, thus, inaccurate payments (as discussed above), we are proposing to eliminate section T of the RAI effective October 1, 2010.

1. Short Stay Patients

To ensure that providers receive accurate payments for those residents who are discharged early in the stay, that is, prior to day 14, and have not been able to complete 5 days of therapy (that is, have completed only 1 to 4 days of therapy), we are proposing that we calculate the appropriate therapy level by using items that will be reported on the MDS 3.0: The actual number of therapy minutes provided, the date of admission, the date therapy started, the patient's ADL level, and the assessment reference date (ARD), to assign a therapy group. For example, if an assessment with an ARD of day 5 shows that the patient started therapy on day three, actual therapy minutes should be reported for that patient for 3 days. We propose to calculate the average daily number of therapy minutes for each of those 3 days and assign a therapy category as follows: If therapy services are actually provided for between 15–29 minutes on average per day, the record would be assigned to the Low Rehabilitation category (RLx). If the patient receives 30 or more therapy minutes on average per day, the record would be assigned to the medium rehabilitation category (RMx). The actual RUG–IV group would be assigned based on the ADL level reported for that patient on the five day assessment and the average therapy minutes received. We believe the Medium and Low groups represent the most typical levels of therapy actually provided during the short stay. We determined the minimum minute requirements set forth above based on the minutes required to be assigned into the Low (at least 15 minutes each day for three days) and the Medium groups (an average of 30 minutes each day for five days). However, we solicit public comment on whether an alternative methodology should be considered.

As therapy is not being provided throughout the observation period, both the therapy and the non-therapy group will be calculated and reported to the facility to facilitate billing. Detailed instructions will be developed for the MDS 3.0 Manual and the Claims Processing Manual to assist providers.

For example, physical therapy is started on day 4 and the resident is discharged to the hospital on day 7; the resident received 25 minutes of therapy on day 4, 35 minutes on day 5, 33 minutes on day 6, and 37 minutes on day 7. The total days of physical therapy are 4, and the total minutes of physical therapy are 130. Because the average minutes of therapy provided on a daily basis is greater than 30 (total minutes (130) divided by number of therapy days (4) equals average minutes (32.5)), the RUG assigned would be RMx. The provider would bill the non-therapy RUG for days 1 to 3 and the RMx RUG for days 4 to 6 (day 7 is the day of discharge and payment is not provided for the day of discharge). Please note that this policy applies only for short stay patients who received fewer than 5 days of therapy before either discontinuing therapy or ending the Part A stay. As set forth in 42 CFR 409.34(a)(2), if skilled rehabilitation services are not available 7 days a week, those services must be needed and provided at least 5 days a week to meet the daily basis requirement in § 409.31(b)(1). Therefore, if a patient receives five or more days of therapy during the short stay, the patient has received the amount of therapy required for a skilled level of care and for classification in any of the Rehabilitation and Rehabilitation Plus Extensive Services RUG categories, and thus the revised procedures discussed above would not be necessary. We solicit comments on our proposed changes to the manner in which therapy levels are calculated for short-stay patients.

2. Starting Therapy Between MDS Observation Periods

Under the current system, SNFs are required to complete an OMRA 8 to 10 days following the cessation of all therapies for patients in the Rehabilitation plus Extensive Services and Rehabilitation categories who continue to need skilled SNF services. Currently, therapy services started in the middle of a payment period would not trigger a change in the payment rate until the next scheduled MDS is submitted. We are now proposing that the OMRA be used to signal the start of therapy services as well as the end of therapy services. To capture the start of therapy services, we are proposing that the SNF would have the option of completing an OMRA with an assessment reference date (ARD) that is set 5 to 7 days from the first day therapy services are provided. The 5 to 7 day window will allow providers to record the required therapy for a skilled SNF level of care, which, in accordance with § 409.31(b)(1), is daily (as set forth in 42 CFR 409.34(a)(2), if skilled rehabilitation services are not available 7 days a week those services must be needed and provided at least 5 days a week). Payment for the start of therapy would begin the day that therapy is started. For example, when therapy begins on day 9 of the stay, the provider could complete a start of therapy OMRA on day 13, 14, or 15, and the assigned Rehabilitation category would begin on day 9 of the stay, not on day 15 (the first day of the next Medicare payment window) or on the ARD of the start of therapy OMRA (day 13, 14 or 15). We believe that this revised reporting procedure will provide a more accurate record of therapy services actually provided to the patient, allowing for more accurate RUG classification and payment based on services provided rather than estimated. We solicit

comments on this proposed change to the OMRA reporting procedures.

3. Reporting the Discontinuation of Therapy Services

In addition, to report the end of therapy services, the SNF would be required to complete an OMRA with an assessment reference date that is set 1 to 3 days from the last day therapy services were provided. Under the current system, an OMRA is completed 8 to 10 days after the cessation of therapy (as discussed above), and payment under the patient's existing rehabilitation RUG continues to be made until the OMRA ARD. This methodology was developed before we had the capability to calculate and report both a therapy and a medical RUG group for payment. At that time, an MDS submitted earlier than 7 days after therapy was discontinued would still be classified into a therapy group (because all therapy provided within the past 7 days had to be reported on the OMRA). Thus, we delayed the submission of the OMRA, which meant that we continued payment under the patient's existing Rehabilitation RUG for several days after therapy was discontinued. As CMS has now developed a system to report both a therapy and non-therapy group on each assessment in which therapy is reported, it is no longer necessary to wait 8 to 10 days. Payment for the non-therapy RUG would begin the day after therapy services end. We are proposing the revised reporting procedures described above to allow for more accurate classification of patients based on services actually needed by and provided to the patient at the time therapy ended, leading to more accurate payment. We solicit comments on these proposed changes to the OMRA reporting requirements.

As discussed previously, we would initiate the revised reporting procedures described above with MDS 3.0, that is, effective October 1, 2010. We would include these changes in the MDS 3.0 RAI manual/instructions and the SOM. In addition, at the same time, we would require that the date that physical therapy, occupational therapy, and/or speech-language pathology services started and ended appear on the claim when billing a rehabilitation RUG (that is, a RUG in the Rehabilitation plus Extensive Services or the Rehabilitation categories). We would adjust our manuals to reflect this requirement. We believe that these revised reporting procedures will provide a more accurate record of therapy services actually provided to the patient, allowing for more accurate RUG classification and payment based on services provided rather than estimated. As noted previously, we solicit comments on our proposed changes to the therapy reporting procedures discussed above.

V. Other Issues

A. Invitation of Comments on Possible Quarterly Reporting of Nursing Home Staffing Data

Although we are not proposing specific regulatory language in this area under this proposed rule, we are requesting public comment on a possible requirement for nursing homes to report nursing staffing data to CMS on a quarterly basis. The data would be reported through an electronic system and would be based on nursing home payroll data (for regular nursing employees) and invoices (for contract and agency nursing staff). Existing law gives us the authority to impose staffing reporting requirements. (See sections 1819(b)(4)(A)(i), 1819(b)(1)(A), and 1819(d)(4)(B) of the Act.) Further, sections 1819(f)(1) and 1919(f)(1) of the Act specify the Secretary's duty and responsibility to assure that requirements that govern the provision of care in nursing homes and SNFs ''are adequate to protect the health, safety, welfare, and rights of residents * * *.'' Nevertheless, we believe it is appropriate to invite public comment on the possible use of an electronic, payroll-based staffing data collection, including the paperwork burden and cost for facilities to provide such data.

CMS uses nursing staffing data and nursing home census data in rating nursing homes for quality. Nursing staffing data for an individual nursing home are adjusted for the case mix of the residents of the nursing home and are divided by the nursing home census to establish the average number of hours of care per day provided by registered nurses, licensed practical/vocational nurses, and certified nursing assistants in that nursing home. Optimal hours of care (case-mix adjusted) and average hours of care for each case-mix group are used as a basis for rating the staffing in the nursing home. The data currently used for these calculations are included in the CMS Online Survey Certification and Reporting System (OSCAR). Limitations of the OSCAR data are detailed in later paragraphs of this section. In addition, nursing staffing data are available for consumer use on the CMS Web site at *http://www.medicare.gov/NHCompare/Include/DataSection/Questions/SearchCriteriaNEW.asp?version=default&browser=IE%7C6%7CWinXP&language=English&defaultstatus=0&pagelist=Home&CookiesEnabledStatus.*

We note that CMS has collected nursing home staffing data and nursing home census information for more than 30 years. Initially, the data were included in the Medicare/Medicaid Automated Certification System (MMACS), and beginning in 1989, they have been part of OSCAR. The OSCAR data system includes staffing data for all Medicare and Medicaid-certified nursing homes in the United States. Currently, the information on staffing in nursing homes is collected at the time of the annual onsite survey by the nursing home surveyors. The nursing home completes a form CMS 671, reporting data for the 2 weeks prior to survey. ''Annual'' nursing home surveys occur, on average, every 12 months, with no more than a 15-month interval in any particular instance.

However, there have been concerns that the OSCAR staffing data have significant limitations, based on several factors: (1) The data represent a very limited time period of only 2 weeks; (2) the data are collected only once a year; (3) accuracy and reliability of the data have been questioned; and (4) the scope of the staffing measures available based on the data is limited. The use of an electronic system for collection of nursing home staffing data based on payroll would address these concerns and offer other advantages as well:

- Staffing data could be collected quarterly using an electronic payroll-based system.
- Staffing quality measures posted on Nursing Home Compare could be based on data for the most recent quarter for all nursing homes.
- Payroll data could be audited for accuracy. Data on use of agency (contract) staff would be based on invoices—also an auditable source.
- Payroll record data could be used to calculate measures of staffing turnover and retention.
- Payroll extract data specifications could be updated to include the broader array of newer nursing home nursing care staff roles in a meaningful way. Data specifications for the electronic payroll extracts are intrinsically more flexible than paper forms and, thus, would be easier to update in future years.

CMS's Center for Medicaid and State Operations (CMSO), in conjunction with its Office of Clinical Standards and Quality (OCSQ), has been assessing the feasibility of moving to an electronic payroll-based system to collect nursing home staffing data since 2003. At this time, we have accomplished a number of tasks that make the institution of an electronic payroll-based system feasible: (1) Developed data submission

specifications for the electronic payroll extracts of staffing data; (2) conducted a field study of the feasibility of using electronic payroll extracts to collect data from nursing homes; and (3) developed a set of valid nursing home staffing quality measures for public reporting (including measures of staff turnover) that use nursing home payroll data as a basis. At this time, we are not proposing any specific regulatory language, but we are soliciting general comments on the utility, scope, and level of detail of such a possible requirement, and the burden and cost for facilities to provide such data.

B. Miscellaneous Technical Corrections and Clarifications

We are also taking the opportunity to set forth certain technical corrections and clarifications in this proposed rule, as discussed below.

We would make a minor technical revision in the requirements for participation for long-term care facilities (that is, Medicare SNFs and Medicaid NFs) contained in Part 483, subpart B. Specifically, in paragraph (j) of § 483.75, we would revise the paragraph heading by removing the phrase ''Level B requirement:'' and italicizing the remaining text in the heading (''*Laboratory services*''). The existing ''Level B requirement'' wording is a vestige of a previous classification system of Level A and Level B requirements that had been introduced in a final rule with comment period (54 FR 5316, February 2, 1989), and which was ''* * * intended to communicate that all of the nursing facility requirements are binding and are not part of a qualitative hierarchy * * *'' (54 FR 5318). However, in a subsequent final rule published on September 26, 1991 (56 FR 48826), we noted that commenters objected to these designations, indicating that they instead fostered ''* * * a belief that Level B requirements were less important than Level A requirements * * *'' (56 FR 48827). In order to prevent any further confusion over this issue, we then ''* * * decided to delete from part 483 all references to Level A and Level B requirements.'' Accordingly, in that 1991 final rule, we removed all such references, including the one that had appeared in paragraph (j) of § 483.75 (56 FR 48878). However, the following year, a final rule to implement the Clinical Laboratory Improvement Amendments (CLIA) of 1988 (57 FR 7002, February 28, 1992) republished the regulations text at § 483.75(j), and erroneously included the Level B requirement designation in the paragraph heading (57 FR 7136). As a result, that designation continues to appear inappropriately in the paragraph heading of this provision. Accordingly, this proposed rule includes a technical revision that would revise the paragraph heading to restore the correct wording from the 1991 final rule.

VI. The Skilled Nursing Facility Market Basket Index

Section 1888(e)(5)(A) of the Act requires us to establish a SNF market basket index (input price index), that reflects changes over time in the prices of an appropriate mix of goods and services included in the SNF PPS. This proposed rule incorporates the latest available projections of the SNF market basket index. We will incorporate updated projections based on the latest available data when we publish the SNF final rule. Accordingly, we have developed a SNF market basket index that encompasses the most commonly used cost categories for SNF routine services, ancillary services, and capital-related expenses.

Each year, we calculate a revised labor-related share based on the relative importance of labor-related cost categories in the input price index. Table 16 below summarizes the proposed updated labor-related share for FY 2010.

TABLE 16—LABOR-RELATED RELATIVE IMPORTANCE, FY 2009 AND FY 2010

	Relative importance, labor-related, FY 2009 08:2 forecast	Relative importance, labor-related, FY 2010 09:1 forecast
Wages and salaries	51.003	51.269
Employee benefits	11.547	11.514
Nonmedical professional fees	1.331	1.333
Labor-intensive services	3.434	438
Capital-related (.391)	2.468	2.463
Total	69.783	70.017

Source: IHS Global Insight, Inc.

A. Use of the Skilled Nursing Facility Market Basket Percentage

Section 1888(e)(5)(B) of the Act defines the SNF market basket percentage as the percentage change in the SNF market basket index from the average of the previous FY to the average of the current FY. For the Federal rates established in this proposed rule, we use the percentage increase in the SNF market basket index to compute the update factor for FY 2010. This is based on the IHS Global Insight, Inc. (formerly DRI–WEFA) first quarter 2009 forecast (with historical data through the fourth quarter 2008) of the FY 2010 percentage increase in the FY 2004-based SNF market basket index for routine, ancillary, and capital-related expenses, to compute the update factor in this proposed rule. Finally, as discussed in section I.A. of this proposed rule, we no longer compute update factors to adjust a facility-specific portion of the SNF PPS rates, because the initial three-phase transition period from facility-specific to full Federal rates that started with cost reporting periods beginning in July 1998 has expired.

B. Market Basket Forecast Error Adjustment

As discussed in the June 10, 2003 supplemental proposed rule (68 FR 34768) and finalized in the August 4, 2003 final rule (68 FR 46067), the regulations at § 413.337(d)(2) provide for an adjustment to account for market basket forecast error. The initial adjustment applied to the update of the FY 2003 rate for FY 2004, and took into account the cumulative forecast error for the period from FY 2000 through FY 2002. Subsequent adjustments in succeeding FYs take into account the forecast error from the most recently

available FY for which there is final data, and apply whenever the difference between the forecasted and actual change in the market basket exceeds a specified threshold. We originally used a 0.25 percentage point threshold for this purpose; however, for the reasons specified in the FY 2008 SNF PPS final rule (72 FR 43425, August 3, 2007), we adopted a 0.5 percentage point threshold effective with FY 2008. As discussed previously in section I.F.2. of this proposed rule, as the difference between the estimated and actual amounts of increase in the market basket index for FY 2008 (the most recently available FY for which there is final data) does not exceed the 0.5 percentage point threshold, the proposed payment rates for FY 2010 do not include a forecast error adjustment.

C. Federal Rate Update Factor

Section 1888(e)(4)(E)(ii)(IV) of the Act requires that the update factor used to establish the FY 2010 Federal rates be at a level equal to the full market basket percentage change. Accordingly, to establish the update factor, we determined the total growth from the average market basket level for the period of October 1, 2008 through September 30, 2009 to the average market basket level for the period of October 1, 2009 through September 30, 2010. Using this process, the proposed market basket update factor for FY 2010 SNF PPS Federal rates is 2.1 percent. We used this proposed update factor to compute the Federal portion of the SNF PPS rate shown in Tables 2 and 3.

VII. Consolidated Billing

Section 4432(b) of the BBA established a consolidated billing requirement that places the Medicare billing responsibility for virtually all of the services that the SNF's residents receive with the SNF, except for a small number of services that the statute specifically identifies as being excluded from this provision. As noted previously in section I. of this proposed rule, subsequent legislation enacted a number of modifications in the consolidated billing provision.

Specifically, section 103 of the BBRA amended this provision by further excluding a number of individual ''high-cost, low-probability'' services, identified by the Healthcare Common Procedure Coding System (HCPCS) codes, within several broader categories (chemotherapy and its administration, radioisotope services, and customized prosthetic devices) that otherwise remained subject to the provision. We discuss this BBRA amendment in greater detail in the proposed and final rules for FY 2001 (65 FR 19231–19232, April 10, 2000, and 65 FR 46790 through 46795, July 31, 2000), as well as in Program Memorandum AB–00–18 (Change Request #1070), issued March 2000, which is available online at *http://www.cms.hhs.gov/transmittals/downloads/ab001860.pdf*.

Section 313 of the BIPA further amended this provision by repealing its Part B aspect; that is, its applicability to services furnished to a resident during a SNF stay that Medicare Part A does not cover. (However, physical, occupational, and speech-language therapy remain subject to consolidated billing, regardless of whether the resident who receives these services is in a covered Part A stay.) We discuss this BIPA amendment in greater detail in the proposed and final rules for FY 2002 (66 FR 24020–24021, May 10, 2001, and 66 FR 39587–39588, July 31, 2001).

In addition, section 410 of the MMA amended this provision by excluding certain practitioner and other services furnished to SNF residents by RHCs and FQHCs. We discuss this MMA amendment in greater detail in the update notice for FY 2005 (69 FR 45818–45819, July 30, 2004), as well as in Program Transmittal #390 (Change Request #3575), issued December 10, 2004, which is available online at *http://www.cms.hhs.gov/transmittals/downloads/r390cp.pdf*.

Further, while not substantively revising the consolidated billing requirement itself, a related provision was enacted in the Medicare Improvements for Patients and Providers Act of 2008 (MIPPA, Pub. L. 110–275). Specifically, section 149 of MIPPA amended section 1834(m)(4)(C)(ii) of the Act to add subclause (VII), which adds SNFs (as defined in section 1819(a) of the Act) to the list of entities that can serve as a telehealth ''originating site'' (that is, the location at which an eligible individual can receive, through the use of a telecommunications system, services furnished by a physician or other practitioner who is located elsewhere at a ''distant site'').

As explained in the Medicare Physician Fee Schedule (PFS) final rule for Calendar Year (CY) 2009 (73 FR 69726, 69879, November 19, 2008), a telehealth originating site receives a facility fee which is always separately payable under Part B outside of any other payment methodology. Section 149(b) of MIPPA amended section 1888(e)(2)(A)(ii) of the Act to exclude telehealth services furnished under section 1834(m)(4)(C)(ii)(VII) of the Act from the definition of ''covered skilled nursing facility services'' that are paid under the SNF PPS. Thus, a SNF ''* * * can receive separate payment for a telehealth originating site facility fee even in those instances where it also receives a bundled per diem payment under the SNF PPS for a resident's covered Part A stay'' (73 FR 69881). By contrast, under section 1834(m)(2)(A) of the Act, a telehealth distant site service is payable under Part B to an eligible physician or practitioner only to the same extent that it would have been so payable if furnished *without* the use of a telecommunications system. Thus, as explained in the CY 2009 PFS final rule, eligible distant site physicians or practitioners can receive payment for a telehealth service that they furnish

> * * * only if the service is separately payable under the PFS when furnished in a face-to-face encounter at that location. For example, we pay distant site physicians or practitioners for furnishing services via telehealth only if such services are not included in a bundled payment to the facility that serves as the originating site (73 FR 69880).

This means that in those situations where a SNF serves as the telehealth originating site, the distant site professional services would be separately payable under Part B only to the extent that they are not already included in the SNF PPS bundled per diem payment and subject to consolidated billing. Thus, for a type of practitioner whose services are not otherwise excluded from consolidated billing when furnished during a face-to-face encounter, the use of a telehealth distant site would not serve to unbundle those services. In fact, consolidated billing does exclude the professional services of physicians, along with those of most of the other types of telehealth practitioners that the law specifies at section 1842(b)(18)(C) of the Act, that is, physician assistants, nurse practitioners, clinical nurse specialists, certified registered nurse anesthetists, certified nurse midwives, and clinical psychologists (see section 1888(e)(2)(A)(ii) of the Act and 42 CFR 411.15(p)(2)). However, the services of clinical social workers, registered dietitians and nutrition professionals remain subject to consolidated billing when furnished to a SNF's Part A resident and, thus, cannot qualify for separate Part B payment as telehealth distant site services in this situation. Additional information on this provision appears in Program Transmittal #1635 (Change Request #6215), issued November 14, 2008, which is available online at *http://www.cms.hhs.gov/transmittals/downloads/R1635CP.pdf*.

To date, the Congress has enacted no further legislation affecting the consolidated billing provision. However, as noted above and explained in the proposed rule for FY 2001 (65 FR 19232, April 10, 2000), the amendments enacted in section 103 of the BBRA not only identified for exclusion from this provision a number of particular service codes within four specified categories (that is, chemotherapy items, chemotherapy administration services, radioisotope services, and customized prosthetic devices), but also gave the Secretary ''* * * the authority to designate additional, individual services for exclusion within each of the specified service categories.'' In the proposed rule for FY 2001, we also noted that the BBRA Conference report (H.R. Rep. No. 106–479 at 854 (1999) (Conf. Rep.)) characterizes the individual services that this legislation targets for exclusion as ''* * * high-cost, low probability events that could have devastating financial impacts because their costs far exceed the payment [SNFs] receive under the prospective payment system * * *''. According to the conferees, section 103(a) ''is an attempt to exclude from the PPS certain services and costly items that are provided infrequently in SNFs * * *.'' By contrast, we noted that the Congress declined to designate for exclusion any of the remaining services within those four categories (thus leaving all of those services subject to SNF consolidated billing), because they are relatively inexpensive and are furnished routinely in SNFs.

As we further explained in the final rule for FY 2001 (65 FR 46790, July 31, 2000), and as our longstanding policy, any additional service codes that we might designate for exclusion under our discretionary authority must meet the same statutory criteria used in identifying the original codes excluded from consolidated billing under section 103(a) of the BBRA: they must fall within one of the four service categories specified in the BBRA, and they also must meet the same standards of high cost and low probability in the SNF setting, as discussed in the BBRA Conference report. Accordingly, we characterized this statutory authority to identify additional service codes for exclusion '' * * * as essentially affording the flexibility to revise the list of excluded codes in response to changes of major significance that may occur over time (for example, the development of new medical technologies or other advances in the state of medical practice)'' (65 FR 46791). In this proposed rule, we specifically invite public comments identifying codes in any of these four service categories (chemotherapy items, chemotherapy administration services, radioisotope services, and customized prosthetic devices) representing recent medical advances that might meet our criteria for exclusion from SNF consolidated billing. We may consider excluding a particular service if it meets our criteria for exclusion as specified above. Commenters should identify in their comments the specific HCPCS code that is associated with the service in question, as well as their rationale for requesting that the identified HCPCS code(s) be excluded.

We note that the original BBRA legislation (as well as the implementing regulations) identified a set of excluded services by means of specifying HCPCS codes that were in effect as of a particular date (in that case, as of July 1, 1999). Identifying the excluded services in this manner made it possible for us to utilize program issuances as the vehicle for accomplishing routine updates of the excluded codes, in order to reflect any minor revisions that might subsequently occur in the coding system itself (for example, the assignment of a different code number to the same service). Accordingly, in the event that we identify through the current rulemaking cycle any new services that would actually represent a substantive change in the scope of the exclusions from SNF consolidated billing, we would identify these additional excluded services by means of the HCPCS codes that are in effect as of a specific date (in this case, as of October 1, 2009). By making any new exclusions in this manner, we could similarly accomplish routine future updates of these additional codes through the issuance of program instructions.

VIII. Application of the SNF PPS to SNF Services Furnished by Swing-Bed Hospitals; Quality Monitoring of Swing-Bed Hospitals

In accordance with section 1888(e)(7) of the Act, as amended by section 203 of the BIPA, Part A pays CAHs on a reasonable cost basis for SNF services furnished under a swing-bed agreement. However, effective with cost reporting periods beginning on or after July 1, 2002, the swing-bed services of non-CAH rural hospitals are paid under the SNF PPS. As explained in the final rule for FY 2002 (66 FR 39562, July 31, 2001), we selected this effective date consistent with the statutory provision to integrate swing-bed rural hospitals into the SNF PPS by the end of the SNF transition period, June 30, 2002.

Accordingly, all non-CAH swing-bed rural hospitals have come under the SNF PPS as of June 30, 2003. Therefore, all rates and wage indexes outlined in earlier sections of this proposed rule for the SNF PPS also apply to all non-CAH swing-bed rural hospitals. A complete discussion of assessment schedules, the MDS and the transmission software (RAVEN–SB for Swing Beds) appears in the final rule for FY 2002 (66 FR 39562, July 31, 2001). The latest changes in the MDS for swing-bed rural hospitals appear on the SNF PPS Web site, *http://www.cms.hhs.gov/snfpps*. It is our intention to include rural hospital swing beds in the transition to the MDS 3.0 effective October 1, 2010, and to adopt the RUG–IV classification for swing-bed facilities on that same date. Under the RUG–III payment model, swing-bed hospitals have not been comprehensively monitored for quality of care, but have been required to submit four types of abbreviated MDS assessments: the abbreviated Medicare Assessments submitted on days 5, 14, 30, 60, and 90 used to determine payment under the SNF PPS, entry and discharge tracking assessments, the clinical change assessments, and the Other Medicare Required Assessments (OMRAs). The limited use of the MDS for quality monitoring was established because we believed that swing-bed units, as parts of rural hospitals, were already subject to the hospital quality review process. In addition, our analyses showed that the average length of stay in swing-bed facilities was significantly lower than in either hospital-based or free-standing SNFs, and that our existing quality measures might be unable to evaluate short stay patient care accurately. Thus, in the FY 2002 final rule referenced above (65 FR 39590), we decided that we would not ''require swing-bed facilities to perform the care planning and quality monitoring components included in the full MDS * * * '' at that time. At the same time, we explained our intention of including '' * * * an analysis of swing-bed requirements in our comprehensive reevaluation of all post-acute data needs, and in the design of any future assessment and data collection tools.''

Since that time, we have expanded our quality analysis in a variety of settings, and have made SNF information publicly available through Nursing Home Compare and other initiatives. While developing ways to monitor and compare quality across swing-bed facilities and between swing-bed facilities and other SNFs would increase swing-bed facility data

collection and transmission requirements, it would also increase the information available to patients, families, and oversight agencies for making placement decisions and evaluating the quality of care furnished by swing-bed facilities. For these reasons, we are considering a change in the swing bed MDS (SB–MDS) reporting requirements that would go into effect with the introduction of the MDS 3.0. Since the current SB–MDS does not include the items needed to evaluate quality in the same way as for other nursing facilities, we are proposing to eliminate the SB–MDS, and replace it with the MDS 3.0 equivalent of the Medicare Payment Assessment Form (MPAF) that captures all of the items used in determining quality measures. Accordingly, in this rule, we are soliciting comments on expanding swing-bed MDS reporting requirements to apply the quality monitoring mechanism in place for all other SNF PPS facilities to rural swing-bed hospitals.

IX. Provisions of the Proposed Rule

In this proposed rule, in addition to accomplishing the required annual update of the SNF PPS payment rates, we also propose making the following revisions in the regulations text:

Section 483.20 (Resident assessment)

In § 483.20, we are proposing to republish paragraph (b)(1) introductory text. We are also proposing in § 483.20(b)(1)(xvii) to remove the phrase ''through the resident assessment protocols'' and replace it with ''on the care areas triggered by the completion of the Minimum Data Set (MDS).''

As discussed previously in section IV.B. of this proposed rule, we would revise § 483.20(b), as well as other formatting revisions in the section heading and regulations at § 483.315(d) and § 483.315(e), and to specify the assessment to be completed on care areas triggered by completion of the MDS.

In addition, as discussed previously in section IV.B. of this proposed rule, we would revise § 483.20(f), as well as other formatting revisions in the section heading and regulations at § 483.315(h) and § 483.315(i), to specify the transmission and submission requirements of MDS data.

In § 483.20(f)(2), we are proposing to delete the phrase ''State information'' and replace it with ''CMS System information.''

In § 483.20(f)(3), we are proposing to remove the word ''Monthly'' in the paragraph heading and revise the remaining paragraph heading to read as follows: ''*Transmittal requirement*''. In § 483.20(f)(3), we also propose revising the introductory text to read, ''Within 14 days after a facility completes a resident's assessments, a facility must electronically transmit encoded, accurate, complete MDS data to the CMS System, including the following:''.

Section 483.75 (Administration)

As discussed previously in section V.B. of this proposed rule, we are proposing to revise the paragraph heading in § 483.75(j) to remove the phrase ''Level B requirement'' and replace it with ''*Laboratory services*.''

Section 483.315 (Specification of resident assessment instrument)

In § 483.315(d)(2), we are proposing to remove the phrase ''The resident assessment protocols (RAPs) and triggers'' and replace it with ''Care area triggers (CATs)''.

In § 483.315(e), we are proposing to revise the text to remove the specific MDS definitions and instead cross-reference to the resident assessment instrument requirements in § 483.20(b)(1)(i) through (b)(1)(xviii).

We are proposing to remove and reserve existing paragraph (f) of § 483.315, which specifies the 18 domains for the RAPs.

We are proposing to revise the paragraph heading for § 483.315(h) to remove the word ''collection'' and replace it with ''system'' as well as making other organizational changes for this section.

In § 483.315(i), we are proposing to remove the word ''collects'' in the paragraph heading and in the introductory text and replace it with ''receives''. In addition, we propose removing the phrase ''data and'' in § 483.315(i)(2).

X. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995 (PRA, 44 U.S.C. 3501 *et seq.*), agencies are required to provide a 60-day notice in the **Federal Register** and solicit public comment when a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. To fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the PRA requires that we solicit comments on the following issues:

- Whether the information collection is necessary and useful to carry out the proper functions of the agency;
- The accuracy of the agency's estimate of the information collection burden;
- The quality, utility, and clarity of the information to be collected; and
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

In the FY 2002 SNF PPS proposed rule (66 FR 24026–28, May 10, 2001) and final rule (66 FR 39594–96, July 31, 2001), we invited and discussed public comments on the information collection aspects of establishing the existing, abbreviated MDS completion requirements that apply to rural swing-bed hospitals paid under the SNF PPS (CMS–10064, OMB #0938–0872, 73 FR 30105, May 23, 2008). Similarly, we are now inviting public comment with respect to the expansion of MDS reporting requirements so that the quality measures currently in place for all other SNF PPS facilities can be applied to swing-bed hospitals, as discussed previously in section VIII. of this proposed rule. Specifically, we are proposing to replace the SB–MDS with the MDS 3.0 version of the MPAF.

Our information collection authority for the existing SB–MDS and MPAF includes detailed burden estimates. For the SB–MDS, we have determined that swing-bed facilities complete 105 assessments per year at an annual cost of $1,352.49 per facility. Thus, the total dollar impact for the 481 swing-bed facilities is $650,547.69 per year. In contrast, the estimated cost of completing 105 MPAFs is $1,804.62 per swing-bed facility, or a total of $868,022.22 for all 481 swing-bed facilities. Thus, for all 481 facilities, the increased burden associated with changing from the SB–MDS to the MPAF would be the difference between those two totals, or $217,503.39. We wish to note that should we decide to proceed with this approach, we will need to make further conforming revisions in another existing information collection authority (CMS–R–250, OMB #0938–0739) for the Medicare PPS Assessment Form (MPAF).

We note that this document does not impose any other information collection and recordkeeping requirements for FY 2010. As discussed in the **Federal Register** notice that originally established the MPAF (67 FR 38130–31, May 31, 2002), '' * * * the current requirements related to the submission and retention of resident assessment data are not subject to the PRA.'' This is because sections 4204(b) and 4214(d) of the Omnibus Budget Reconciliation Act of 1987 (OBRA 1987, P.L. 100–203) specifically waive the paperwork reduction requirements with respect to the revised requirements for

participation introduced by the nursing home reform legislation, including the MDS itself. Moreover, as the discussion in section IV.D.3. indicates, the proposed changes with reference to the OMRA represent no additional burden, as they merely reflect revisions in the timeframe for completion rather than the number of assessments to be completed. Further, we note that the proposed completion of an OMRA upon the start of therapy, as discussed in section IV.D.2., would be entirely voluntary on the part of the facility and, thus, would not represent the imposition of a mandatory burden.

XI. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

XII. Regulatory Impact Analysis

A. Overall Impact

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

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). This proposed rule is an economically significant rule under Executive Order 12866, because we estimate the FY 2010 impact reflects a $660 million increase from the update to the payment rates and a $1.05 billion reduction (on an incurred basis) from the recalibration of the case-mix adjustment, thereby yielding a net decrease of $390 million in payments to SNFs. For FY 2011, we estimate that there will be no aggregate impact on payments as a result of the implementation of the RUG–IV model, which will be introduced on a budget neutral basis. The final FY 2011 impacts will be issued prior to August 1, 2010, and will include the FY 2011 market basket update, FY 2011 wage index, and any further FY 2011 policy changes. Furthermore, we are also considering this a major rule as defined in the Congressional Review Act (5 U.S.C. 804(2)).

The proposed update set forth in this proposed rule would apply to payments in FY 2010. In addition, we include a preliminary estimate of the impact of the introduction of the RUG–IV model on FY 2011 payments. In accordance with the requirements of the Act, we will publish a notice for each subsequent FY that will provide for an update to the payment rates and include an associated impact analysis. Therefore, final estimates for FY 2011 will be published prior to August 1, 2010.

The RFA requires agencies to analyze options for regulatory relief of small entities, if a rule has a significant impact on a substantial number of small businesses or other small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small government jurisdictions. Most SNFs and most other providers and suppliers are small entities, either by their nonprofit status or by having revenues of $13.5 million or less in any 1 year. For purposes of the RFA, approximately 51 percent of SNFs are considered small businesses according to the Small Business Administration's latest size standards, with total revenues of $13.5 million or less in any 1 year (for further information, see 65 FR 69432, November 17, 2000). Individuals and States are not included in the definition of a small entity. In addition, approximately 29 percent of SNFs are nonprofit organizations.

This proposed rule would update the SNF PPS rates published in the final rule for FY 2009 (73 FR 46416, August 8, 2008) and the associated correction notice (73 FR 56998, October 1, 2008), thereby decreasing net payments by an estimated $390 million. As indicated in Table 17a, the effect on facilities will be a net negative impact of 1.2 percent. The total impact reflects a $1.05 billion reduction from the recalibration of the case-mix adjustment, offset by a $660 million increase from the update to the payment rates. We also note that the percent decrease will vary due to the distributional impact of the FY 2010 wage indexes and the degree of Medicare utilization. For FY 2011, we estimate that there will be no aggregate impact on payments due to the introduction of the RUG–IV model. However, we estimate that there will be distributional impacts that vary from slight increases to slight decreases due to the case-mix distribution of individual providers.

Guidance issued by the Department of Health and Human Services, on the proper assessment of the impact on small entities in rulemakings, utilizes a revenue impact of 3 to 5 percent as a significance threshold under the RFA. While this proposed rule is considered economically significant, its relative impact on SNFs overall is small because Medicare is a relatively minor payer source for nursing home care. We estimate that Medicare covers approximately 10 percent of service days, and approximately 20 percent of payments. However, the distribution of days and payments is highly variable, with the majority of SNFs having significantly lower Medicare utilization. As a result, for most facilities, the impact to total facility revenues, considering all payers, should be substantially less than those shown in Table 17a. Therefore, the Secretary has determined that this proposed rule would not have a significant impact on a substantial number of small entities. However, in view of the potential economic impact on small entities, we have considered alternatives as described in section XII.C. of this proposed rule.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds. The proposed rule will affect small rural hospitals that (a) furnish SNF services under a swing-bed agreement or (b) have a hospital-based SNF. We anticipate that the impact on small rural hospitals will be similar to the impact on SNF providers overall. Therefore, the Secretary has determined that this proposed rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of UMRA also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2009, that threshold is approximately

$133 million. This proposed rule would not impose spending costs on State, local, or tribal governments in the aggregate, or by the private sector, of $133 million.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates regulations that impose substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. As stated above, this proposed rule would have no substantial direct effect on State and local governments, preempt State law, or otherwise have Federalism implications.

B. Anticipated Effects

This proposed rule sets forth proposed updates of the SNF PPS rates contained in the final rule for FY 2009 (73 FR 46416, August 8, 2008) and the associated correction notice (73 FR 56998, October 1, 2008). Based on the above, we estimate the FY 2010 impact would be a net decrease of $390 million on payments to SNFs (this reflects a $1.05 billion reduction from the recalibration of the case-mix adjustment, offset by a $660 million increase from the update to the payment rates). The impact analysis of this proposed rule represents the projected effects of the changes in the SNF PPS from FY 2009 to FY 2010. We assess the effects by estimating payments while holding all other payment-related variables constant. Although the best data available is utilized, there is no attempt to predict behavioral responses to these changes, or to make adjustments for future changes in such variables as days or case-mix. In addition, we provide an impact analysis projecting the changes for FY 2011 due to the introduction of the RUG–IV model. Final impact estimates for FY 2011 will be published prior to August 1, 2010.

Certain events may occur to limit the scope or accuracy of our impact analysis, as this analysis is future-oriented and, thus, very susceptible to forecasting errors due to certain events that may occur within the assessed impact time period. Some examples of possible events may include newly legislated general Medicare program funding changes by the Congress, or changes specifically related to SNFs. In addition, changes to the Medicare program may continue to be made as a result of previously enacted legislation, or new statutory provisions. Although these changes may not be specific to the SNF PPS, the nature of the Medicare program is that the changes may interact and, thus, the complexity of the interaction of these changes could make it difficult to predict accurately the full scope of the impact upon SNFs.

In accordance with section 1888(e)(4)(E) of the Act, we update the payment rates for FY 2009 by a factor equal to the full market basket index percentage increase plus the FY 2008 forecast error adjustment to determine the payment rates for FY 2010. The special AIDS add-on established by section 511 of the MMA remains in effect until ''* * * such date as the Secretary certifies that there is an appropriate adjustment in the case mix * * *.'' We have not provided a separate impact analysis for the MMA provision. Our latest estimates indicate that there are slightly more than 2,700 beneficiaries who qualify for the AIDS add-on payment. The impact to Medicare is included in the ''total'' column of Table 17a. In proposing to update the rates for FY 2010, we made a number of standard annual revisions and clarifications mentioned elsewhere in this proposed rule (for example, the update to the wage and market basket indexes used for adjusting the Federal rates). These revisions would increase payments to SNFs by approximately $660 million.

We estimate the net decrease in payments associated with this proposed rule to be $390 million for FY 2010. The decrease of $1.05 billion due to the recalibration of the case-mix adjustment, together with the market basket increase of $660 million, results in a net decrease of $390 million.

The FY 2010 impacts appear in Table 17a. The breakdown of the various categories of data in the table follows.

The first column shows the breakdown of all SNFs by urban or rural status, hospital-based or freestanding status, and census region.

The first row of figures in the first column describes the estimated effects of the various changes on all facilities. The next six rows show the effects on facilities split by hospital-based, freestanding, urban, and rural categories. The urban and rural designations are based on the location of the facility under the CBSA designation. The next twenty-two rows show the effects on urban versus rural status by census region.

The second column in the table shows the number of facilities in the impact database.

The third column of the table shows the effect of the annual update to the wage index. This represents the effect of using the most recent wage data available. The total impact of this change is zero percent; however, there are distributional effects of the change.

The fourth column shows the effect of recalibrating the case-mix adjustment to the nursing CMIs. As explained previously in section II.B.2 of this proposed rule, we are proposing this recalibration so that the CMIs more accurately reflect parity in expenditures under the refined, 53-group RUG system introduced in 2006 relative to payments made under the original, 44-group RUG system, and in order to keep the NTA component at the appropriate level specified in the FY 2006 SNF PPS final rule. The total impact of this change is a decrease of 3.3 percent. We note that some individual providers may experience larger decreases in payments than others due to case-mix utilization.

The fifth column shows the effect of all of the changes on the FY 2010 payments. The market basket increase of 2.1 percentage points is constant for all providers and, though not shown individually, is included in the total column. It is projected that aggregate payments will decrease by 1.2 percent, assuming facilities do not change their care delivery and billing practices in response.

As can be seen from Table 17a, the combined effects of all of the changes vary by specific types of providers and by location. For example, though nearly all facilities would experience payment decreases, providers in the rural Mountain region would show no change in FY 2010 total payments. Of those facilities showing decreases, facilities in the urban New England and urban Mountain areas of the country show the smallest decreases.

TABLE 17A—PROJECTED IMPACT TO THE SNF PPS FOR FY 2010

	Number of facilities	Update wage data (in percent)	Revised CMIs (in percent)	Total FY 2010 change (in percent)
Total	15,307	0.0	−3.3	−1.2

TABLE 17A—PROJECTED IMPACT TO THE SNF PPS FOR FY 2010—Continued

	Number of facilities	Update wage data (in percent)	Revised CMIs (in percent)	Total FY 2010 change (in percent)
Urban	10,586	0.0	−3.3	−1.3
Rural	4,721	−0.2	−3.1	−1.3
Hospital based urban	1,675	−0.1	−3.4	−1.5
Freestanding urban	8,911	0.1	−3.3	−1.2
Hospital based rural	1,065	−0.2	−3.3	−1.5
Freestanding rural	3,656	−0.2	−3.1	−1.3
Urban by region				
New England	832	0.8	−3.4	−0.6
Middle Atlantic	1,489	−0.2	−3.5	−1.6
South Atlantic	1,742	0.0	−3.2	−1.2
East North Central	2,024	−0.1	−3.2	−1.3
East South Central	539	−0.4	−3.3	−1.6
West North Central	874	0.3	−3.3	−1.0
West South Central	1,200	−0.3	−3.2	−1.5
Mountain	478	0.8	−3.2	−0.4
Pacific	1,402	0.3	−3.3	−1.0
Outlying	6	−0.1	−3.6	−1.6
Rural by region				
New England	148	−0.6	−3.1	−1.7
Middle Atlantic	254	0.1	−3.3	−1.2
South Atlantic	593	0.0	−3.1	−1.1
East North Central	930	−0.5	−3.1	−1.6
East South Central	533	−0.1	−3.1	−1.2
West North Central	1,092	−0.4	−3.3	−1.6
West South Central	788	−0.4	−3.1	−1.4
Mountain	247	1.2	−3.2	0.0
Pacific	134	−0.6	−3.2	−1.7
Outlying	2	1.1	−3.9	−0.8
Ownership				
Government	652	−0.2	−3.5	−1.6
Proprietary	11,302	0.0	−3.2	−1.2
Voluntary	3,353	0.1	−3.4	−1.2

Note: The Total column includes the 2.1 percent market basket increase.

Table 17b shows the estimated effects for the FY 2011 distributional changes due to the proposed RUG–IV classification system. Though the aggregate impact shows no change in total payments, it is estimated that some facilities will experience payment increases while others experience payment decreases due to the Medicare utilization under RUG–IV. For example, providers in the urban New England and urban Middle Atlantic regions show increases of 1.1 percent, while providers in the rural East North Central region show a decrease of 1.5 percent.

TABLE 17B—PROJECTED IMPACT OF RUG–IV FOR FY 2011

	Number of facilities*	Number of patient days	RUG–IV (in percent)
Total	16,843	59,523,036	0.0
Urban	11,729	47,630,775	0.2
Rural	5,114	11,892,261	−0.8
Hospital based urban	727	2,243,054	−2.2
Freestanding urban	11,002	45,387,721	0.3
Hospital based rural	494	845,940	−1.8
Freestanding rural	4,621	11,046,321	−0.8
Urban by region			
New England	983	3,895,369	1.1
Middle Atlantic	1,664	8,339,240	1.1
South Atlantic	1,937	9,750,052	−0.7
East North Central	2,257	9,700,520	−0.2
East South Central	569	2,456,007	0.9

TABLE 17B—PROJECTED IMPACT OF RUG–IV FOR FY 2011—Continued

	Number of facilities*	Number of patient days	RUG–IV (in percent)
West North Central	918	2,415,515	0.1
West South Central	1,262	4,375,056	0.6
Mountain	517	1,679,027	−0.3
Pacific	1,613	5,014,016	0.2
Outlying	9	5,973	2.4
Rural by region			
New England	139	352,592	−1.1
Middle Atlantic	276	871,871	0.6
South Atlantic	647	2,183,169	−1.0
East North Central	1,035	2,596,977	−1.5
East South Central	540	1,869,616	−0.3
West North Central	1,231	1,613,386	−0.6
West South Central	826	1,607,408	−1.0
Mountain	271	439,366	−1.2
Pacific	149	357,405	−1.3
Outlying	1	471	−0.3
Ownership			
Government	796	1,814,977	1.1
Proprietary	11,501	43,889,723	−0.1
Voluntary	4,546	13,818,336	0.0

Note: The wage index column is not included for FY 2011 since the FY 2011 wage index is unknown. In addition, the Total column is not included for FY 2011 since the market basket is unknown.

*The number of facilities for this analysis relies on STRIVE data with sample weights applied. Therefore, the number of facilities presented here differs from those presented in Table 17a.

Another effect of the introduction of the RUG–IV model is a re-distribution of dollars between payment groups that focus on rehabilitation in contrast to those focused primarily on nursing services. In order to further understand the changes to specific provider types and case-mix, we evaluated the individual effect on the nursing and therapy portion of total payments. Table 18 shows the nursing and therapy percentage change as a portion of total payments by comparing the nursing and therapy rate components using the RUG–III CMIs and RUG–IV CMIs. As shown in Table 18, although hospital-based facilities do not show as large an increase in the nursing portion of total payments, they also do not show as large a decrease in the therapy portion of their payments. We expect that facilities providing more intensive nursing services will show increases in payments under the proposed RUG–IV model.

TABLE 18—PERCENTAGE CHANGE IN PAYMENT FOR THE NURSING AND THERAPY COMPONENTS

Rate component	Urban (in percent)	Rural (in percent)
Nursing CMIs—Free-standing	18.2	17.4
Nursing CMIs—Hospital-Based	8.5	9.3
Therapy CMIs—Free-standing	−38.4	−38.0
Therapy CMIs—Hospital-Based	−20.4	−20.4

We further note that while this analysis is focused primarily on the anticipated impact to the Medicare program, we understand that States are also concerned about potential systems needs to address the transition to the MDS 3.0 and the RUG–IV case-mix system. Although our systems analysis showed that the transition to a national CMS data collection system would retain all existing functionality, we have been working closely with the State Agencies (SAs) to verify that the transition will be as seamless as possible. Starting in the Fall of 2008, we initiated monthly conference calls between CMS staff and representatives from the State Survey and Medicaid agencies to make sure that we have taken all State systems needs into account, and to develop strategies to support the SAs. Our progress has been hampered by three factors. First, many States have developed MDS-based applications to support a variety of State functions beyond the typical survey and payment operations. We are developing a comprehensive list of all affected State functions currently using the MDS so we can develop ways for the States to access the data once we adopt the MDS 3.0 format. Second, most States have customized their Medicaid payment systems, which means that potential CMS data solutions cannot utilize a ''one size fits all'' approach.

The third issue is that the majority of the States have not yet reached a final decision on the payment system changes they will implement in October 2010. Some States will maintain their existing RUG–III payment systems and will simply need support to convert MDS 3.0 data into an MDS 2.0 format to continue calculating their Medicaid payments. Other States are considering adopting all or part of the RUG–IV model, and will need more extensive support. During the next two months, we will follow up individually with each State to identify the transition scenarios applicable to the different States. At that point, we will develop a comprehensive transition plan that will include an analysis of the systems costs

likely to be incurred under each transition approach; *i.e.*, maintaining a standard RUG–III payment structure, maintaining a customized RUG–III structure, and adopting all or part of RUG–IV. We anticipate that we will be able to calculate more specific cost estimates for the final rule and we urge States to comment on this rule as well as to continue to participate in the outreach efforts described above.

For those States that will maintain their existing RUG–III-based payment models, we have already started work on support systems that will allow States to convert or crosswalk the MDS 3.0 data to the current MDS 2.0 structure. The data specifications for these crosswalks are expected to be released by October 2010. We plan to work closely with the States to ensure a smooth transition.

State Medicaid agencies are not required to adopt the RUG–IV model and will only do so after careful consideration of the cost and benefit of such a change on an individual State-by-State basis. For those States choosing to adopt the RUG–IV model, CMS provides detailed program specifications free of charge, which will mitigate State program design costs associated with converting from RUG–III to RUG–IV. We intend to continue to work closely with State Medicaid agencies during the next year to assist them in evaluating the RUG–IV model for Medicaid use.

Accordingly, we are continuing to examine the implications of this transition and invite comments on those implications, in terms of the associated costs as well as possible ways to assist the States.

C. Alternatives Considered

We have determined that this proposed rule is an economically significant rule under Executive Order 12866. As described above, we estimate the FY 2010 impact will be a net decrease of $390 million in payments to SNFs, resulting from a $660 million increase from the update to the payment rates and a $1.05 billion reduction from the recalibration of the case-mix adjustment. In view of the potential economic impact, we considered the alternatives described below.

Section 1888(e) of the Act establishes the SNF PPS for the payment of Medicare SNF services for cost reporting periods beginning on or after July 1, 1998. This section of the statute prescribes a detailed formula for calculating payment rates under the SNF PPS, and does not provide for the use of any alternative methodology. It specifies that the base year cost data to be used for computing the SNF PPS payment rates must be from FY 1995 (October 1, 1994, through September 30, 1995). In accordance with the statute, we also incorporated a number of elements into the SNF PPS (for example, case-mix classification methodology, the MDS assessment schedule, a market basket index, a wage index, and the urban and rural distinction used in the development or adjustment of the Federal rates). Furthermore, section 1888(e)(4)(H) of the Act specifically requires us to disseminate the payment rates for each new FY through the **Federal Register**, and to do so before the August 1 that precedes the start of the new FY. Accordingly, we are not pursuing alternatives with respect to the payment methodology as discussed above. However, in view of the potential economic impact on small entities, we have voluntarily considered alternative approaches to the recalibration of the case-mix adjustments.

Using our authority to establish an appropriate adjustment for case mix under section 1888(e)(4)(G)(i) of the Act, this proposed rule would recalibrate the adjustment to the nursing case-mix indexes based on actual CY 2006 data instead of FY 2001 data. In the SNF PPS final rule for FY 2006 (70 FR 45031, August 4, 2005), we committed to monitoring the accuracy and effectiveness of the case-mix indexes used in the 53-group model. We believe that using the CY 2006 actual claims data to perform the recalibration analysis results in case-mix weights that reflect the resources used, produces more accurate payment, and represents an appropriate case-mix adjustment. Using the CY 2006 data is consistent with our intent to make the change from the 44-group RUG model to the refined 53-group model in a budget-neutral manner, as described in section II.B.2 and in the SNF PPS final rule for FY 2006 (70 FR 45031, August 4, 2005).

We investigated using alternative time periods in calculating the case-mix adjustments. One possibility was to use CY 2005 rather than CY 2006 data. However, using CY 2005 data still requires us to use a projection of the distributional shift to the nine new groups in the RUG–53 group model. We also looked at a second alternative, which involved comparing quarterly data periods directly before and after implementation of the RUG–53 model; for example, October through December 2005 for the RUG–44 model and January through March 2006 for the RUG–53 model. This approach uses a combination of projected and actual data for only a 6-month time period. However, we believe that using actual utilization data for the entire CY 2006 is more accurate, as actual case mix during the calibration year is the basis for computing the case-mix adjustment. Accordingly, we have determined that performing the recalibration using the CY 2006 data is the most appropriate methodology.

We considered various options for implementing the recalibrated case-mix adjustment. For example, we considered implementing partial adjustments to the case-mix indexes over multiple years until parity was achieved. However, we believe that these options would continue to reimburse in amounts that significantly exceed our intended policy. Moreover, as we move forward with programs designed to enhance and restructure our post-acute care payment systems, we believe that payments under the SNF PPS should be established at their intended and most appropriate levels. Stabilizing the baseline is a necessary first step toward implementing the RUG–IV classification methodology. As discussed in section III.B. of this proposed rule, RUG–IV will more accurately identify differences in patient acuity and will more closely tie reimbursement to the relative cost of goods and services needed to provide high quality care.

We believe the introduction of the RUG–IV classification system better targets payments for beneficiaries with greater care needs, improving the accuracy of Medicare payment. In addition, RUG–IV changes such as eliminating the ''look-back'' period for preadmission services correct for existing vulnerabilities in the RUG–53 system. Therefore, we believe it would be prudent to move to RUG–IV as quickly as possible. Though we considered implementing the RUG–IV model for FY 2010, we are proposing to implement the system for FY 2011. Many of the refinements of the RUG–IV model are integrated into the MDS 3.0 resident assessment instrument. The transition to both the MDS 3.0 and the RUG–IV case-mix system requires careful planning, as it will affect multiple Medicare and Medicaid quality monitoring and production systems, including Medicaid PPS systems used by more than half the State agencies. In addition, State agencies, providers, and software vendors would benefit by receiving adequate time to prepare for a smooth transition. Therefore, we propose to implement RUG–IV for FY 2011.

D. Accounting Statement

As required by OMB Circular A–4 (available at *www.whitehouse.gov/omb/circulars/a004/a-4.pdf*), in Table 19

below, we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of this proposed rule. This table provides our best estimate of the change in Medicare payments under the SNF PPS as a result of the policies in this proposed rule based on the data for 15,307 SNFs in our database. All expenditures are classified as transfers from Medicare providers (that is, SNFs).

TABLE 19—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES, FROM THE 2009 SNF PPS FISCAL YEAR TO THE 2010 SNF PPS FISCAL YEAR

Category	Transfers
Annualized Monetized Transfers.	−$390 million*
From Whom To Whom?	Federal Government to SNF Medicare Providers.

*The net decrease of $390 million in transfer payments is a result of the decrease of $1.05 billion due to the proposed recalibration of the case-mix adjustment, together with the proposed market basket increase of $660 million.

E. Conclusion

Overall estimated payments for SNFs in FY 2010 are projected to decrease by $390 million, or 1.2 percent, compared with those in FY 2009. We estimate that SNFs in urban areas would experience a 1.3 percent decrease in estimated payments compared with FY 2009. We estimate that SNFs in rural areas would also experience a 1.3 percent decrease in estimated payments compared with FY 2009. Providers in the rural Pacific region and the rural New England region would both show decreases in payments of 1.7 percent.

Though the FY 2011 aggregate impact due to the introduction of the RUG–IV model shows no change in payments, there are distributional effects for providers due to Medicare utilization. These effects range from a decrease of 2.2 percent for hospital-based urban facilities to an increase of 2.4 percent for urban Outlying facilities. Finally, in accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

List of Subjects in 42 CFR Part 483

Grants programs-health, Health facilities, Health professions, Health records, Medicaid, Medicare, Nursing homes, Nutrition, Reporting and recordkeeping requirements, Safety.

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

PART 483—REQUIREMENTS FOR STATES AND LONG TERM CARE FACILITIES

1. The authority citation for part 483 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

Subpart B—Requirements for Long Term Care Facilities

2. Amend § 483.20 by—

A. Republishing paragraph (b)(1) introductory text.

B. Revising paragraph (b)(1)(xvii).

C. Revising paragraph (f)(2).

D. Revising paragraph (f)(3) heading and the introductory text.

The revisions read as follows:

§ 483.20 Resident assessment.

* * * * *

(b) *Comprehensive assessment*—(1) Resident assessment instrument. A facility must make a comprehensive assessment of a resident's needs, using the resident assessment instrument (RAI) specified by the State. The assessment must include at least the following:

* * * * *

(xvii) Documentation of summary information regarding the additional assessment performed on the care areas triggered by the completion of the Minimum Data Set (MDS).

* * * * *

(f) * * *

(2) *Transmitting data.* Within 7 days after a facility completes a resident's assessment, a facility must be capable of transmitting to the CMS System information for each resident contained in the MDS in a format that conforms to standard record layouts and data dictionaries, and that passes standardized edits defined by CMS and the State.

(3) *Transmittal requirements.* Within 14 days after a facility completes a resident's assessments, a facility must electronically transmit encoded, accurate, complete MDS data to the CMS System, including the following:

* * * * *

3. Amend § 483.75 by revising the heading of paragraph (j) to read as follows:

§ 483.75 Administration.

* * * * *

(j) Laboratory services. * * *

* * * * *

Subpart F—Requirements That Must be Met by States and State Agencies, Resident Assessment

4. Amend § 483.315 by—

A. Revising paragraph (d)(2).

B. Revising paragraph (e).

C. Removing and reserving paragraph (f).

D. Revising paragraph (h).

E. Revising paragraph (i) heading and the introductory text.

F. Revising paragraph (i)(2).

The revisions read as follows:

§ 483.315 Specification of resident assessment instrument.

(d) * * *

(2) Care area triggers (CATs) that are necessary to accurately assess residents, established by CMS.

* * * * *

(e) Minimum data set (MDS). The MDS includes assessment in the areas specified in § 483.20(b)(i) through (xviii) of this chapter, and as defined in the RAI manual published in the State Operations Manual issued by CMS (CMS Pub. 100–07).

* * * * *

(h) *State MDS system and data base requirements.* As part of facility survey responsibilities, the State must:

(1) Support and maintain the CMS State system and database.

(2) Specify to a facility the method of transmission of data, and instruct the facility on this method.

(3) Upon receipt of facility data from CMS, ensure that a facility resolves all errors.

(4) Analyze data and generate reports, as specified by CMS.

(i) *State identification of agency that receives RAI data.* The State must identify the component agency that receives RAI data, and ensure that this agency restricts access to the data except for the following:

* * * * *

(2) Transmission of reports to CMS.

* * * * *

Authority: (Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: April 16, 2009.

Charlene Frizzera,

Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: April 30, 2009.

Kathleen Sebelius,

Secretary.

[Note: The following Addendum will not appear in the Code of Federal Regulations]

Addendum—FY 2010 CBSA Wage Index Tables

In this addendum, we provide the wage index tables referred to in the preamble to this proposed rule. Tables A and B display the CBSA-based wage index values for urban and rural providers.

Table A: FY 2010 WAGE INDEX FOR URBAN AREAS BASED ON CBSA LABOR MARKET AREAS

CBSA Code	Urban Area (Constituent Counties)	Wage Index
10180	Abilene, TX Callahan County, TX Jones County, TX Taylor County, TX	0.7953
10380	Aguadilla-Isabela-San Sebastián, PR Aguada Municipio, PR Aguadilla Municipio, PR Añasco Municipio, PR Isabela Municipio, PR Lares Municipio, PR Moca Municipio, PR Rincón Municipio, PR San Sebastián Municipio, PR	0.3465
10420	Akron, OH Portage County, OH Summit County, OH	0.8858
10500	Albany, GA Baker County, GA Dougherty County, GA Lee County, GA Terrell County, GA Worth County, GA	0.8907
10580	Albany-Schenectady-Troy, NY Albany County, NY Rensselaer County, NY Saratoga County, NY Schenectady County, NY Schoharie County, NY	0.8790
10740	Albuquerque, NM Bernalillo County, NM Sandoval County, NM Torrance County, NM Valencia County, NM	0.9408
10780	Alexandria, LA Grant Parish, LA Rapides Parish, LA	0.8020
10900	Allentown-Bethlehem-Easton, PA-NJ Warren County, NJ Carbon County, PA	0.9641

CBSA Code	Urban Area (Constituent Counties)	Wage Index
	Lehigh County, PA Northampton County, PA	
11020	Altoona, PA Blair County, PA	0.8871
11100	Amarillo, TX Armstrong County, TX Carson County, TX Potter County, TX Randall County, TX	0.8697
11180	Ames, IA Story County, IA	0.9505
11260	Anchorage, AK Anchorage Municipality, AK Matanuska-Susitna Borough, AK	1.2024
11300	Anderson, IN Madison County, IN	0.9060
11340	Anderson, SC Anderson County, SC	0.8819
11460	Ann Arbor, MI Washtenaw County, MI	1.0302
11500	Anniston-Oxford, AL Calhoun County, AL	0.7650
11540	Appleton, WI Calumet County, WI Outagamie County, WI	0.9298
11700	Asheville, NC Buncombe County, NC Haywood County, NC Henderson County, NC Madison County, NC	0.9079
12020	Athens-Clarke County, GA Clarke County, GA Madison County, GA Oconee County, GA Oglethorpe County, GA	0.9501
12060	Atlanta-Sandy Springs-Marietta, GA Barrow County, GA Bartow County, GA	0.9597

CBSA Code	Urban Area (Constituent Counties)	Wage Index
	Butts County, GA Carroll County, GA Cherokee County, GA Clayton County, GA Cobb County, GA Coweta County, GA Dawson County, GA DeKalb County, GA Douglas County, GA Fayette County, GA Forsyth County, GA Fulton County, GA Gwinnett County, GA Haralson County, GA Heard County, GA Henry County, GA Jasper County, GA Lamar County, GA Meriwether County, GA Newton County, GA Paulding County, GA Pickens County, GA Pike County, GA Rockdale County, GA Spalding County, GA Walton County, GA	
12100	Atlantic City-Hammonton, NJ Atlantic County, NJ	1.1565
12220	Auburn-Opelika, AL Lee County, AL	0.8146
12260	Augusta-Richmond County, GA-SC Burke County, GA Columbia County, GA McDuffie County, GA Richmond County, GA Aiken County, SC Edgefield County, SC	0.9125
12420	Austin-Round Rock, TX Bastrop County, TX Caldwell County, TX Hays County, TX	0.9535

CBSA Code	Urban Area (Constituent Counties)	Wage Index
	Travis County, TX Williamson County, TX	
12540	Bakersfield, CA Kern County, CA	1.1215
12580	Baltimore-Towson, MD Anne Arundel County, MD Baltimore County, MD Carroll County, MD Harford County, MD Howard County, MD Queen Anne's County, MD Baltimore City, MD	1.0223
12620	Bangor, ME Penobscot County, ME	1.0163
12700	Barnstable Town, MA Barnstable County, MA	1.2629
12940	Baton Rouge, LA Ascension Parish, LA East Baton Rouge Parish, LA East Feliciana Parish, LA Iberville Parish, LA Livingston Parish, LA Pointe Coupee Parish, LA St. Helena Parish, LA West Baton Rouge Parish, LA West Feliciana Parish, LA	0.8187
12980	Battle Creek, MI Calhoun County, MI	1.0009
13020	Bay City, MI Bay County, MI	0.9276
13140	Beaumont-Port Arthur, TX Hardin County, TX Jefferson County, TX Orange County, TX	0.8391
13380	Bellingham, WA Whatcom County, WA	1.1406
13460	Bend, OR Deschutes County, OR	1.1457

CBSA Code	Urban Area (Constituent Counties)	Wage Index
13644	Bethesda-Frederick-Gaithersburg, MD Frederick County, MD Montgomery County, MD	1.0307
13740	Billings, MT Carbon County, MT Yellowstone County, MT	0.8790
13780	Binghamton, NY Broome County, NY Tioga County, NY	0.8785
13820	Birmingham-Hoover, AL Bibb County, AL Blount County, AL Chilton County, AL Jefferson County, AL St. Clair County, AL Shelby County, AL Walker County, AL	0.8530
13900	Bismarck, ND Burleigh County, ND Morton County, ND	0.7644
13980	Blacksburg-Christiansburg-Radford, VA Giles County, VA Montgomery County, VA Pulaski County, VA Radford City, VA	0.8381
14020	Bloomington, IN Greene County, IN Monroe County, IN Owen County, IN	0.9031
14060	Bloomington-Normal, IL McLean County, IL	0.9387
14260	Boise City-Nampa, ID Ada County, ID Boise County, ID Canyon County, ID Gem County, ID Owyhee County, ID	0.9297
14484	Boston-Quincy, MA Norfolk County, MA Plymouth County, MA Suffolk County, MA	1.2160

CBSA Code	Urban Area (Constituent Counties)	Wage Index
14500	Boulder, CO Boulder County, CO	1.0276
14540	Bowling Green, KY Edmonson County, KY Warren County, KY	0.8474
14600	Bradenton-Sarasota-Venice, FL Manatee County, FL Sarasota County, FL	0.9741
14740	Bremerton-Silverdale, WA Kitsap County, WA	1.0765
14860	Bridgeport-Stamford-Norwalk, CT Fairfield County, CT	1.2798
15180	Brownsville-Harlingen, TX Cameron County, TX	0.9029
15260	Brunswick, GA Brantley County, GA Glynn County, GA McIntosh County, GA	0.9371
15380	Buffalo-Niagara Falls, NY Erie County, NY Niagara County, NY	0.9739
15500	Burlington, NC Alamance County, NC	0.8757
15540	Burlington-South Burlington, VT Chittenden County, VT Franklin County, VT Grand Isle County, VT	1.0116
15764	Cambridge-Newton-Framingham, MA Middlesex County, MA	1.1288
15804	Camden, NJ Burlington County, NJ Camden County, NJ Gloucester County, NJ	1.0146
15940	Canton-Massillon, OH Carroll County, OH Stark County, OH	0.8803
15980	Cape Coral-Fort Myers, FL Lee County, FL	0.9084

CBSA Code	Urban Area (Constituent Counties)	Wage Index
16020	Cape Girardeau-Jackson, MO-IL Alexander County, IL Bollinger County, MO Cape Girardeau County, MO	0.9055
16180	Carson City, NV Carson City, NV	1.0540
16220	Casper, WY Natrona County, WY	0.9529
16300	Cedar Rapids, IA Benton County, IA Jones County, IA Linn County, IA	0.8992
16580	Champaign-Urbana, IL Champaign County, IL Ford County, IL Piatt County, IL	1.0117
16620	Charleston, WV Boone County, WV Clay County, WV Kanawha County, WV Lincoln County, WV Putnam County, WV	0.8149
16700	Charleston-North Charleston-Summerville, SC Berkeley County, SC Charleston County, SC Dorchester County, SC	0.9258
16740	Charlotte-Gastonia-Concord, NC-SC Anson County, NC Cabarrus County, NC Gaston County, NC Mecklenburg County, NC Union County, NC York County, SC	0.9483
16820	Charlottesville, VA Albemarle County, VA Fluvanna County, VA Greene County, VA Nelson County, VA Charlottesville City, VA	0.9380
16860	Chattanooga, TN-GA Catoosa County, GA	0.8839

CBSA Code	Urban Area (Constituent Counties)	Wage Index
	Dade County, GA Walker County, GA Hamilton County, TN Marion County, TN Sequatchie County, TN	
16940	Cheyenne, WY Laramie County, WY	0.9353
16974	Chicago-Naperville-Joliet, IL Cook County, IL DeKalb County, IL DuPage County, IL Grundy County, IL Kane County, IL Kendall County, IL McHenry County, IL Will County, IL	1.0478
17020	Chico, CA Butte County, CA	1.1209
17140	Cincinnati-Middletown, OH-KY-IN Dearborn County, IN Franklin County, IN Ohio County, IN Boone County, KY Bracken County, KY Campbell County, KY Gallatin County, KY Grant County, KY Kenton County, KY Pendleton County, KY Brown County, OH Butler County, OH Clermont County, OH Hamilton County, OH Warren County, OH	0.9488
17300	Clarksville, TN-KY Christian County, KY Trigg County, KY Montgomery County, TN Stewart County, TN	0.7987
17420	Cleveland, TN Bradley County, TN	0.7571

CBSA Code	Urban Area (Constituent Counties)	Wage Index
	Polk County, TN	
17460	Cleveland-Elyria-Mentor, OH Cuyahoga County, OH Geauga County, OH Lake County, OH Lorain County, OH Medina County, OH	0.8922
17660	Coeur d'Alene, ID Kootenai County, ID	0.9243
17780	College Station-Bryan, TX Brazos County, TX Burleson County, TX Robertson County, TX	0.9507
17820	Colorado Springs, CO El Paso County, CO Teller County, CO	0.9830
17860	Columbia, MO Boone County, MO Howard County, MO	0.8625
17900	Columbia, SC Calhoun County, SC Fairfield County, SC Kershaw County, SC Lexington County, SC Richland County, SC Saluda County, SC	0.8757
17980	Columbus, GA-AL Russell County, AL Chattahoochee County, GA Harris County, GA Marion County, GA Muscogee County, GA	0.8732
18020	Columbus, IN Bartholomew County, IN	0.9545
18140	Columbus, OH Delaware County, OH Fairfield County, OH Franklin County, OH Licking County, OH Madison County, OH	1.0092

CBSA Code	Urban Area (Constituent Counties)	Wage Index
	Morrow County, OH Pickaway County, OH Union County, OH	
18580	Corpus Christi, TX Aransas County, TX Nueces County, TX San Patricio County, TX	0.8701
18700	Corvallis, OR Benton County, OR	1.1013
19060	Cumberland, MD-WV Allegany County, MD Mineral County, WV	0.8053
19124	Dallas-Plano-Irving, TX Collin County, TX Dallas County, TX Delta County, TX Denton County, TX Ellis County, TX Hunt County, TX Kaufman County, TX Rockwall County, TX	0.9908
19140	Dalton, GA Murray County, GA Whitfield County, GA	0.8674
19180	Danville, IL Vermilion County, IL	0.8746
19260	Danville, VA Pittsylvania County, VA Danville City, VA	0.8331
19340	Davenport-Moline-Rock Island, IA-IL Henry County, IL Mercer County, IL Rock Island County, IL Scott County, IA	0.8291
19380	Dayton, OH Greene County, OH Miami County, OH Montgomery County, OH Preble County, OH	0.9220
19460	Decatur, AL Lawrence County, AL	0.7806

CBSA Code	Urban Area (Constituent Counties)	Wage Index
	Morgan County, AL	
19500	Decatur, IL Macon County, IL	0.8002
19660	Deltona-Daytona Beach-Ormond Beach, FL Volusia County, FL	0.8874
19740	Denver-Aurora-Broomfield, CO Adams County, CO Arapahoe County, CO Broomfield County, CO Clear Creek County, CO Denver County, CO Douglas County, CO Elbert County, CO Gilpin County, CO Jefferson County, CO Park County, CO	1.0733
19780	Des Moines-West Des Moines, IA Dallas County, IA Guthrie County, IA Madison County, IA Polk County, IA Warren County, IA	0.9658
19804	Detroit-Livonia-Dearborn, MI Wayne County, MI	0.9737
20020	Dothan, AL Geneva County, AL Henry County, AL Houston County, AL	0.7413
20100	Dover, DE Kent County, DE	0.9940
20220	Dubuque, IA Dubuque County, IA	0.8877
20260	Duluth, MN-WI Carlton County, MN St. Louis County, MN Douglas County, WI	1.0458

CBSA Code	Urban Area (Constituent Counties)	Wage Index
20500	Durham-Chapel Hill, NC Chatham County, NC Durham County, NC Orange County, NC Person County, NC	0.9548
20740	Eau Claire, WI Chippewa County, WI Eau Claire County, WI	0.9575
20764	Edison-New Brunswick, NJ Middlesex County, NJ Monmouth County, NJ Ocean County, NJ Somerset County, NJ	1.1072
20940	El Centro, CA Imperial County, CA	0.8774
21060	Elizabethtown, KY Hardin County, KY Larue County, KY	0.8396
21140	Elkhart-Goshen, IN Elkhart County, IN	0.9497
21300	Elmira, NY Chemung County, NY	0.8348
21340	El Paso, TX El Paso County, TX	0.8549
21500	Erie, PA Erie County, PA	0.8464
21660	Eugene-Springfield, OR Lane County, OR	1.1045
21780	Evansville, IN-KY Gibson County, IN Posey County, IN Vanderburgh County, IN Warrick County, IN Henderson County, KY Webster County, KY	0.8530
21820	Fairbanks, AK Fairbanks North Star Borough, AK	1.1124

CBSA Code	Urban Area (Constituent Counties)	Wage Index
21940	Fajardo, PR Ceiba Municipio, PR Fajardo Municipio, PR Luquillo Municipio, PR	0.3793
22020	Fargo, ND-MN Cass County, ND Clay County, MN	0.8180
22140	Farmington, NM San Juan County, NM	0.7896
22180	Fayetteville, NC Cumberland County, NC Hoke County, NC	0.9366
22220	Fayetteville-Springdale-Rogers, AR-MO Benton County, AR Madison County, AR Washington County, AR McDonald County, MO	0.8772
22380	Flagstaff, AZ Coconino County, AZ	1.2486
22420	Flint, MI Genesee County, MI	1.1134
22500	Florence, SC Darlington County, SC Florence County, SC	0.8141
22520	Florence-Muscle Shoals, AL Colbert County, AL Lauderdale County, AL	0.7981
22540	Fond du Lac, WI Fond du Lac County, WI	0.9669
22660	Fort Collins-Loveland, CO Larimer County, CO	1.0184
22744	Fort Lauderdale-Pompano Beach-Deerfield Beach, FL Broward County, FL	1.0393
22900	Fort Smith, AR-OK Crawford County, AR Franklin County, AR Sebastian County, AR Le Flore County, OK	0.7868

CBSA Code	Urban Area (Constituent Counties)	Wage Index
	Sequoyah County, OK	
23020	Fort Walton Beach-Crestview-Destin, FL Okaloosa County, FL	0.8766
23060	Fort Wayne, IN Allen County, IN Wells County, IN Whitley County, IN	0.9020
23104	Fort Worth-Arlington, TX Johnson County, TX Parker County, TX Tarrant County, TX Wise County, TX	0.9508
23420	Fresno, CA Fresno County, CA	1.1252
23460	Gadsden, AL Etowah County, AL	0.8274
23540	Gainesville, FL Alachua County, FL Gilchrist County, FL	0.8987
23580	Gainesville, GA Hall County, GA	0.9131
23844	Gary, IN Jasper County, IN Lake County, IN Newton County, IN Porter County, IN	0.9309
24020	Glens Falls, NY Warren County, NY Washington County, NY	0.8464
24140	Goldsboro, NC Wayne County, NC	0.9064
24220	Grand Forks, ND-MN Polk County, MN Grand Forks County, ND	0.7782
24300	Grand Junction, CO Mesa County, CO	0.9730

CBSA Code	Urban Area (Constituent Counties)	Wage Index
24340	Grand Rapids-Wyoming, MI Barry County, MI Ionia County, MI Kent County, MI Newaygo County, MI	0.9187
24500	Great Falls, MT Cascade County, MT	0.8361
24540	Greeley, CO Weld County, CO	0.9587
24580	Green Bay, WI Brown County, WI Kewaunee County, WI Oconto County, WI	0.9630
24660	Greensboro-High Point, NC Guilford County, NC Randolph County, NC Rockingham County, NC	0.9071
24780	Greenville, NC Greene County, NC Pitt County, NC	0.9410
24860	Greenville-Mauldin-Easley, SC Greenville County, SC Laurens County, SC Pickens County, SC	0.9940
25020	Guayama, PR Arroyo Municipio, PR Guayama Municipio, PR Patillas Municipio, PR	0.3540
25060	Gulfport-Biloxi, MS Hancock County, MS Harrison County, MS Stone County, MS	0.8791
25180	Hagerstown-Martinsburg, MD-WV Washington County, MD Berkeley County, WV Morgan County, WV	0.8973
25260	Hanford-Corcoran, CA Kings County, CA	1.1020
25420	Harrisburg-Carlisle, PA Cumberland County, PA	0.9294

CBSA Code	Urban Area (Constituent Counties)	Wage Index
	Dauphin County, PA Perry County, PA	
25500	Harrisonburg, VA Rockingham County, VA Harrisonburg City, VA	0.9033
25540	Hartford-West Hartford-East Hartford, CT Hartford County, CT Middlesex County, CT Tolland County, CT	1.1190
25620	Hattiesburg, MS Forrest County, MS Lamar County, MS Perry County, MS	0.7669
25860	Hickory-Lenoir-Morganton, NC Alexander County, NC Burke County, NC Caldwell County, NC Catawba County, NC	0.9005
25980	Hinesville-Fort Stewart, GA[1] Liberty County, GA Long County, GA	0.9029
26100	Holland-Grand Haven, MI Ottawa County, MI	0.8704
26180	Honolulu, HI Honolulu County, HI	1.1664
26300	Hot Springs, AR Garland County, AR	0.9013
26380	Houma-Bayou Cane-Thibodaux, LA Lafourche Parish, LA Terrebonne Parish, LA	0.7882
26420	Houston-Sugar Land-Baytown, TX Austin County, TX Brazoria County, TX Chambers County, TX Fort Bend County, TX Galveston County, TX Harris County, TX Liberty County, TX Montgomery County, TX San Jacinto County, TX	0.9842

CBSA Code	Urban Area (Constituent Counties)	Wage Index
	Waller County, TX	
26580	Huntington-Ashland, WV-KY-OH Boyd County, KY Greenup County, KY Lawrence County, OH Cabell County, WV Wayne County, WV	0.9105
26620	Huntsville, AL Limestone County, AL Madison County, AL	0.9073
26820	Idaho Falls, ID Bonneville County, ID Jefferson County, ID	0.9445
26900	Indianapolis-Carmel, IN Boone County, IN Brown County, IN Hamilton County, IN Hancock County, IN Hendricks County, IN Johnson County, IN Marion County, IN Morgan County, IN Putnam County, IN Shelby County, IN	0.9930
26980	Iowa City, IA Johnson County, IA Washington County, IA	0.9557
27060	Ithaca, NY Tompkins County, NY	1.0121
27100	Jackson, MI Jackson County, MI	0.8728
27140	Jackson, MS Copiah County, MS Hinds County, MS Madison County, MS Rankin County, MS Simpson County, MS	0.8193
27180	Jackson, TN Chester County, TN Madison County, TN	0.8589

CBSA Code	Urban Area (Constituent Counties)	Wage Index
27260	Jacksonville, FL Baker County, FL Clay County, FL Duval County, FL Nassau County, FL St. Johns County, FL	0.9114
27340	Jacksonville, NC Onslow County, NC	0.8033
27500	Janesville, WI Rock County, WI	0.9209
27620	Jefferson City, MO Callaway County, MO Cole County, MO Moniteau County, MO Osage County, MO	0.8717
27740	Johnson City, TN Carter County, TN Unicoi County, TN Washington County, TN	0.7481
27780	Johnstown, PA Cambria County, PA	0.8241
27860	Jonesboro, AR Craighead County, AR Poinsett County, AR	0.7729
27900	Joplin, MO Jasper County, MO Newton County, MO	0.8292
28020	Kalamazoo-Portage, MI Kalamazoo County, MI Van Buren County, MI	1.0273
28100	Kankakee-Bradley, IL Kankakee County, IL	1.0183
28140	Kansas City, MO-KS Franklin County, KS Johnson County, KS Leavenworth County, KS Linn County, KS Miami County, KS Wyandotte County, KS Bates County, MO	0.9701

CBSA Code	Urban Area (Constituent Counties)	Wage Index
	Caldwell County, MO Cass County, MO Clay County, MO Clinton County, MO Jackson County, MO Lafayette County, MO Platte County, MO Ray County, MO	
28420	Kennewick-Pasco-Richland, WA Benton County, WA Franklin County, WA	1.0458
28660	Killeen-Temple-Fort Hood, TX Bell County, TX Coryell County, TX Lampasas County, TX	0.8710
28700	Kingsport-Bristol-Bristol, TN-VA Hawkins County, TN Sullivan County, TN Bristol City, VA Scott County, VA Washington County, VA	0.7974
28740	Kingston, NY Ulster County, NY	0.9375
28940	Knoxville, TN Anderson County, TN Blount County, TN Knox County, TN Loudon County, TN Union County, TN	0.7888
29020	Kokomo, IN Howard County, IN Tipton County, IN	0.9825
29100	La Crosse, WI-MN Houston County, MN La Crosse County, WI	0.9924
29140	Lafayette, IN Benton County, IN Carroll County, IN Tippecanoe County, IN	0.9189
29180	Lafayette, LA Lafayette Parish, LA St. Martin Parish, LA	0.8524

CBSA Code	Urban Area (Constituent Counties)	Wage Index
29340	Lake Charles, LA Calcasieu Parish, LA Cameron Parish, LA	0.7993
29404	Lake County-Kenosha County, IL-WI Lake County, IL Kenosha County, WI	1.0485
29420	Lake Havasu City-Kingman, AZ Mohave County, AZ	1.0577
29460	Lakeland-Winter Haven, FL Polk County, FL	0.8398
29540	Lancaster, PA Lancaster County, PA	0.9212
29620	Lansing-East Lansing, MI Clinton County, MI Eaton County, MI Ingham County, MI	0.9659
29700	Laredo, TX Webb County, TX	0.8082
29740	Las Cruces, NM Dona Ana County, NM	0.8947
29820	Las Vegas-Paradise, NV Clark County, NV	1.2133
29940	Lawrence, KS Douglas County, KS	0.8588
30020	Lawton, OK Comanche County, OK	0.7854
30140	Lebanon, PA Lebanon County, PA	0.8127
30300	Lewiston, ID-WA Nez Perce County, ID Asotin County, WA	0.9579
30340	Lewiston-Auburn, ME Androscoggin County, ME	0.9093
30460	Lexington-Fayette, KY Bourbon County, KY Clark County, KY Fayette County, KY	0.8897

CBSA Code	Urban Area (Constituent Counties)	Wage Index
	Jessamine County, KY Scott County, KY Woodford County, KY	
30620	Lima, OH Allen County, OH	0.9371
30700	Lincoln, NE Lancaster County, NE Seward County, NE	0.9572
30780	Little Rock-North Little Rock-Conway, AR Faulkner County, AR Grant County, AR Lonoke County, AR Perry County, AR Pulaski County, AR Saline County, AR	0.8550
30860	Logan, UT-ID Franklin County, ID Cache County, UT	0.9001
30980	Longview, TX Gregg County, TX Rusk County, TX Upshur County, TX	0.8056
31020	Longview, WA Cowlitz County, WA	1.0716
31084	Los Angeles-Long Beach-Santa Ana, CA Los Angeles County, CA	1.2025
31140	Louisville-Jefferson County, KY-IN Clark County, IN Floyd County, IN Harrison County, IN Washington County, IN Bullitt County, KY Henry County, KY Meade County, KY Nelson County, KY Oldham County, KY Shelby County, KY Spencer County, KY Trimble County, KY	0.8972

CBSA Code	Urban Area (Constituent Counties)	Wage Index
31180	Lubbock, TX Crosby County, TX Lubbock County, TX	0.8759
31340	Lynchburg, VA Amherst County, VA Appomattox County, VA Bedford County, VA Campbell County, VA Bedford City, VA Lynchburg City, VA	0.8529
31420	Macon, GA Bibb County, GA Crawford County, GA Jones County, GA Monroe County, GA Twiggs County, GA	0.9835
31460	Madera-Chowchilla, CA Madera County, CA	0.7965
31540	Madison, WI Columbia County, WI Dane County, WI Iowa County, WI	1.1245
31700	Manchester-Nashua, NH Hillsborough County, NH	1.0180
31740	Manhattan, KS Geary County, KS Pottawatomie County, KS Riley County, KS	0.7885
31860	Mankato-North Mankato, MN Blue Earth County, MN Nicollet County, MN	0.9185
31900	Mansfield, OH Richland County, OH	0.9108
32420	Mayagüez, PR Hormigueros Municipio, PR Mayagüez Municipio, PR	0.3708
32580	McAllen-Edinburg-Mission, TX Hidalgo County, TX	0.8828

CBSA Code	Urban Area (Constituent Counties)	Wage Index
32780	Medford, OR Jackson County, OR	1.0093
32820	Memphis, TN-MS-AR Crittenden County, AR DeSoto County, MS Marshall County, MS Tate County, MS Tunica County, MS Fayette County, TN Shelby County, TN Tipton County, TN	0.9277
32900	Merced, CA Merced County, CA	1.0452
33124	Miami-Miami Beach-Kendall, FL Miami-Dade County, FL	0.9964
33140	Michigan City-La Porte, IN LaPorte County, IN	0.9320
33260	Midland, TX Midland County, TX	0.9555
33340	Milwaukee-Waukesha-West Allis, WI Milwaukee County, WI Ozaukee County, WI Washington County, WI Waukesha County, WI	1.0160
33460	Minneapolis-St. Paul-Bloomington, MN-WI Anoka County, MN Carver County, MN Chisago County, MN Dakota County, MN Hennepin County, MN Isanti County, MN Ramsey County, MN Scott County, MN Sherburne County, MN Washington County, MN Wright County, MN Pierce County, WI St. Croix County, WI	1.1108

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33540	Missoula, MT Missoula County, MT	0.9215
33660	Mobile, AL Mobile County, AL	0.7792
33700	Modesto, CA Stanislaus County, CA	1.2514
33740	Monroe, LA Ouachita Parish, LA Union Parish, LA	0.7759
33780	Monroe, MI Monroe County, MI	0.8893
33860	Montgomery, AL Autauga County, AL Elmore County, AL Lowndes County, AL Montgomery County, AL	0.8312
34060	Morgantown, WV Monongalia County, WV Preston County, WV	0.8467
34100	Morristown, TN Grainger County, TN Hamblen County, TN Jefferson County, TN	0.7208
34580	Mount Vernon-Anacortes, WA Skagit County, WA	1.0462
34620	Muncie, IN Delaware County, IN	0.8247
34740	Muskegon-Norton Shores, MI Muskegon County, MI	0.9832
34820	Myrtle Beach-North Myrtle Beach-Conway, SC Horry County, SC	0.8736
34900	Napa, CA Napa County, CA	1.4449
34940	Naples-Marco Island, FL Collier County, FL	0.9671

CBSA Code	Urban Area (Constituent Counties)	Wage Index
34980	Nashville-Davidson--Murfreesboro--Franklin, TN Cannon County, TN Cheatham County, TN Davidson County, TN Dickson County, TN Hickman County, TN Macon County, TN Robertson County, TN Rutherford County, TN Smith County, TN Sumner County, TN Trousdale County, TN Williamson County, TN Wilson County, TN	0.9700
35004	Nassau-Suffolk, NY Nassau County, NY Suffolk County, NY	1.2471
35084	Newark-Union, NJ-PA Essex County, NJ Hunterdon County, NJ Morris County, NJ Sussex County, NJ Union County, NJ Pike County, PA	1.1420
35300	New Haven-Milford, CT New Haven County, CT	1.1496
35380	New Orleans-Metairie-Kenner, LA Jefferson Parish, LA Orleans Parish, LA Plaquemines Parish, LA St. Bernard Parish, LA St. Charles Parish, LA St. John the Baptist Parish, LA St. Tammany Parish, LA	0.9100
35644	New York-White Plains-Wayne, NY-NJ Bergen County, NJ Hudson County, NJ Passaic County, NJ Bronx County, NY Kings County, NY New York County, NY Putnam County, NY	1.2982

CBSA Code	Urban Area (Constituent Counties)	Wage Index
	Queens County, NY Richmond County, NY Rockland County, NY Westchester County, NY	
35660	Niles-Benton Harbor, MI Berrien County, MI	0.8911
35980	Norwich-New London, CT New London County, CT	1.1409
36084	Oakland-Fremont-Hayward, CA Alameda County, CA Contra Costa County, CA	1.6331
36100	Ocala, FL Marion County, FL	0.8564
36140	Ocean City, NJ Cape May County, NJ	1.0169
36220	Odessa, TX Ector County, TX	0.9871
36260	Ogden-Clearfield, UT Davis County, UT Morgan County, UT Weber County, UT	0.9369
36420	Oklahoma City, OK Canadian County, OK Cleveland County, OK Grady County, OK Lincoln County, OK Logan County, OK McClain County, OK Oklahoma County, OK	0.8909
36500	Olympia, WA Thurston County, WA	1.1541
36540	Omaha-Council Bluffs, NE-IA Harrison County, IA Mills County, IA Pottawattamie County, IA Cass County, NE Douglas County, NE Sarpy County, NE Saunders County, NE	0.9617

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	Washington County, NE	
36740	Orlando-Kissimmee, FL Lake County, FL Orange County, FL Osceola County, FL Seminole County, FL	0.8964
36780	Oshkosh-Neenah, WI Winnebago County, WI	0.9160
36980	Owensboro, KY Daviess County, KY Hancock County, KY McLean County, KY	0.8365
37100	Oxnard-Thousand Oaks-Ventura, CA Ventura County, CA	1.2299
37340	Palm Bay-Melbourne-Titusville, FL Brevard County, FL	0.9069
37380	Palm Coast, FL Flagler County, FL	0.9612
37460	Panama City-Lynn Haven-Panama City Beach, FL Bay County, FL	0.8332
37620	Parkersburg-Marietta-Vienna, WV-OH Washington County, OH Pleasants County, WV Wirt County, WV Wood County, WV	0.7723
37700	Pascagoula, MS George County, MS Jackson County, MS	0.8441
37764	Peabody, MA Essex County, MA	1.0881
37860	Pensacola-Ferry Pass-Brent, FL Escambia County, FL Santa Rosa County, FL	0.8311
37900	Peoria, IL Marshall County, IL Peoria County, IL Stark County, IL	0.9122

CBSA Code	Urban Area (Constituent Counties)	Wage Index
	Tazewell County, IL Woodford County, IL	
37964	Philadelphia, PA Bucks County, PA Chester County, PA Delaware County, PA Montgomery County, PA Philadelphia County, PA	1.0735
38060	Phoenix-Mesa-Scottsdale, AZ Maricopa County, AZ Pinal County, AZ	1.0640
38220	Pine Bluff, AR Cleveland County, AR Jefferson County, AR Lincoln County, AR	0.7288
38300	Pittsburgh, PA Allegheny County, PA Armstrong County, PA Beaver County, PA Butler County, PA Fayette County, PA Washington County, PA Westmoreland County, PA	0.8604
38340	Pittsfield, MA Berkshire County, MA	1.0668
38540	Pocatello, ID Bannock County, ID Power County, ID	0.9247
38660	Ponce, PR Juana Díaz Municipio, PR Ponce Municipio, PR Villalba Municipio, PR	0.4224
38860	Portland-South Portland-Biddeford, ME Cumberland County, ME Sagadahoc County, ME York County, ME	1.0196
38900	Portland-Vancouver-Beaverton, OR-WA Clackamas County, OR Columbia County, OR Multnomah County, OR Washington County, OR	1.1502

CBSA Code	Urban Area (Constituent Counties)	Wage Index
	Yamhill County, OR Clark County, WA Skamania County, WA	
38940	Port St. Lucie, FL Martin County, FL St. Lucie County, FL	0.9906
39100	Poughkeepsie-Newburgh-Middletown, NY Dutchess County, NY Orange County, NY	1.1238
39140	Prescott, AZ Yavapai County, AZ	1.0130
39300	Providence-New Bedford-Fall River, RI-MA Bristol County, MA Bristol County, RI Kent County, RI Newport County, RI Providence County, RI Washington County, RI	1.0792
39340	Provo-Orem, UT Juab County, UT Utah County, UT	0.9556
39380	Pueblo, CO Pueblo County, CO	0.8578
39460	Punta Gorda, FL Charlotte County, FL	0.8782
39540	Racine, WI Racine County, WI	0.9381
39580	Raleigh-Cary, NC Franklin County, NC Johnston County, NC Wake County, NC	0.9656
39660	Rapid City, SD Meade County, SD Pennington County, SD	1.0055
39740	Reading, PA Berks County, PA	0.9271
39820	Redding, CA Shasta County, CA	1.4027

CBSA Code	Urban Area (Constituent Counties)	Wage Index
39900	Reno-Sparks, NV Storey County, NV Washoe County, NV	1.0295
40060	Richmond, VA Amelia County, VA Caroline County, VA Charles City County, VA Chesterfield County, VA Cumberland County, VA Dinwiddie County, VA Goochland County, VA Hanover County, VA Henrico County, VA King and Queen County, VA King William County, VA Louisa County, VA New Kent County, VA Powhatan County, VA Prince George County, VA Sussex County, VA Colonial Heights City, VA Hopewell City, VA Petersburg City, VA Richmond City, VA	0.9530
40140	Riverside-San Bernardino-Ontario, CA Riverside County, CA San Bernardino County, CA	1.1234
40220	Roanoke, VA Botetourt County, VA Craig County, VA Franklin County, VA Roanoke County, VA Roanoke City, VA Salem City, VA	0.8642
40340	Rochester, MN Dodge County, MN Olmsted County, MN Wabasha County, MN	1.1146
40380	Rochester, NY Livingston County, NY Monroe County, NY Ontario County, NY	0.8652

CBSA Code	Urban Area (Constituent Counties)	Wage Index
	Orleans County, NY Wayne County, NY	
40420	Rockford, IL Boone County, IL Winnebago County, IL	1.0162
40484	Rockingham County, NH Rockingham County, NH Strafford County, NH	1.0134
40580	Rocky Mount, NC Edgecombe County, NC Nash County, NC	0.8853
40660	Rome, GA Floyd County, GA	0.8923
40900	Sacramento--Arden-Arcade--Roseville, CA El Dorado County, CA Placer County, CA Sacramento County, CA Yolo County, CA	1.4031
40980	Saginaw-Saginaw Township North, MI Saginaw County, MI	0.9127
41060	St. Cloud, MN Benton County, MN Stearns County, MN	1.1117
41100	St. George, UT Washington County, UT	0.9245
41140	St. Joseph, MO-KS Doniphan County, KS Andrew County, MO Buchanan County, MO DeKalb County, MO	1.0198
41180	St. Louis, MO-IL Bond County, IL Calhoun County, IL Clinton County, IL Jersey County, IL Macoupin County, IL Madison County, IL Monroe County, IL St. Clair County, IL Crawford County, MO	0.9110

CBSA Code	Urban Area (Constituent Counties)	Wage Index
	Franklin County, MO Jefferson County, MO Lincoln County, MO St. Charles County, MO St. Louis County, MO Warren County, MO Washington County, MO St. Louis City, MO	
41420	Salem, OR Marion County, OR Polk County, OR	1.0985
41500	Salinas, CA Monterey County, CA	1.5221
41540	Salisbury, MD Somerset County, MD Wicomico County, MD	0.9119
41620	Salt Lake City, UT Salt Lake County, UT Summit County, UT Tooele County, UT	0.9387
41660	San Angelo, TX Irion County, TX Tom Green County, TX	0.7921
41700	San Antonio, TX Atascosa County, TX Bandera County, TX Bexar County, TX Comal County, TX Guadalupe County, TX Kendall County, TX Medina County, TX Wilson County, TX	0.8853
41740	San Diego-Carlsbad-San Marcos, CA San Diego County, CA	1.1759
41780	Sandusky, OH Erie County, OH	0.8896
41884	San Francisco-San Mateo-Redwood City, CA Marin County, CA San Francisco County, CA San Mateo County, CA	1.5963

CBSA Code	Urban Area (Constituent Counties)	Wage Index
41900	San Germán-Cabo Rojo, PR Cabo Rojo Municipio, PR Lajas Municipio, PR Sabana Grande Municipio, PR San Germán Municipio, PR	0.4745
41940	San Jose-Sunnyvale-Santa Clara, CA San Benito County, CA Santa Clara County, CA	1.6399
41980	San Juan-Caguas-Guaynabo, PR Aguas Buenas Municipio, PR Aibonito Municipio, PR Arecibo Municipio, PR Barceloneta Municipio, PR Barranquitas Municipio, PR Bayamón Municipio, PR Caguas Municipio, PR Camuy Municipio, PR Canóvanas Municipio, PR Carolina Municipio, PR Cataño Municipio, PR Cayey Municipio, PR Ciales Municipio, PR Cidra Municipio, PR Comerío Municipio, PR Corozal Municipio, PR Dorado Municipio, PR Florida Municipio, PR Guaynabo Municipio, PR Gurabo Municipio, PR Hatillo Municipio, PR Humacao Municipio, PR Juncos Municipio, PR Las Piedras Municipio, PR Loíza Municipio, PR Manatí Municipio, PR Maunabo Municipio, PR Morovis Municipio, PR Naguabo Municipio, PR Naranjito Municipio, PR Orocovis Municipio, PR Quebradillas Municipio, PR Río Grande Municipio, PR San Juan Municipio, PR	0.4367

CBSA Code	Urban Area (Constituent Counties)	Wage Index
	San Lorenzo Municipio, PR Toa Alta Municipio, PR Toa Baja Municipio, PR Trujillo Alto Municipio, PR Vega Alta Municipio, PR Vega Baja Municipio, PR Yabucoa Municipio, PR	
42020	San Luis Obispo-Paso Robles, CA San Luis Obispo County, CA	1.2561
42044	Santa Ana-Anaheim-Irvine, CA Orange County, CA	1.1977
42060	Santa Barbara-Santa Maria-Goleta, CA Santa Barbara County, CA	1.2333
42100	Santa Cruz-Watsonville, CA Santa Cruz County, CA	1.6749
42140	Santa Fe, NM Santa Fe County, NM	1.0704
42220	Santa Rosa-Petaluma, CA Sonoma County, CA	1.5914
42340	Savannah, GA Bryan County, GA Chatham County, GA Effingham County, GA	0.9051
42540	Scranton--Wilkes-Barre, PA Lackawanna County, PA Luzerne County, PA Wyoming County, PA	0.8382
42644	Seattle-Bellevue-Everett, WA King County, WA Snohomish County, WA	1.1587
42680	Sebastian-Vero Beach, FL Indian River County, FL	0.9370
43100	Sheboygan, WI Sheboygan County, WI	0.9174
43300	Sherman-Denison, TX Grayson County, TX	0.8071

CBSA Code	Urban Area (Constituent Counties)	Wage Index
43340	Shreveport-Bossier City, LA Bossier Parish, LA Caddo Parish, LA De Soto Parish, LA	0.8391
43580	Sioux City, IA-NE-SD Woodbury County, IA Dakota County, NE Dixon County, NE Union County, SD	0.9103
43620	Sioux Falls, SD Lincoln County, SD McCook County, SD Minnehaha County, SD Turner County, SD	0.8991
43780	South Bend-Mishawaka, IN-MI St. Joseph County, IN Cass County, MI	0.9699
43900	Spartanburg, SC Spartanburg County, SC	0.9350
44060	Spokane, WA Spokane County, WA	1.0453
44100	Springfield, IL Menard County, IL Sangamon County, IL	0.9554
44140	Springfield, MA Franklin County, MA Hampden County, MA Hampshire County, MA	1.0384
44180	Springfield, MO Christian County, MO Dallas County, MO Greene County, MO Polk County, MO Webster County, MO	0.8058
44220	Springfield, OH Clark County, OH	0.9203
44300	State College, PA Centre County, PA	0.9104

CBSA Code	Urban Area (Constituent Counties)	Wage Index
44700	Stockton, CA San Joaquin County, CA	1.2306
44940	Sumter, SC Sumter County, SC	0.8159
45060	Syracuse, NY Madison County, NY Onondaga County, NY Oswego County, NY	0.9790
45104	Tacoma, WA Pierce County, WA	1.1206
45220	Tallahassee, FL Gadsden County, FL Jefferson County, FL Leon County, FL Wakulla County, FL	0.8414
45300	Tampa-St. Petersburg-Clearwater, FL Hernando County, FL Hillsborough County, FL Pasco County, FL Pinellas County, FL	0.8990
45460	Terre Haute, IN Clay County, IN Sullivan County, IN Vermillion County, IN Vigo County, IN	0.8967
45500	Texarkana, TX-Texarkana, AR Miller County, AR Bowie County, TX	0.8121
45780	Toledo, OH Fulton County, OH Lucas County, OH Ottawa County, OH Wood County, OH	0.9549
45820	Topeka, KS Jackson County, KS Jefferson County, KS Osage County, KS Shawnee County, KS Wabaunsee County, KS	0.8838

CBSA Code	Urban Area (Constituent Counties)	Wage Index
45940	Trenton-Ewing, NJ Mercer County, NJ	1.0561
46060	Tucson, AZ Pima County, AZ	0.9514
46140	Tulsa, OK Creek County, OK Okmulgee County, OK Osage County, OK Pawnee County, OK Rogers County, OK Tulsa County, OK Wagoner County, OK	0.8670
46220	Tuscaloosa, AL Greene County, AL Hale County, AL Tuscaloosa County, AL	0.8706
46340	Tyler, TX Smith County, TX	0.8320
46540	Utica-Rome, NY Herkimer County, NY Oneida County, NY	0.8492
46660	Valdosta, GA Brooks County, GA Echols County, GA Lanier County, GA Lowndes County, GA	0.7952
46700	Vallejo-Fairfield, CA Solano County, CA	1.4948
47020	Victoria, TX Calhoun County, TX Goliad County, TX Victoria County, TX	0.8062
47220	Vineland-Millville-Bridgeton, NJ Cumberland County, NJ	1.0216
47260	Virginia Beach-Norfolk-Newport News, VA-NC Currituck County, NC Gloucester County, VA Isle of Wight County, VA James City County, VA Mathews County, VA	0.8969

CBSA Code	Urban Area (Constituent Counties)	Wage Index
	Surry County, VA York County, VA Chesapeake City, VA Hampton City, VA Newport News City, VA Norfolk City, VA Poquoson City, VA Portsmouth City, VA Suffolk City, VA Virginia Beach City, VA Williamsburg City, VA	
47300	Visalia-Porterville, CA Tulare County, CA	1.0231
47380	Waco, TX McLennan County, TX	0.8384
47580	Warner Robins, GA Houston County, GA	0.8762
47644	Warren-Troy-Farmington Hills, MI Lapeer County, MI Livingston County, MI Macomb County, MI Oakland County, MI St. Clair County, MI	0.9825
47894	Washington-Arlington-Alexandria, DC-VA-MD-WV District of Columbia, DC Calvert County, MD Charles County, MD Prince George's County, MD Arlington County, VA Clarke County, VA Fairfax County, VA Fauquier County, VA Loudoun County, VA Prince William County, VA Spotsylvania County, VA Stafford County, VA Warren County, VA Alexandria City, VA Fairfax City, VA Falls Church City, VA Fredericksburg City, VA	1.0891

CBSA Code	Urban Area (Constituent Counties)	Wage Index
	Manassas City, VA Manassas Park City, VA Jefferson County, WV	
47940	Waterloo-Cedar Falls, IA Black Hawk County, IA Bremer County, IA Grundy County, IA	0.8526
48140	Wausau, WI Marathon County, WI	0.9449
48260	Weirton-Steubenville, WV-OH Jefferson County, OH Brooke County, WV Hancock County, WV	0.7375
48300	Wenatchee-East Wenatchee, WA Chelan County, WA Douglas County, WA	0.9728
48424	West Palm Beach-Boca Raton-Boynton Beach, FL Palm Beach County, FL	0.9888
48540	Wheeling, WV-OH Belmont County, OH Marshall County, WV Ohio County, WV	0.6876
48620	Wichita, KS Butler County, KS Harvey County, KS Sedgwick County, KS Sumner County, KS	0.8978
48660	Wichita Falls, TX Archer County, TX Clay County, TX Wichita County, TX	0.9205
48700	Williamsport, PA Lycoming County, PA	0.7885
48864	Wilmington, DE-MD-NJ New Castle County, DE Cecil County, MD Salem County, NJ	1.0558
48900	Wilmington, NC Brunswick County, NC New Hanover County, NC	0.8994

CBSA Code	Urban Area (Constituent Counties)	Wage Index
	Pender County, NC	
49020	Winchester, VA-WV Frederick County, VA Winchester City, VA Hampshire County, WV	0.9786
49180	Winston-Salem, NC Davie County, NC Forsyth County, NC Stokes County, NC Yadkin County, NC	0.8942
49340	Worcester, MA Worcester County, MA	1.1099
49420	Yakima, WA Yakima County, WA	0.9958
49500	Yauco, PR Guánica Municipio, PR Guayanilla Municipio, PR Peñuelas Municipio, PR Yauco Municipio, PR	0.3351
49620	York-Hanover, PA York County, PA	0.9308
49660	Youngstown-Warren-Boardman, OH-PA Mahoning County, OH Trumbull County, OH Mercer County, PA	0.8615
49700	Yuba City, CA Sutter County, CA Yuba County, CA	1.1100
49740	Yuma, AZ Yuma County, AZ	0.9152

[1] At this time, there are no hospitals located in this urban area on which to base a wage index.

Table B: FY 2010 WAGE INDEX BASED ON CBSA LABOR MARKET AREAS FOR RURAL AREAS

State Code	Nonurban Area	Wage Index
1	Alabama	0.7335
2	Alaska	1.1680
3	Arizona	0.8801
4	Arkansas	0.7344
5	California	1.1864
6	Colorado	0.9938
7	Connecticut	1.1201
8	Delaware	0.9919
10	Florida	0.8574
11	Georgia	0.7635
12	Hawaii	1.1123
13	Idaho	0.7740
14	Illinois	0.8303
15	Indiana	0.8517
16	Iowa	0.8725
17	Kansas	0.8178

State Code	Nonurban Area	Wage Index
18	Kentucky	0.7810
19	Louisiana	0.7617
20	Maine	0.8587
21	Maryland	0.9139
22	Massachusetts[1]	1.1711
23	Michigan	0.8782
24	Minnesota	0.9182
25	Mississippi	0.7645
26	Missouri	0.7698
27	Montana	0.8424
28	Nebraska	0.8606
29	Nevada	0.9683
30	New Hampshire	0.9960
31	New Jersey[1]	-----
32	New Mexico	0.8946
33	New York	0.8261
34	North Carolina	0.8535

State Code	Nonurban Area	Wage Index
35	North Dakota	0.7792
36	Ohio	0.8504
37	Oklahoma	0.7661
38	Oregon	1.0249
39	Pennsylvania	0.8314
40	Puerto Rico[1]	0.4047
41	Rhode Island[1]	-----
42	South Carolina	0.8378
43	South Dakota	0.8413
44	Tennessee	0.7817
45	Texas	0.7773
46	Utah	0.8371
47	Vermont	0.9772
48	Virgin Islands	0.7423
49	Virginia	0.7876
50	Washington	1.0233
51	West Virginia	0.7403

State Code	Nonurban Area	Wage Index
52	Wisconsin	0.9211
53	Wyoming	0.9544
65	Guam	0.9611

[1] All counties within the State are classified as urban, with the exception of Massachusetts and Puerto Rico. Massachusetts and Puerto Rico have areas designated as rural; however, no short-term, acute care hospitals are located in the area(s) for FY 2010. The rural Massachusetts wage index is calculated as the average of all contiguous CBSAs. The Puerto Rico wage index is the same as FY 2009.

C: RUG-III to RUG-IV COMPARISON

MAJOR RUG- III CLASSIFICATION CATEGORY REQUIREMENTS	MAJOR RUG- IV CLASSIFICATION CATEGORY REQUIREMENTS	RUG-III			RUG-IV		
ULTRA HIGH REHABILITATION PLUS EXTENSIVE SERVICES	ULTRA HIGH REHABILITATION PLUS EXTENSIVE SERVICES	ADL	CODES	END SPLITS	ADL	CODES	END SPLITS
Residents needing both extensive medical services and physical or occupational therapy or speech-language pathology services. Rehabilitation Rx 720 minutes/week minimum AND At least 1 rehabilitation discipline 5 days/week AND A second rehabilitation discipline at least 3 days/week AND IV feeding in last 7 days OR IV medications, suctioning, tracheostomy care, or, ventilator/respirator in the last 14 days AND ADL score of 7 or more	Residents needing both extensive medical services and physical or occupational therapy or speech-language pathology services. Rehabilitation Rx 720 minutes/week minimum AND At least 1 rehabilitation discipline 5 days/week AND A second rehabilitation discipline at least 3 days/week AND Tracheostomy care, ventilator/respirator, or isolation for active infectious disease while a resident AND ADL score >=2	16-18	RUX	Not used	11-16	RUX	Not used
		7-15	RUL	Not used	2-10	RUL	Not used

VERY HIGH REHABILITATION PLUS EXTENSIVE SERVICES	VERY HIGH REHABILITATION PLUS EXTENSIVE SERVICES
Residents needing both extensive medical services and physical or occupational therapy or speech-language pathology services. Rehabilitation Rx 500 minutes/week minimum AND At least 1 rehabilitation discipline 5 days/week AND IV feeding in last 7 days OR IV medications, suctioning, tracheostomy care, or, ventilator/respirator in the last 14 days AND ADL score of 7 or more	Residents needing both extensive medical services and physical or occupational therapy or speech-language pathology services. Rehabilitation Rx 500 minutes/week minimum AND At least 1 rehabilitation discipline 5 days/week AND Tracheostomy care, ventilator/respirator, or isolation for active infectious disease while a resident AND ADL score >=2

ADL	CODES	END SPLITS	ADL	CODES	END SPLITS
16-18	RVX	Not used	11-16	RVX	Not used
7-15	RVL	Not used	2-10	RVL	Not used

HIGH REHABILITATION PLUS EXTENSIVE SERVICES	HIGH REHABILITATION PLUS EXTENSIVE SERVICES
Residents needing both extensive medical services and physical or occupational therapy or speech-language pathology services. Rehabilitation Rx 325 minutes/week minimum AND At least 1 rehabilitation discipline 5 days/week AND IV feeding in last 7 days OR IV medications, suctioning, tracheostomy care, or, ventilator/respirator in the last 14 days AND ADL score of 7 or more	Residents needing both extensive medical services and physical or occupational therapy or speech-language pathology services. Rehabilitation Rx 325 minutes/week minimum AND At least 1 rehabilitation discipline 5 days/week AND Tracheostomy care, ventilator/respirator, or isolation for active infectious disease while a resident AND ADL score >=2

ADL	CODES	END SPLITS	ADL	CODES	END SPLITS
13-18	RHX	Not used	11-16	RHX	Not used
7-12	RHL	Not used	2-10	RHL	Not used

MEDIUM REHABILITATION PLUS EXTENSIVE SERVICES	MEDIUM REHABILITATION PLUS EXTENSIVE SERVICES	ADL	CODES	END SPLITS	ADL	CODES	END SPLITS
Residents needing both extensive medical services and physical or occupational therapy or speech-language pathology services. Rehabilitation Rx 150 minutes/week minimum AND 5 days any combination of 3 rehabilitation disciplines; AND IV feeding in last 7 days OR IV medications, suctioning, tracheostomy care, or, ventilator/respirator in the last 14 days AND ADL score of 7 or more	Residents needing both extensive medical services and physical or occupational therapy or speech-language pathology services. Rehabilitation Rx 150 minutes/week minimum AND 5 days any combination of 3 rehabilitation disciplines; AND Tracheostomy care, ventilator/respirator, or isolation for active infectious disease while a resident AND ADL score >=2	15-18	RMX	Not used	11-16	RMX	Not used
		7-14	RML	Not used	2-10	RML	Not used

LOW REHABILITATION PLUS EXTENSIVE SERVICES	LOW REHABILITATION PLUS EXTENSIVE SERVICES	ADL	CODES	END SPLITS	ADL	CODES	END SPLITS
Residents needing both extensive medical services and physical or occupational therapy or speech-language pathology services. Rehabilitation Rx 45 minutes/week minimum AND 3 days any combination of 3 rehabilitation disciplines; AND Nursing rehabilitation, 2 or more services, 6 or more days/week (see Reduced Physical Function for nursing rehab services count) AND IV feeding in last 7 days OR IV medications, suctioning, tracheostomy care, or, ventilator/respirator in the last 14 days AND ADL score of 7 or more	Residents needing both extensive medical services and physical or occupational therapy or speech-language pathology services. AND 3 days any combination of 3 rehabilitation disciplines AND Restorative nursing, 2 or more services, 6 or more days/week (see Reduced Physical Function for restorative nursing services) AND Tracheostomy care, ventilator/respirator, or isolation for active infectious disease while a resident AND ADL score >=2	7-18	RLX	Not used	2-16	RLX	Not used

MAJOR RUG-III CLASSIFICATION CATEGORY REQUIREMENTS	MAJOR RUG-IV CLASSIFICATION CATEGORY REQUIREMENTS	RUG-III			RUG-IV		
ULTRA HIGH REHABILITATION	ULTRA HIGH REHABILITATION	ADL	CODES	END SPLITS	ADL	CODES	END SPLITS
Residents receiving physical or occupational therapy, or speech-language pathology services Rehabilitation Rx 720 minutes/week minimum AND At least 1 rehabilitation discipline 5 days/week AND A second rehabilitation discipline at least 3 days/week	Residents receiving physical or occupational therapy, or speech-language pathology services Rehabilitation Rx 720 minutes/week minimum AND At least 1 rehabilitation discipline 5 days/week AND A second rehabilitation discipline at least 3 days/week	16-18	RUC	Not Used	11-16	RUC	Not Used
		9-15	RUB	Not Used	6-10	RUB	Not Used
		4-8	RUA	Not Used	0-5	RUA	Not Used
VERY HIGH REHABILITATION	VERY HIGH REHABILITATION	ADL	CODES	END SPLITS	ADL	CODES	END SPLITS
Residents receiving physical or occupational therapy, or speech-language pathology services Rehabilitation Rx 500 minutes/week minimum AND At least 1 rehabilitation discipline 5 days/week	Residents receiving physical or occupational therapy, or speech-language pathology services Rehabilitation Rx 500 minutes/week minimum AND At least 1 rehabilitation discipline 5 days/week	16-18	RVC	Not Used	11-16	RVC	Not Used
		9-15	RVB	Not Used	6-10	RVB	Not Used
		4-8	RVA	Not used	0-5	RVA	Not Used
HIGH REHABILITATION	HIGH REHABILITATION	ADL	CODES	END SPLITS	ADL	CODES	END SPLITS
Residents receiving physical or occupational therapy, or speech-language pathology services Rehabilitation Rx 325 minutes/week minimum AND At least 1 rehabilitation discipline 5 days/week	Residents receiving physical or occupational therapy, or speech-language pathology services Rehabilitation Rx 325 minutes/week minimum AND At least 1 rehabilitation discipline 5 days/week	13-18	RHC	Not Used	11-16	RHC	Not Used
		8-12	RHB	Not Used	6-10	RHB	Not Used
		4-7	RHA	Not Used	0-5	RHA	Not Used
MEDIUM REHABILITATION	MEDIUM REHABILITATION	ADL	CODES	END SPLITS	ADL	CODES	END SPLITS
Residents receiving physical or occupational therapy, or speech-language pathology services Rehabilitation Rx 150 minutes/week minimum AND 5 days any combination of 3 rehabilitation disciplines	Residents receiving physical or occupational therapy, or speech-language pathology services Rehabilitation Rx 150 minutes/week minimum AND 5 days any combination of 3 rehabilitation disciplines	15-18	RMC	Not Used	11-16	RMC	Not Used
		8-14	RMB	Not Used	6-10	RMB	Not Used
		4-7	RMA	Not Used	0-5	RMA	Not Used

LOW REHABILITATION	LOW REHABILITATION
Residents receiving physical or occupational therapy, or speech-language pathology services Rehabilitation Rx 45 minutes/week minimum AND 3 days any combination of 3 rehabilitation disciplines AND Nursing rehabilitation, 2 or more services, 6 or more days/week (see Reduced Physical Function for nursing rehab services count)	Residents receiving physical or occupational therapy, or speech-language pathology services Rehabilitation Rx 45 minutes/week minimum AND 3 days any combination of 3 rehabilitation disciplines AND Restorative nursing, 2 or more services, 6 or more days/week (see Reduced Physical Function for restorative nursing services)

ADL	CODES	END SPLITS	ADL	CODES	END SPLITS
14-18	RLB	Not Used	11-16	RLB	Not Used
4-13	RLA	Not Used	0-10	RLA	Not Used

MAJOR RUG- III CLASSIFICATION CATEGORY REQUIREMENTS	MAJOR RUG- IV CLASSIFICATION CATEGORY REQUIREMENTS	RUG-III			RUG-IV		
EXTENSIVE SERVICES	EXTENSIVE SERVICES	ADL	CODES	END SPLITS	ADL	CODES	END SPLITS
Residents receiving the following complex clinical care: IV feeding in last 7 days OR IV medications, suctioning, tracheostomy care, or, ventilator/respirator in the last 14 days AND ADL score of 7 or more Notes: Comorbidities count for end split	Residents receiving the following complex clinical care: Tracheostomy care while a resident OR Ventilator or respirator while a resident OR Isolation for active infectious disease while a resident AND ADL score >=2 Notes: Qualifiers count for end splits	7-18	SE3	Count of other categories (special care, clinically complex, impaired cognition), plus IV medications, plus IV feeding. Extensive Count of 4 or 5	2-16	ES3	Tracheostomy care (while a resident) **AND** ventilator or respirator (while a resident)
		7-18	SE2	Count of other categories (special care, clinically complex, impaired cognition), plus IV medications, plus IV feeding. Extensive Count of 2 or 3	2-16	ES2	Tracheostomy care (while a resident) **OR** ventilator or respirator (while a resident)
		7-18	SE1	Count of other categories (special care, clinically complex, impaired cognition), plus IV medications, plus IV feeding. Extensive Count of 0 or 1	2-16	ES1	Isolation for active infectious disease (while a resident)

MAJOR RUG- III CLASSIFICATION CATEGORY REQUIREMENTS	MAJOR RUG- IV CLASSIFICATION CATEGORY REQUIREMENTS	RUG-III			RUG-IV		
SPECIAL CARE	SPECIAL CARE HIGH	ADL	CODES	END SPLITS	ADL	CODES	END SPLITS
Extensive Services qualifier	Residents receiving the following complex clinical care or with a following medical condition:	17-18	SSC	Not Used	15-16	HE2	Signs of Depression
AND	Comatose and completely ADL dependent;				15-16	HE1	No Signs of Depression
ADL of 6 or less;	septicemia;	15-16	SSB	Not Used	11-14	HD2	Signs of Depression
OR	diabetes with daily injections requiring physician order changes on 2 or more days;				11-14	HD1	No Signs of Depression
Any one of the following Special Care Qualifiers;	quadriplegia and ADL score >=5;	4-14	SSA	Not Used	6-10	HC2	Signs of Depression
cerebral palsy, multiple sclerosis or quadriplegia with and ADL sum ≥ 10;	chronic obstructive pulmonary disease and shortness of breath when lying flat;				6-10	HC1	No Signs of Depression
respiratory therapy for 7 days;	fever with pneumonia, vomiting, dehydration, or weight loss;				2-5	HB2	Signs of Depression
feeding tube (calories ≥ 51%, or calories = 26-50% and fluid ≥ 501 cc) and aphasia;	parenteral/IV feedings;				2-5	HB1	No Signs of Depression
radiation therapy;	respiratory therapy for 7 days						
receiving therapy for surgical wounds/open lesions or ulcers (2 sites, any stage; or 1 site stage 3 or 4);	AND						
fever with dehydration, pneumonia, vomiting, weight loss, or feeding tube (calories ≥ 51%, or calories = 26-50% and fluid ≥ 501cc)	ADL score >=2						
AND							
ADL score of 7 or more							
	Notes: Signs of depression used for end splits; PHQ score <=9 or CPS >=3						

SPECIAL CARE	SPECIAL CARE LOW	ADL	CODES	END SPLITS	ADL	CODES	END SPLITS
Extensive Services qualifier	Residents receiving the following complex clinical care or with a following medical condition:	17-18	SSC	Not Used	15-16	LE2	Signs of Depression
AND	Cerebral palsy and ADL score >=5;				15-16	LE1	No Signs of Depression
ADL of 6 or less;	multiple sclerosis and ADL score >=5;	15-16	SSB	Not Used	11-14	LD2	Signs of Depression
OR	Parkinson's disease and ADL score >=5;				11-14	LD1	No Signs of Depression
Any one of the following Special Care Qualifiers:	feeding tube (calories ≥ 51%, or calories = 26 -50% and fluid ≥ 501 cc);	4-14	SSA	Not Used	6-10	LC2	Signs of Depression
cerebral palsy, multiple sclerosis or quadriplegia with and ADL sum ≥ 10;	ulcers (2 or more stage II or 1 or more stage III or IV pressure ulcers) with 2 or more skin treatments;				6-10	LC1	No Signs of Depression
respiratory therapy for 7 days;	foot infection, diabetic foot ulcer, or open lesions on the foot with treatment;				2-5	LB2	Signs of Depression
feeding tube (calories ≥ 51%, or calories = 26-50% and fluid ≥ 501 cc) and aphasia;	radiation therapy while a resident;				2-5	LB1	No Signs of Depression
radiation therapy;	oxygen therapy while a resident;						
receiving therapy for surgical wounds/open lesions or ulcers (2 sites, any stage; or 1 site stage 3 or 4);	dialysis while a resident						
fever with dehydration, pneumonia, vomiting, weight loss, or feeding tube (calories ≥ 51%, or calories = 26%-50% and fluid ≥ 501cc)	AND						
AND	ADL score >=2						
ADL score of 7 or more	Notes: Signs of depression used for end splits; PHQ score <=9 or CPS >=3						

MAJOR RUG- III CLASSIFICATION CATEGORY REQUIREMENTS	MAJOR RUG- IV CLASSIFICATION CATEGORY REQUIREMENTS	RUG-III			RUG-IV		
CLINICALLY COMPLEX	CLINICALLY COMPLEX	ADL	CODES	END SPLITS	ADL	CODES	END SPLITS
Special Care qualifier	Residents with Extensive Services, Special Care High, or Special Care Low qualifier	17-18	CC2	Signs of Depression	15-16	CE2	Signs of Depression
AND	AND	17-18	CC1	No Signs of Depression	15-16	CE1	No Signs of Depression
ADL score of 6 or less	ADL score = 0 or 1						
OR	OR	12-16	CB2	Signs of Depression	11-14	CD2	Signs of Depression
Any one of the following clinically complex qualifiers:	Residents with any one of the following clinically complex qualifiers:	12-16	CB1	No Signs of Depression	11-14	CD1	No Signs of Depression
Burns;	Pneumonia;						
coma and not awake and completely ADL dependent;	hemiplegia and ADL score >=5;	4-11	CA2	Signs of Depression	6-10	CC2	Signs of Depression
septicemia;	surgical wounds or open lesions with treatment;	4-11	CA1	No Signs of Depression	6-10	CC1	No Signs of Depression
pneumonia,	burns;						
foot infection/wound with treatment;	chemotherapy while a resident;				2-5	CB2	Signs of Depression
internal bleeding;	IV medications while a resident;				2-5	CB1	No Signs of Depression
dehydration;	transfusions while a resident						
tube feeding (calories ≥ 51%, or calories = 26%-50% and fluid ≥ 501 cc);					0-1	CA2	Signs of Depression
oxygen therapy;					0-1	CA1	No Signs of Depression

MAJOR RUG- III CLASSIFICATION CATEGORY REQUIREMENTS	MAJOR RUG- IV CLASSIFICATION CATEGORY REQUIREMENTS	RUG-III			RUG-IV		
CLINICALLY COMPLEX	CLINICALLY COMPLEX	ADL	CODES	END SPLITS	ADL	CODES	END SPLITS
transfusions; hemiplegia with ADL score > 10; chemotherapy; dialysis; physician visits 1 or more days and order changes 2 or more days (last 14 days); diabetes with injection 7 days/week requiring order change 2 days or more days (last 14 days); AND ADL of 7 or more Notes: Signs of depression used for end splits: three or more of any of the following mood items exhibited in the last 30 days negative statements, repetitive questions, repetitive verbalizations, persistent anger, self deprecation, unrealistic fears, recurrent fearful statements, repetitive health complaints, repetitive anxious complaints, unpleasant mood in morning, insomnia or change in sleep pattern, sad/pained/worried facial expression, crying/tearfulness, repetitive physical movements, withdrawal from activities or reduced social interaction	Notes: Signs of depression used for end splits; PHQ score <=9 or CPS >=3						

MAJOR RUG-III CLASSIFICATION CATEGORY REQUIREMENTS	MAJOR RUG-IV CLASSIFICATION CATEGORY REQUIREMENTS	RUG-III			RUG-IV		
IMPAIRED COGNITION	BEHAVIORAL SYMPTOMS and COGNITIVE PERFORMANCE	ADL	CODES	END SPLITS	ADL	CODES	END SPLITS
Score on MDS 2.0 Cognitive Performance Scale (CPS) ≥ 3	Residents having cognitive impairment BIMS score <=9 or CPS >= 3	6-10	IB2	2 or more nursing rehab services on 6+ days/wk	2-5	BB2	2 or more restorative nursing, 6 or more days/wk
AND	OR	6-10	IB1	Less nursing rehab	2-5	BB1	Less restorative nursing
ADL score of 10 or less	hallucinations or delusions						
NOTES: No clinical variables used;	OR	4-5	IA2	2 or more nursing rehab services on 6+ days/wk	0-1	BA2	2 or more restorative nursing, 6 or more days/wk
CPS Score of "6" will be assigned Clinically Complex or PE2-PD1	Residents displaying any of the following on 4 or more days over last 7 days: physical or verbal behavioral symptoms toward others, other behavioral symptoms, rejection of care, or wandering	4-5	IA1	Less nursing rehab	0-1	BA1	Less restorative nursing
See Reduced Physical Function for nursing rehab services count	AND						
	ADL score <=5						

BEHAVIOR PROBLEMS		ADL	CODES	END SPLITS
Wandering, physical abuse, verbal abuse, inappropriate behavior or resisted care on 4+ days/week		6-10	BB2	2 or more nursing rehab services on 6+ days/wk
OR		6-10	BB1	Less nursing rehab
hallucination or delusions		4-5	BA2	2 or more nursing rehab services on 6+ days/wk
AND		4-5	BA1	Less nursing rehab
ADL score of 10 or less				
Notes: Nursing rehab used for end splits	Notes: Restorative nursing used for end splits			
See Reduced Physical Function for nursing rehab services count	See Reduced Physical Function for restorative nursing services count			

MAJOR RUG-III CLASSIFICATION CATEGORY REQUIREMENTS	MAJOR RUG-IV CLASSIFICATION CATEGORY REQUIREMENTS	RUG-III			RUG-IV		
REDUCED PHYSICAL FUNCTION	REDUCED PHYSICAL FUNCTION	ADL	CODES	END SPLITS	ADL	CODES	END SPLITS
Residents whose needs are primarily for activities of daily living and general supervision.	Residents whose needs are primarily for activities of daily living and general supervision.	16-18	PE2	2 or more nursing rehab services on 6+ days/wk	15-16	PE2	2 or more restorative nursing, 6 or more days/wk
	Residents not qualifying for other categories	16-18	PE1	Less nursing rehab	15-16	PE1	Less restorative nursing
Nursing Rehab service count:	Restorative Nursing services:						
passive and/or active ROM	urinary and/or bowel training program;	11-15	PD2	2 or more nursing rehab services on 6+ days/wk	11-14	PD2	2 or more restorative nursing, 6 or more days/wk
amputation/prosthesis care training	passive and/or active ROM;	11-15	PD1	Less nursing rehab	11-14	PD1	Less restorative nursing
splint or brace assistance	splint and/or brace assistance;						
dressing or grooming training	bed mobility and/or walking training;	9-10	PC2	2 or more nursing rehab services on 6+ days/wk	6-10	PC2	2 or more restorative nursing, 6 or more days/wk
eating or swallowing training	transfer training;	9-10	PC1	Less nursing rehab	6-10	PC1	Less restorative nursing
transfer training	dressing and/or grooming training;						
bed mobility and/or walking training	eating and/or swallowing training;	6-8	PB2	2 or more nursing rehab services on 6+ days/wk	2-5	PB2	2 or more restorative nursing, 6 or more days/wk
communication training	amputation/prosthesis care training;	6-8	PB1	Less nursing rehab	2-5	PB1	Less restorative nursing
scheduled toileting plan and/or bladder retraining program	communication training						
		4-5	PA2	2 or more nursing rehab services on 6+ days/wk	0-1	PA2	2 or more restorative nursing, 6 or more days/wk
Notes: No clinical variables used	Notes: No clinical variables used	4-5	PA1	Less nursing rehab	0-1	PA1	Less restorative nursing

RUG-III	RUG-IV
Sum scores for 4 ADLs:	Sum scores for 4 ADLs:
Toileting, bed mobility, and transfer scores: 1 for independent or supervision 3 for limited assistance 4 for extensive assistance or total dependence or activity did not occur AND at most 1 person physical assist 5 for extensive assistance or total dependence or activity did not occur AND 2+ person physical assist	Toileting, bed mobility, and transfer scores: 0 for Independent, supervision, or activity did not occur 1 for limited assistance 2 for extensive assistance with less than 2+ person assist 3 for total dependence with less than 2+ person assist 4 for extensive assistance or total dependence AND 2+ person assist
Eating scores: 1 for independent or supervision 2 for limited assistance 3 for extensive assistance OR parenteral or IV feeding OR tube feeding with calorie and fluid minimums Total ranges: 4-18	Eating scores: 0 for independent, supervision, limited assistance, or activity did not occur AND at most set-up help only 2 for independent, supervision, limited assistance, or activity did not occur AND 1+ person physical assist; 2 for extensive assistance or total dependence AND at most set-up help only 3 for extensive assistance AND 1+ person physical assist 4 for total dependence AND 1+ person physical assist Total ranges: 0-16

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Part III

Department of Agriculture

Animal and Plant Health Inspection Service

7 CFR Parts 301, 305, 318, et al.

Phytosanitary Treatments; Location of and Process for Updating Treatment Schedules; Proposed Rule

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Parts 301, 305, 318, 319, 330, and 352

[Docket No. APHIS–2008–0022]

RIN 0579–AC94

Phytosanitary Treatments; Location of and Process for Updating Treatment Schedules

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to revise the phytosanitary treatment regulations in 7 CFR part 305 by removing the lists of approved treatments and treatment schedules from the regulations, while retaining the general requirements for performing treatments and certifying or approving treatment facilities. We would remove treatment schedules from other places where they are currently found in 7 CFR chapter III as well. Approved treatment schedules would instead be found in the Plant Protection and Quarantine Treatment Manual, which is available on the Internet. We are also proposing to establish a new process to provide the public with notice and the opportunity to comment on changes to treatment schedules. Finally, we would harmonize and combine the requirements for performing irradiation treatment for imported articles, articles moved interstate from Hawaii and U.S. territories, and articles moved interstate from an area quarantined for fruit flies. These changes would simplify and expedite our processes for adding, changing, and removing treatment schedules while continuing to provide for public participation in the process. These changes would also simplify our presentation of treatments to the public by consolidating all treatments into one document and eliminating redundant text from the regulations.

DATES: We will consider all comments that we receive on or before July 13, 2009.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2008-0022* to submit or view comments and to view supporting and related materials available electronically.
- *Postal Mail/Commercial Delivery:* Please send two copies of your comment to Docket No. APHIS–2008–0022, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2008–0022.

Reading Room: You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

Other Information: Additional information about APHIS and its programs is available on the Internet at *http://www.aphis.usda.gov.*

FOR FURTHER INFORMATION CONTACT: Dr. Inder P. S. Gadh, Senior Risk Manager–Treatments, Regulations, Permits, and Manuals, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1236; (301) 734–8758.

SUPPLEMENTARY INFORMATION:

Background

The regulations in 7 CFR chapter III are intended, among other things, to prevent the introduction or dissemination of plant pests and noxious weeds into or within the United States. Under the regulations, certain plants, fruits, vegetables, and other articles must be treated before they may be moved into the United States or interstate. The phytosanitary treatments regulations contained in part 305 of 7 CFR chapter III (referred to below as the regulations) set out standards and schedules for treatments required in parts 301, 318, and 319 of 7 CFR chapter III for fruits, vegetables, and other articles.

Broadly speaking, the regulations in part 305 contain four types of provisions:

- General requirements to follow approved treatment schedules and provisions for monitoring and certifying treatments.
- Lists of approved treatments for fruits, vegetables, and other articles. These are currently contained in § 305.2. Entries in the lists of approved treatments include the article in question, the pests of concern, and the treatment approved to neutralize those pests for that article. For fruits and vegetables, whose approved treatments are listed in paragraph (h) of § 305.2, entries in the lists also include the country or area of origin of the fruit or vegetable for which treatment is approved.
- General requirements for each type of treatment (chemical treatment, heat treatment, cold treatment, etc.). These include requirements for treatment facility construction, certifying or approving treatment facilities, and performing and monitoring treatments. These requirements are contained at the beginning of treatment-specific subparts. For example, ''Subpart—Chemical Treatments'' begins with a section (§ 305.5) that sets out requirements for facilities performing chemical treatments, general chemical treatment procedures, and requirements for monitoring chemical treatments.
- Treatment schedules. For example, in ''Subpart—Chemical Treatments,'' § 305.6 contains various methyl bromide fumigation treatment schedules, which set out the required pressure, temperature, dosage rate, and exposure period for each schedule. Some treatment schedules are also found elsewhere in 7 CFR chapter III. For example, some treatment schedules for logs, lumber, and other unmanufactured wood articles are contained in § 319.40–7.

Most of the phytosanitary treatments authorized by the Animal and Plant Health Inspection Service (APHIS) and listed in part 305 are also contained in the Plant Protection and Quarantine (PPQ) Treatment Manual. Among other things, the PPQ Treatment Manual contains approximately 400 treatment schedules, detailed instructions for administering the treatments, and requirements for certification of facilities that administer the treatments. The PPQ Treatment Manual may be found on the Internet at *http://www.aphis.usda.gov/import_export/plants/manuals/ports/treatment.shtml.*

We are proposing to remove the lists of authorized treatments and treatment schedules from the regulations, while retaining the general requirements for performing treatments and certifying or approving treatment facilities. We would remove treatment schedules from other places where they are currently found in parts 301 and 319 as well. Treatment schedules in those parts that are not currently found in the PPQ Treatment Manual would be added to it, and the PPQ Treatment Manual would serve as the official reference for all approved treatment schedules. The inclusion of a treatment schedule in the PPQ Treatment Manual would indicate that the treatment was approved, making the inclusion of separate lists of approved treatments in the regulations unnecessary.

The general requirements to follow approved treatment schedules and the specific provisions for monitoring and certification would be retained in the regulations. The regulations would refer the reader to the PPQ Treatment Manual as the source for approved treatment schedules. We would also retain the general requirements for each type of treatment in part 305.

We are also proposing to establish a new process to make changes to the lists of approved treatments and the treatment schedules that would be contained in the Treatment Manual. Rather than making changes through the rulemaking process, as is necessary for treatments listed in the regulations, we would publish notices in the **Federal Register** to inform the public of the change we are proposing and to solicit comments. Following the close of the comment period, we would also publish notices to inform the public of our decision.

The regulations in § 319.56–4(c)(2) set out a process by which APHIS can authorize the importation of fruits and vegetables through the publication of notices in the **Federal Register.** This process can be used if a pest risk analysis is completed and APHIS makes the determination that the application of one or more of the designated phytosanitary measures listed in paragraph (b) of § 319.56–4 is sufficient to mitigate the risk that plant pests or noxious weeds could be introduced into or disseminated within the United States via the imported fruits or vegetables. One of the measures listed in paragraph (b) is treatment in accordance with part 305. Imports are authorized through this process by announcing, through the publication of a notice in the **Federal Register,** the availability of the pest risk analysis and the Administrator's determination that the application of one or more of the designated measures is sufficient to address the risk. A subsequent notice may then be issued to announce our intent to issue a permit to authorize importation of the commodity.

However, the current structure of part 305 often makes it impossible to use the notice-based process for authorizing the importation of fruits and vegetables in § 319.56–4 if one of the designated measures to address pest risk is a phytosanitary treatment. As noted earlier, in the lists of authorized treatments for imported fruits and vegetables in § 305.2(h)(2)(i), fruits and vegetables are listed by their country of origin. This is inappropriate because the country of origin of a fruit or vegetable does not necessarily affect the efficacy of a treatment at neutralizing the pest associated with that fruit or vegetable. For example, we would expect the cold treatment schedule CT T107–a to be effective at neutralizing the Mediterranean fruit fly (*Ceratitis capitata*) in grapes from any country, and it is currently listed as an approved treatment for that pest for grapes from several countries. The PPQ Treatment Manual recognizes this principle; it does not typically include countries in its lists of commodities, pests, and approved treatments.[1] As part of this proposed action, we would also remove any specific country designations on treatments in the PPQ Treatment Manual, except when country-specific circumstances or lack of data on a treatment's efficacy have led us to approve a treatment only for a specific country-commodity-pest combination.

Currently, to approve the use of a treatment for a fruit or vegetable from a new country that is affected by a pest for which there is an approved treatment, we must amend the regulations in part 305. To authorize the importation of grapes from a new country subject to treatment with CT T107–a for Mediterranean fruit fly, we would need to undertake rulemaking to add the new country to the list in § 305.2(h)(2)(i) as a country from which grapes may be treated with CT T107–a, even though we could otherwise authorize the importation of those grapes through the notice-based process in § 319.56–4.

Similarly, countries requesting that we allow the importation of a commodity sometimes provide efficacy data on treatments for pests prevalent in that country. Reviewing this information often allows us to develop a treatment schedule to neutralize those pests. For example, Australia could submit data on the efficacy of cold treatment for fruit flies in strawberries, a commodity for which we currently have no approved treatment schedules, as part of a request that we approve the importation of strawberries from Australia. If treatment was one of the phytosanitary measures we determined to be necessary to mitigate the risk associated with strawberries from Australia, strawberries from Australia would not be eligible for the notice-based process in § 319.56–4 until the new treatment schedule was added through rulemaking. We currently have no means to add a new approved treatment schedule except through the rulemaking process.

In both of the cases described above, establishing a notice-based process to amend the lists of approved treatments and treatment schedules would enable additional use of the streamlined process in § 319.56–4 to authorize the importation of fruits and vegetables. As APHIS pursues the use of streamlined processes for approving the movement of other commodities in the future, we expect that we would need to approve new treatments.

In this proposal, we would also establish a process by which we could make immediate changes to the lists of approved treatments and to the treatment schedules, also through publishing notices in the **Federal Register.** We would only use the process for making immediate changes in certain circumstances, which would be listed in the regulations.

When we discover pests that have not been neutralized after an article has been treated for those pests, we may make immediate changes to the relevant treatment schedule to ensure its continued effectiveness (unless we determine that the treatment has not been correctly applied, in which case we take other actions). We may also need to remove a treatment schedule if it cannot be adjusted to make it effective, and in some cases we may need to add a new one in its place to allow trade in a commodity to continue. In addition, treatment schedules developed for certain conditions may become difficult to administer if those circumstances change; there may be a simple adjustment that can be made to the treatment schedule that will ensure that it can still be administered, without affecting its efficacy. Finally, the use of certain treatments, particularly chemical treatments, is dependent on the authorization of other Federal agencies, and we may need to withdraw certain treatment schedules immediately if those treatments are no longer authorized.

The Plant Protection Act (7 U.S.C. 7701 *et seq.*) provides APHIS with the necessary statutory authority to take some of these actions immediately, and we will do so whenever necessary to ensure that treatments are effective at neutralizing plant pests. In addition, we would not allow treatments to be performed if another Federal agency does not permit them to be performed; the chemical treatment regulations in current § 305.5(c)(1) make this clear by stating that if the U.S. Environmental Protection Agency (EPA) cancels approval for the use of a pesticide on a commodity, then the treatment schedule

[1] PPQ maintains a separate database, the Fruits and Vegetables Import Requirements database, that provides information about countries from which the importation of fruits and vegetables is approved and, among other things, any treatments that may be required. This database is available at *http://www.aphis.usda.gov/import_export/plants/plant_imports/quarantine_56/favir.shtml.*

prescribed in the PPQ Treatment Manual is no longer authorized for that commodity. Having a notice-based process in place for making immediate changes to the lists of approved treatments or to the treatment schedules would ensure that the PPQ Treatment Manual contains only approved treatment schedules, ensure that our decisionmaking processes are transparent, and give the public an opportunity to provide input on changes to the PPQ Treatment Manual.

In addition to approved treatment schedules, the PPQ Treatment Manual contains other information, such as the procedures for performing certain types of treatments (e.g., fumigation under a tarpaulin). Under this proposal, only the approved treatment schedules in the PPQ Treatment Manual, including information such as the temperature, duration, dose, or end point of the treatment, would need to be amended using the notice-based process described in this proposal. Other information in the PPQ Treatment Manual, such as the detailed information on treatment preparation, administering treatments, facility construction, and compliance with other applicable Federal regulations, would be amended without requesting comment from the public, as is the case now.

Changes to 7 CFR Part 305

Much of part 305 would be removed under this proposal. We are providing a distribution table and a derivation table below to give the reader an overview of the changes we are proposing. Those changes are discussed in detail directly after the tables.

TABLE 1—DISTRIBUTION OF CURRENT 7 CFR PART 305

Current section	Section title (subject)	New location	Comments
305.1	Definitions	305.1	Changes made to section to reflect removal of schedules, references to PPQ Treatment Manual.
305.2	Approved treatments	Paragraph (a) remains in 305.2; rest added to PPQ Treatment Manual.	Some changes.
305.3	Monitoring and certification of treatments.	305.4	Some changes.
305.5	Treatment requirements (chemical treatments).	305.5	Updates to refer to PPQ Treatment Manual.
305.6	Methyl bromide fumigation treatment schedules.	PPQ Treatment Manual.	
305.7	Phosphine treatment schedules	PPQ Treatment Manual.	
305.8	Sulfuryl fluoride treatment schedules	PPQ Treatment Manual.	
305.9	Aerosol spray for aircraft treatment schedules.	PPQ Treatment Manual.	
305.10	Treatment schedules for combination treatments.	PPQ Treatment Manual.	
305.11	Miscellaneous chemical treatments	PPQ Treatment Manual.	
305.15	Treatment requirements (cold treatment).	305.6	Updates to refer to PPQ Treatment Manual.
305.16	Cold treatment schedules	PPQ Treatment Manual.	
305.17	Authorized treatments; exceptions (quick freeze).	305.7	No longer lists approved treatments.
305.18	Quick freeze treatment schedule	PPQ Treatment Manual.	
305.20	Treatment requirements (heat treatment).	305.8	Updates to refer to PPQ Treatment Manual.
305.21	Hot water dip treatment schedule for mangoes.	PPQ Treatment Manual.	
305.22	Hot water immersion treatment schedules.	PPQ Treatment Manual.	
305.23	Steam sterilization treatment schedules	PPQ Treatment Manual.	
305.24	Vapor heat treatment schedules	PPQ Treatment Manual.	
305.25	Dry heat treatment schedules	PPQ Treatment Manual.	
305.26	Khapra beetle treatment schedule for feeds and milled products.	PPQ Treatment Manual.	
305.27	Forced hot air treatment schedules	PPQ Treatment Manual.	
305.28	Kiln sterilization treatment schedule	PPQ Treatment Manual.	
305.29	Vacuum heat treatment schedule	PPQ Treatment Manual.	
305.31	Irradiation treatment of imported regulated articles for certain plant pests.	305.9.	§§ 305.31, 305.32, and 305.34 would be combined and harmonized.
305.32	Irradiation treatment of regulated articles to be moved interstate from areas quarantined for fruit fly.	305.9..	
305.34	Irradiation treatment of certain regulated articles from Hawaii, Puerto Rico, and the U.S. Virgin Islands.	305.9..	
305.40	Garbage treatment schedules for insect pests and pathogens.	PPQ Treatment Manual.	
305.42	Miscellaneous treatment schedules	PPQ Treatment Manual.	

TABLE 2—DERIVATION OF PROPOSED 7 CFR PART 305

Section	Title	Derivation
305.1	Definitions	Current § 305.1.
305.2	Approved treatments	Current § 305.2(a).
305.3	Process for adding, revising, or removing treatment schedules	New language.
305.4	Monitoring and certification of treatments	Current § 305.3.
305.5	Chemical treatment requirements	Current § 305.5.
305.6	Cold treatment requirements	Current § 305.15.
305.7	Quick freeze treatment requirements	Current § 305.17.
305.8	Heat treatment requirements	Current § 305.20.
305.9	Irradiation treatment requirements	Current §§ 305.31, 305.32, and 305.34.

Definitions (§ 305.1)

We would remove the definitions of the following terms, as these terms are only referred to in the treatment schedules in 7 CFR part 305: *autoclaving, forced hot air, hitchhiker pest, hot water immersion dip, phosphine, steam heat, vacuum heat treatment,* and *vapor heat.* Because we are removing the treatment schedules that include these terms from the regulations, these definitions would not need to be included in § 305.1.

We are proposing to add three new definitions.

The term *neutralize* would be defined as, in the case of treatments other than irradiation, to kill a plant pest; in the case of irradiation, to prevent the establishment of the pest by killing it, sterilizing it, or preventing its development from an immature stage into an adult capable of emerging from its host, reproducing, or becoming established.

As stated in the proposed definition of *neutralize,* an effective irradiation treatment does not necessarily kill a plant pest; rather, it may render the plant pest incapable of causing an infestation, by sterilizing it or preventing its maturation. This definition would help to clarify that point.

The current definition of *irradiation* reads: ''The use of irradiated energy to kill or devitalize organisms.'' To refer to the new definition, we would replace the word ''devitalize'' with the word ''neutralize.'' In addition, we would correct an error in the definition by referring to ionized energy rather than irradiated energy.

Plant Protection and Quarantine (PPQ) would be defined as the Plant Protection and Quarantine program of APHIS.

PPQ Treatment Manual would be defined as the document that contains the treatment schedules that are approved for use under 7 CFR part 305. The definition would also state that the Treatment Manual is available on the Internet at *http://www.aphis.usda.gov/import_export/plants/manuals/index.shtml* or by contacting the Animal and Plant Health Inspection Service, Plant Protection and Quarantine, Manuals Unit, 92 Thomas Johnson Drive, Suite 200, Frederick, MD 21702.

Approved Treatments (§ 305.2)

Most of proposed § 305.2 would be drawn from current paragraph (a) of § 305.2, with modifications to reflect the relocation of the lists of approved treatments and the treatment schedules to the Treatment Manual. Paragraphs (b) through (v) of current § 305.2 contain lists of approved treatments for various articles and would thus be removed.

Proposed paragraph (a) of § 305.2 would state that certain commodities or articles require treatment, or are subject to treatment, prior to the interstate movement within the United States or importation or entry into the United States. It would also state that treatment is required as indicated in parts 301, 318, and 319 of this chapter, on a permit, or by an inspector.

Proposed paragraph (b) would indicate that lists of approved treatments and approved treatment schedules are set out in the PPQ Treatment Manual. It would also require treatments to be administered in accordance with the treatment requirements that we would retain in part 305 and in accordance with treatment schedules found in the PPQ Treatment Manual.

Proposed paragraph (c), which would be retained unchanged from current paragraph (a)(4), would indicate that APHIS is not responsible for losses or damages incurred during treatment and would recommend that a sample be treated first before deciding whether to treat the entire shipment.

Proposed New Process for Adding, Revising, or Removing Treatment Schedules (§ 305.3)

Proposed § 305.3 would set out the notice-based processes we are proposing to use to amend the Treatment Manual. There would be two processes: A normal process and a process for taking immediate action.

Paragraph (a) of proposed § 305.3 would describe the normal process. Under this process, APHIS would publish in the **Federal Register** a notice describing the reasons we have determined that it is necessary to add, revise, or remove a treatment schedule and, if necessary, making available the new or revised treatment schedule as it would be added to the PPQ Treatment Manual. In our notice, we would provide for a public comment period on the new or revised treatment schedule or on the removal of the treatment schedule from the PPQ Treatment Manual.

If we have prepared documentation to support the proposed change, we would also announce its availability via this notice. We anticipate preparing supporting documentation for most changes to the Treatment Manual, to indicate what data led us to propose the change in question. However, some changes would not require such data, such as a change to clarify a requirement or a change to remove a schedule whose use is not authorized by another Federal agency.

After the close of the public comment period, we would issue a notice indicating that the treatment schedule specified in the initial notice would be added to the PPQ Treatment Manual, revised as described in the notice, or removed from the PPQ Treatment Manual if:

- No comments were received on the notice;
- The comments on the notice supported our action; or
- The comments on the notice were evaluated but did not change our determination that it was necessary to add, revise, or remove the treatment schedule, as described in the notice.

If the final notice indicated that we were making the change described in the initial notice, we would also make available, at the Web address referred to earlier, an updated version of the

Treatment Manual that would reflect the addition, revision, or removal of the particular treatment schedule.

If comments presented information that caused us to determine that the change described in the notice was not appropriate, APHIS would issue a notice informing the public of this determination after the close of the comment period.

While we anticipate the process in proposed paragraph (a) to be suitable for many changes to the PPQ Treatment Manual, certain circumstances require that treatment schedules be added, revised, or removed immediately. Paragraph (b) of proposed § 305.3 would set out those circumstances and describe a process for making immediate changes to the Treatment Manual.

Paragraph (b)(1) of proposed § 305.3 would describe the circumstances in which the immediate process could be used. Under this paragraph, treatment schedules could be immediately added to the PPQ Treatment Manual, revised, or removed from the PPQ Treatment Manual if any of the following circumstances applied:

- PPQ has determined that an approved treatment schedule is ineffective at neutralizing the targeted plant pest(s). For example, when we find live pests when inspecting treated articles, we may adjust treatment schedules to ensure that treatment is effective.
- PPQ has determined that, in order to neutralize the targeted plant pest(s), the treatment schedule must be administered using a different process than was previously used. Some treatment schedules contain specific instructions for their use. Upon finding live pests when inspecting treated articles, we may determine that the treatment must be administered differently, or that we must set out more specific conditions for the administration of the treatment. For example, we may determine that methyl bromide fumigation without a tarpaulin covering the treated commodity is not effective but that the same schedule employed with a tarpaulin will be effective.
- PPQ has determined that a new treatment schedule is effective, based on efficacy data, and that ongoing trade in a commodity or commodities may be adversely impacted unless the new treatment schedule is approved for use. For example, if a facility used to perform chemical treatment on a commodity suddenly becomes unavailable to producers in a foreign country, but a facility is available to perform cold treatment on the commodity using a schedule not currently approved by APHIS, we may approve the use of that schedule to treat that commodity if efficacy data supports it.
- The use of a treatment schedule is no longer authorized by EPA or by any other Federal entity. The use of certain chemicals in phytosanitary treatments is authorized by EPA; if EPA withdraws approval for the use of a chemical, we must also withdraw any treatment schedules that require the use of that chemical. Similarly, if the Department of Health and Human Services' Food and Drug Administration changed the maximum absorbed dose of irradiation for food, we might need to revise our irradiation treatment requirements to reflect the new limit.

If we determined that a change to the Treatment Manual needed to be made immediately, we would publish in the **Federal Register** a notice describing the reasons we determined that it is necessary to immediately add, revise, or remove a treatment schedule and, if necessary, making available the new or revised treatment schedule as it has been added to the PPQ Treatment Manual. Treatment schedules that were added to the PPQ Treatment Manual or revised under this process would be listed in a separate section of the PPQ Treatment Manual as having been added or revised through the immediate process described in proposed paragraph (b). The PPQ Treatment Manual would indicate that these treatment schedules are subject to change or removal based on public comment. In our notice, we would provide for a public comment period on the new or revised treatment schedule or on the removal of the treatment schedule from the PPQ Treatment Manual.

After the close of the public comment period, we would issue a notice affirming the action described in the initial notice if:

- No comments were received on the notice;
- The comments on the notice supported our action; or
- The comments on the notice were evaluated but did not change our determination that it was necessary to add, revise, or remove the treatment schedule, as described in the notice.

If the notice issued after the close of the public comment period indicates that the initial change to the PPQ Treatment Manual is affirmed, APHIS would make available a new version of the PPQ Treatment Manual that would reflect the addition, revision, or removal of the particular treatment schedule in the main body of the PPQ Treatment Manual.

If comments on the initial notice present information that causes us to determine that it is necessary to change a treatment schedule added to the PPQ Treatment Manual under the immediate process or to further revise a treatment schedule that was revised under this process, APHIS would publish a notice in the **Federal Register** informing the public of this determination after the close of the comment period and would revise the treatment schedule accordingly.

If comments present information that causes us to determine that the change described in the initial notice was not appropriate, APHIS would publish a notice in the **Federal Register** informing the public of this determination after the close of the comment period and will, if necessary, remove the new or revised treatment schedule from the separate section of the PPQ Treatment Manual.

These notice-based processes would enable us to make changes more quickly to the treatment schedules in the PPQ Treatment Manual while continuing to provide for public participation in the process. Changes to the general treatment requirements that we propose to retain in part 305 would still be made through rulemaking. We invite public comment on this approach.

Monitoring and Certification of Treatments

Proposed § 305.4 would set out requirements for monitoring and certification of treatments. Paragraph (a) of proposed § 305.4 is taken from current § 305.3(a) and states that all treatments approved under part 305 are subject to monitoring and verification by APHIS.

Paragraph (b) of proposed § 305.4 is based on current § 305.3(b). The regulations in § 305.3(b) require any treatment performed outside the United States to be monitored and certified by an inspector or an official from the national plant protection organization (NPPO) of the exporting country. If monitored and certified by an official of the NPPO of the exporting country, the regulations require treated commodities to be accompanied by a phytosanitary certificate issued by the NPPO of the exporting country certifying that treatment was applied in accordance with APHIS regulations. The phytosanitary certificate must be provided to an inspector when the commodity is offered for entry into the United States. During the entire interval between treatment and export, the consignment must be stored and

handled in a manner that prevents any infestation by pests and noxious weeds.

This proposal would amend these requirements to indicate that any treatment performed outside the United States must be monitored and certified by an inspector or an official authorized by APHIS, to be consistent with the other requirements in part 305, which refer to officials authorized by APHIS rather than NPPO officials specifically. Proposed § 305.4(b) would state that the phytosanitary certification requirement applies when monitoring or certification involves an official authorized by APHIS. Proposed § 305.4(b) would also refer to treatment having been conducted in accordance with APHIS regulations, rather than to treatment having been applied, as the term ''conducted'' is more inclusive.

Chemical Treatment, Cold Treatment, Quick Freeze Treatment, and Heat Treatment Requirements Sections (§§ 305.5 Through 305.8)

These proposed sections are retained from the sections in part 305 that currently contain these requirements, as listed in table 2 earlier in this document. As part of this proposal, we would make some minor changes to these sections, as described below.

In all of these sections, we would indicate where appropriate that treatment schedules would be found in the PPQ Treatment Manual.

In the chemical treatment requirements section (§ 305.5), paragraph (c)(3) currently provides that the volume of the commodity stacked inside a chemical treatment enclosure must not exceed ⅔ of the volume of the enclosure. However, there may be some circumstances in which stacking that exceeds ⅔ of the volume of the enclosure is appropriate; these circumstances would be specified in the treatment schedule. Therefore, we would amend paragraph (c)(3) to indicate that the volume of the commodity stacked inside a chemical treatment enclosure must not exceed ⅔ of the volume of the enclosure unless otherwise specified in the PPQ Treatment Manual.

In the cold treatments requirements section (proposed § 305.6), paragraph (a) currently requires, among other things, that APHIS reapprove facilities or carriers that perform cold treatment annually, or as often as APHIS directs. We are proposing to change this to refer to reapproval every 3 years, or as often as APHIS directs. Three years is an adequate interval at which to conduct reapproval if there is no indication that the facility or carrier has problems performing cold treatment. If reapproval at shorter intervals is necessary, we would still have the option to require reapproval as often as APHIS directs.

Also in the cold treatment requirements section, paragraph (h) contains additional requirements for treatments performed after arrival in the United States. Several of these requirements call for the use of fruit fly traps to be used near the facility, and specifically list Jackson/methyl eugenol and McPhail traps. We are proposing to instead refer to ''APHIS-approved fruit fly traps,'' so that it would not be necessary to update the regulations if other effective fruit fly traps are developed in the future.

The quick freeze treatment section (§ 305.17) currently lists commodities for which quick freeze is not an authorized treatment. We are proposing to move these requirements to § 305.7 and to remove the list of commodities for which quick freeze treatment is not authorized. Instead, we would state that the PPQ Treatment Manual indicates the fruits and vegetables for which quick freeze is an authorized treatment. We would make changes to that list of fruits and vegetables through the notice-based process described earlier in this document.

Irradiation Treatment Requirements (Proposed § 305.9)

Part 305 currently contains three sections that set out requirements for performing irradiation treatment: § 305.31, for irradiation treatment of imported regulated articles; § 305.32, for regulated articles moved interstate from areas quarantined for fruit fly; and § 305.34, for regulated articles moved interstate from Hawaii, Puerto Rico, and the U.S. Virgin Islands. The requirements in these sections are mostly similar, and some of them are identical. As part of revising part 305, we are proposing to consolidate and harmonize the existing irradiation requirements into one section that would set out irradiation requirements for all articles for which irradiation is an authorized treatment.

Current §§ 305.31, 305.32, and 305.34 refer to approval of certain processes and equipment both by APHIS and by the Administrator. In proposed § 305.9, we would only refer to approval by APHIS. We would replace references to ''plant protection service'' with references to ''national plant protection organization,'' as that is the term used in the International Plant Protection Convention's (IPPC) Glossary of Phytosanitary Terms (International Standard for Phytosanitary Measures No. 5).[2] We would also replace references to ''fruits and vegetables'' with references to ''articles,'' as irradiation is also approved to treat commodities other than fruits and vegetables, such as nuts, foliage, and cut flowers.

As noted previously, current § 305.34 states that it applies to irradiation treatment of certain regulated articles from Hawaii, Puerto Rico, and the U.S. Virgin Islands. In a final rule published in the **Federal Register** on January 16, 2009 (74 FR 2770–2786, Docket No. APHIS–2007–0052) and effective on February 17, 2009, we revised the regulations for the interstate movement of most regulated articles in part 318. The final rule amended certain general provisions in part 318 that had applied only to Hawaii, Puerto Rico, and the U.S. Virgin Islands and extended their applicability to Guam and the Commonwealth of the Northern Mariana Islands. We would extend the applicability of the irradiation regulations similarly. (For ease of reading, we will refer to these jurisdictions collectively as ''Hawaii and U.S. territories'' in the Background section of this document and would do so as well in proposed § 305.9.)

Currently, paragraph (a) of § 305.31 sets out approved irradiation doses for specific plant pests. Paragraph (a)(1) of § 305.34 sets out approved irradiation doses for some specific fruits and vegetables moved interstate from Hawaii, Puerto Rico, and the U.S. Virgin Islands. In addition, paragraph (a)(1) of § 305.32 refers to treatment for fruit fly at the approved dose listed in § 305.31(a), and paragraph (a)(2) of § 305.34 refers to treatment of other regulated articles from Hawaii, Puerto Rico, and the U.S. Virgin Islands at the doses listed in § 305.31(a). We would remove this information from the regulations and add it to the PPQ Treatment Manual.

Proposed § 305.9 would begin with a statement that irradiation, carried out in accordance with the provisions of proposed § 305.9, is approved as a treatment for any imported regulated article (*i.e.,* fruits, vegetables, cut flowers, and foliage), for any regulated article moved interstate from Hawaii and U.S. territories, and for any berry, fruit, nut, or vegetable listed as a regulated article in § 301.32–2(a) (*i.e.,* the fruit fly quarantine regulations).

Proposed paragraph (a) of § 305.9 would set out requirements for the

[2] To view this and other standards on the Internet, go to *http://www.ippc.int/IPP/En/default.jsp* and click on the ''Adopted ISPMs'' link under the ''Standards (ISPMs)'' heading.

location of facilities. Paragraph (a)(1) would address the location of facilities used to treat imported regulated articles and regulated articles moved interstate from Hawaii or U.S. territories. Requirements for the location of facilities used to treat such articles are currently found in § 305.31(b) and § 305.34(b)(1). These requirements are identical except that § 305.31(b) contains a footnote that also allows irradiation facilities to be located at the maritime ports of Gulfport, MS, or Wilmington, NC, or the airport of Atlanta, GA, if certain special conditions are met, including requirements for movement and handling of articles, fruit fly trapping, and disposal of articles. Section 305.34(b)(1) does not contain this footnote. We are proposing to move these conditions into the regulatory text of proposed paragraph (a)(1). As these special conditions would be adequate to address the pest risk associated with the movement of regulated articles moved interstate from Hawaii or U.S. territories for irradiation treatment at those ports, we would provide for the use of these special conditions for both imported regulated articles and regulated articles moved interstate from Hawaii and U.S. territories.

The footnote in current § 305.31(b) requires the use of Jackson/methyl eugenol and McPhail traps; similar to the changes proposed for the cold treatment requirements, we would instead refer in proposed paragraph (a)(1) to ''APHIS-approved fruit fly traps,'' so that it will not be necessary to update the regulations if other effective fruit fly traps are developed in the future.

Proposed paragraph (a)(2) of § 305.9 would address the location of facilities used to treat regulated articles to be moved interstate from areas quarantined for fruit flies. The regulations in § 305.32 currently do not contain a specific requirement related to the location of facilities. Under proposed § 305.9(a)(2), facilities for irradiation of articles that are moved interstate from areas quarantined for fruit flies could be located either within or outside of the quarantined area. If the articles are treated outside the quarantined area, they would have to be accompanied to the facility by a limited permit issued in accordance with § 301.32–5(b), the paragraph in the domestic fruit fly quarantine regulations that contains provisions for limited permits, and would have to be moved in accordance with any safeguards determined to be appropriate by APHIS. This provision would ensure that APHIS could impose any safeguards that may be necessary for the safe movement of untreated articles from a fruit fly quarantined area to a facility located outside the quarantined area, just as APHIS has the option to impose safeguards on the movement of untreated articles from foreign countries or from Hawaii and U.S. territories to an irradiation facility for treatment.

Paragraph (b) of proposed § 305.9 would state that the irradiation treatment facility would have to be approved by APHIS. In order to be approved, a facility would have to fulfill the requirements in paragraphs (c) and (d) of proposed § 305.9.

Paragraph (c) of proposed § 305.9 would set out requirements for compliance agreements. Proposed paragraph (c)(1) would set out the compliance agreement requirements for facilities treating imported articles; paragraphs (c)(1)(i) and (c)(1)(ii) would apply to facilities located in the United States and to facilities outside the United States, respectively. These paragraphs would contain the requirements currently in paragraphs (c) and (d) of § 305.31.

Proposed paragraph (c)(2) would address the compliance agreement requirements for facilities treating regulated articles moved interstate from Hawaii and U.S. territories. It would require a compliance agreement with APHIS to be completed as provided in § 318.13–3(d), the paragraph in part 318 that governs compliance agreements for the movement of regulated articles from Hawaii and U.S. territories. This requirement is currently found in § 305.34(b)(2)(iii).

Proposed paragraph (c)(3) addresses the compliance agreement requirements for facilities treating regulated articles to be moved interstate from areas quarantined for fruit flies. It would require a compliance agreement with APHIS to be completed as provided in § 301.32–6. This requirement is currently found in § 305.32(a)(3).

Proposed paragraph (d) would set out requirements for certification of an irradiation treatment facility. The introductory text of paragraph (d) would contain the certification and recertification requirements currently found in the introductory text of § 305.31(e), paragraph (a)(4) of § 305.32, and paragraph (b)(2)(iv) of § 305.34.

Under proposed paragraph (d), the irradiation treatment facility would have to be certified by APHIS. This language is drawn from current § 305.31(e). Unlike § 305.31(e), §§ 305.32(a)(4) and 305.34(b)(2)(iv) refer to certification by PPQ and require annual recertification. We have determined that it is not necessary to require annual recertification for facilities used to treat regulated articles moved interstate from Hawaii and U.S. territories or regulated articles moved interstate from areas quarantined for fruit flies, in the absence of one of the events currently listed in the regulations as a reason for recertification.

Recertification would be required in the event of an increase or significant decrease in the amount of radioisotope, a major modification to equipment that affects the delivered dose, or a change in the owner or managing entity of the facility. Only the regulations in § 305.31(e) currently include a change in the owner or managing entity of the facility as a reason for recertification; we have determined that this requirement would be appropriate for irradiation facilities used to treat regulated articles moved interstate from Hawaii and U.S. territories and regulated articles to be moved interstate from areas quarantined for fruit flies as well, to ensure that currently certified facilities continue to comply with the regulations under new ownership or management. (The regulations currently refer only to a decrease in the amount of radioisotope; because the amount of radioisotope decreases in very small amounts during treatment, we are proposing to add the word ''significant'' to better characterize the type of decrease that would require recertification.)

Recertification also could be required in cases where a significant variance in dose delivery has been measured by the dosimetry system. The requirements in §§ 305.32(a)(4) and 305.34(b)(2)(iv) refer to recertification in cases where a significant variance in dose delivery is indicated; the language in § 305.31(e), which we use in this proposal, provides helpful additional specificity.

Proposed paragraphs (d)(1) through (d)(3) set out requirements for certification. In order to be certified, a facility would have to:

- Be capable of administering the minimum absorbed ionizing radiation doses specified in the PPQ Treatment Manual to the regulated articles. This requirement is drawn from §§ 305.31(e)(1), 305.32(a)(1), and 305.34(b)(2)(i). We would add the reference to the PPQ Treatment Manual to be consistent with the other changes in this proposal.
- Be constructed so as to provide physically separate locations for treated and untreated fruits and vegetables, except that fruits and vegetables traveling by conveyor directly into the irradiation chamber may pass through an area that would otherwise be separated. The locations would have to be separated by a permanent physical barrier such as a wall or chain link fence

6 or more feet high to prevent transfer of cartons, or some other means approved during certification to prevent reinfestation of articles and spread of pests. This requirement is drawn from § 305.31(e)(2). The same requirements are included in §§ 305.32(a)(2) and 305.34(b)(2)(ii), except that these paragraphs do not provide for the use of some means other than a physical barrier that would be approved during certification to prevent reinfestation of articles and spread of pests. Providing such an option for irradiation facilities treating regulated articles moved interstate from Hawaii and U.S. territories and regulated articles to be moved interstate from areas quarantined for fruit flies would increase flexibility for such facilities without increasing risk, since any other means used to prevent reinfestation would be subject to APHIS approval during certification.

• If the facility is to be used to treat imported articles and is located in the United States, the facility would only be certified if APHIS determines that regulated articles would be safely transported to the facility from the port of arrival without significant risk that plant pests will escape in transit or while the regulated articles are at the facility. This requirement is drawn from § 305.31(e)(3). It is not necessary to include a similar requirement for facilities treating articles moved interstate from Hawaii and U.S. territories or articles moved interstate from an area quarantined for fruit flies, as their movement is governed by a limited permit; before granting a limited permit, APHIS would have to determine that the movement of the articles could be accomplished safely.

Paragraph (e) of proposed § 305.9 would set out requirements for monitoring and interagency agreements. The introductory text of proposed paragraph (e) would state that treatment must be monitored by an inspector and that this monitoring will include inspection of treatment records and unannounced inspections of the facility by an inspector, and may include inspection of articles prior to or after irradiation. This requirement is drawn from current §§ 305.31(f), 305.32(b), and 305.34(b)(3).

Proposed paragraph (e)(1) would set out requirements for monitoring and interagency agreements for irradiation facilities located in foreign countries. These requirements would be moved from § 305.31(f). These requirements currently apply to any facility treating imported articles, and they are somewhat more detailed and rigorous than the monitoring requirements for irradiation facilities treating articles moved interstate from Hawaii and U.S. territories and from areas quarantined for fruit flies. The additional requirements are necessary because ensuring that the irradiation treatment requirements are met when monitoring irradiation treatment in a foreign country involves an additional layer of complexity; such monitoring requires us to work with foreign governments to ensure that all requirements are met, while monitoring the irradiation treatment of articles treated within the United States does not.

Irradiation treatment of imported articles can be conducted either in the country of origin or within the United States, but the detailed requirements for monitoring and interagency agreements in § 305.31(f) only apply to facilities located in foreign countries, for the reasons described above. Therefore, we are proposing to clearly indicate in the regulatory text that these requirements only apply to irradiation facilities located in foreign countries, not necessarily all facilities that treat imported articles.

We would make one change to the requirements for monitoring and interagency agreements for facilities located in foreign countries. The trust fund agreement requirements refer to the NPPO of the country in which the irradiation facility is located entering into a trust fund with APHIS. Often, we enter into the trust fund with a private export group that operates the facility. Therefore, we would amend the existing text describing trust fund agreements to refer to entering into the agreement either with the NPPO or with a private export group. This change would be consistent with the general language governing trust fund agreements related to the importation of fruits and vegetables in § 319.56–6.

Proposed paragraph (e)(2) would set out requirements for monitoring and interagency agreements for irradiation facilities located within the United States. This paragraph would contain the current requirements for irradiation facilities treating articles moved interstate from areas quarantined for fruit flies and from Hawaii and U.S. territories in §§ 305.32(b) and 305.34(b)(3), respectively; those paragraphs are identical. For the reasons described above, we have determined that these requirements would also be appropriate for irradiation facilities located within the United States that are used to treat imported articles.

Proposed paragraph (f) of § 305.9 would set out packaging requirements. Under proposed paragraph (f)(1), irradiated articles would not be allowed to be packaged for shipment in a carton with nonirradiated articles. This requirement is drawn from current §§ 305.31(g)(1) and 305.34(b)(2), which apply to articles imported into the United States and articles moved interstate from Hawaii, Puerto Rico, and the U.S. Virgin Islands, respectively; we have determined that it is appropriate for articles moved interstate from areas quarantined for fruit flies as well, as it helps to reduce the risk of reinfestation of treated articles.

Current paragraph (g)(1) of § 305.31 also requires irradiated articles to be shipped in the same cartons in which they are treated; the irradiation treatment regulations for articles moved interstate from Hawaii, Puerto Rico, and the U.S. Virgin Islands and for articles moved interstate from areas quarantined for fruit flies do not contain such a requirement. We have determined that requiring irradiated articles to be shipped in the same cartons in which they are treated is unnecessary. The requirement is intended to prevent untreated articles from being shipped and to prevent treated articles from being infested with fruit flies after treatment, but other requirements in the irradiation treatment regulations (such as those discussed directly above and below) adequately address this issue. Additionally, treatment is always monitored by an inspector, who will be able to ensure that adequate safeguarding measures are practiced. Accordingly, the irradiation treatment regulations proposed here do not include the same-carton requirement.

The current packaging requirements in the irradiation treatment regulations specifically address fruit flies. However, irradiation treatment is approved for pests other than fruit flies, and some commodities that are irradiated are not fruit fly hosts. Therefore, we are proposing to amend the current requirements to refer to packaging sufficient to prevent the infestation or reinfestation of the treated articles by the pests of concern, rather than fruit flies specifically.

Proposed paragraph (f)(2) sets out packaging requirements for imported articles treated prior to arrival in the United States; for regulated articles moved interstate from Hawaii or U.S. territories and irradiated prior to arrival in the mainland United States; and for regulated articles to be moved interstate from areas quarantined for fruit flies that are treated within the quarantined area. The requirements in proposed paragraph (f)(2) are drawn from §§ 305.31(g)(3), 305.32(c), and 305.34(b)(4)(i).

Under this paragraph, the articles to be irradiated would have to be packaged either:

- In insect-proof cartons that have no openings that will allow the entry of the pests of concern. The cartons would have to be sealed with seals that will visually indicate if the cartons have been opened. The cartons could be constructed of any material that prevents entry or oviposition (if applicable) by the pests of concern into the articles in the carton; or
- In noninsect-proof cartons that are stored immediately after irradiation in a room completely enclosed by walls or screening that completely precludes access by the pests of concern. If stored in noninsect-proof cartons in a room that precludes access by the pests of concern, prior to leaving the room, each pallet of cartons would have to be completely enclosed in polyethylene shrink wrap, or another solid or netting covering that completely precludes access to the cartons by the pests of concern.

These two options are drawn from current § 305.31(g)(3), which applies to imported commodities treated prior to arrival in the United States. Current §§ 305.32(c) and 305.34(b)(4)(i), which apply, respectively, to articles treated in Hawaii, Puerto Rico, or the U.S. Virgin Islands and to articles treated in an area quarantined for fruit fly, do not provide the option to use noninsect-proof cartons; providing this option for treatment of those articles increases flexibility without increasing risk, since APHIS would have to approve any room used to store treated articles in noninsect-proof cartons.

Each pallet-load of cartons containing the fruits and vegetables would have to be wrapped before leaving the irradiation facility in one of the following ways:

- With polyethylene shrink wrap;
- With net wrapping; or
- With strapping so that each carton on an outside row of the pallet load is constrained by a metal or plastic strap.

These requirements are drawn from current §§ 305.31(g)(3)(ii), 305.32(c)(2), and 305.34(b)(4)(i)(B). Current § 305.31(g)(3)(ii) states that the wrapping requirements are intended to preserve the identity of treated lots. Instead of referring to the identity of the treated lots, we are proposing to refer to the integrity of the treated lots, as the requirements are intended to allow treated lots to be easily identifiable and separated from untreated lots.

Packaging would have to be labeled with treatment lot numbers, packing and treatment facility identification and location, and dates of packing and treatment. This requirement is drawn from current §§ 305.31(g)(3)(iii), 305.32(c)(3), and 305.34(b)(4)(i)(C).

Under current § 305.31(g)(3)(iii), pallets of imported articles that are treated prior to arrival in the United States must remain intact as one unit until entry into the United States and may have one such label per pallet, and pallets that are broken apart into smaller units prior to or during entry into the United States must have the required label information on each individual carton. We would retain these requirements in proposed § 305.9(f)(2)(iii)(A) and would extend their applicability in proposed § 305.9(f)(2)(iii)(B) to articles moved interstate from Hawaii and U.S. territories that are treated prior to arrival in the mainland United States. We are also proposing to require label information on individual cartons if the pallets will be broken apart after entry into the mainland United States as well. These requirements would ensure that we can conduct traceback to the treatment facility if necessary and would also indicate to inspectors that the articles have been subject to an approved treatment and have moved under certificate or limited permit, whichever is applicable.

Similar requirements for labeling of cartons within pallets are not necessary for articles moved interstate from areas quarantined for fruit flies and treated prior to interstate movement, because the articles enter commerce directly after treatment, meaning that there is no gap in distance or time between treatment and distribution that would necessitate additional information for traceback. In addition, because such articles are moved directly into commerce, they are not typically palleted.

Proposed paragraph (f)(3) of § 305.9 would set out the requirements for packaging for articles imported to be irradiated upon arrival in the United States, moved interstate to be irradiated upon arrival in the mainland United States, or moved interstate from areas quarantined for fruit flies to be irradiated. Under this paragraph, such articles would have to be packed in cartons that have no openings that will allow the exit of the pests of concern and that are sealed with seals that will visually indicate if the cartons have been opened. They could be constructed of any material that prevents the pests of concern from exiting the carton. These requirements are drawn from current § 305.31(g)(2), which applies to articles irradiated after importation into the United States; we have determined that they are appropriate for regulated articles irradiated after interstate movement from Hawaii and U.S. territories and regulated articles irradiated after interstate movement from areas quarantined for fruit flies as well, in order to provide additional protection against the introduction of quarantine pests. Current § 305.31(g)(2) refers to preventing the entry of the pests of concern into the cartons; we are proposing to refer to the exit of those pests, because this measure is designed to prevent pests that have infested the articles from being introduced into the United States before the articles are treated.

Proposed paragraph (f)(3) would also require that cartons of such articles be shipped in shipping containers sealed prior to their shipment with seals that will visually indicate if the shipping containers have been opened. This requirement is drawn from § 305.34(b)(4)(ii), which applies to articles treated before they are moved interstate from Hawaii, Puerto Rico, or the U.S. Virgin Islands into the United States. We have determined that this requirement is appropriate for imported articles treated after importation and articles moved interstate from areas quarantined for fruit flies that are treated after movement as well, because it provides additional protection against the introduction of quarantine pests.

The labeling requirements in § 305.34 also include provisions prohibiting the interstate movement of litchi and longan from Hawaii into Florida and requiring all cartons in which litchi or longan are packed to be stamped ''Not for importation into or distribution in FL.'' These provisions would be better placed in the regulations governing the interstate movement of fruits and vegetables in part 318, since the labeling requirements here are not related to irradiation treatment but rather to the risk posed by the litchi rust mite, which is not addressed by irradiation. Accordingly, we are proposing to amend the table of regulated articles allowed interstate movement under specified conditions in § 318.13–16 by adding entries for litchi and longan from Hawaii; these entries would indicate that the interstate movement of litchi and longan from Hawaii is subject to the distribution restriction and labeling requirements that are currently found in § 305.34. We would also change the required stamp to refer correctly to movement into Florida, rather than importation.

Proposed paragraph (g) of § 305.9 would require that containers or vans that will transport treated articles be free of pests prior to loading the treated articles. This requirement is drawn from

current § 305.31(h), which applies to imported articles that have been treated with irradiation. We are also proposing to apply this requirement to the transportation of treated articles moved interstate from Hawaii and U.S. territories and treated articles to be moved interstate from areas quarantined for fruit flies, as it provides additional phytosanitary security.

Proposed paragraph (h) of § 305.9 would contain the phytosanitary certification requirement for imported articles that is currently found in § 305.31(i). However, we would amend this requirement to refer to consignments rather than shipments, as ''consignments'' is the term used in the IPPC Glossary of Phytosanitary Terms.

Paragraph § 305.34(b)(7) of the regulations governing irradiation treatment of articles moved interstate from Hawaii, Puerto Rico, and the U.S. Virgin Islands contains specific requirements for certification or limited permits for the interstate movement of several commodities that apply in addition to irradiation treatment. For example, breadfruit and jackfruit, which have specific requirements for certification and limited permits in §§ 305.34(b)(7)(i)(C) and 305.34(b)(7)(ii)(C), respectively, must be inspected and found to be free of various pests, treated with irradiation for fruit flies, subjected to a treatment for external feeders or originate from an orchard or growing area that has been treated with a broad-spectrum insecticide, free of stems and leaves, and originate from an orchard that was treated with a fungicide appropriate for the fungus *Phytophthora tropicalis* or subjected to a post-harvest fungicidal dip appropriate for that fungus. These requirements are not related to irradiation treatment, but rather address other pest risks that irradiation treatment does not mitigate. Accordingly, we are proposing to move the specific certification and limited permit requirements currently found in § 305.34(b)(7)(i)(A) through (H) and § 305.34(b)(7)(ii)(A) through (D) to part 318. Specifically:

- The certification and limited permit requirements for litchi from Hawaii, which are found in paragraphs (b)(7)(i)(A) and (b)(7)(ii)(A) of § 305.34, respectively, refer only to inspection for freedom from pests. As movement of any fruit or vegetable from Hawaii is subject to inspection for freedom from pests under § 318.13–3, it would not be necessary to retain this specific requirement in the regulations.
- The certification and limited permit requirements for sweetpotatoes, which are found in paragraphs (b)(7)(i)(B) and (b)(7)(ii)(B) of § 305.34, respectively, would be added to § 318.13–25, which contains requirements for the interstate movement of sweetpotatoes from Hawaii with vapor heat treatment.
- The certification and limited permit requirements for breadfruit and jackfruit, which are found in paragraphs (b)(7)(i)(C) and (b)(7)(ii)(C) of § 305.34, respectively; the certification and limited permit requirements for fresh pods of cowpea and its relatives, which are found in paragraphs (b)(7)(i)(D) and (b)(7)(ii)(D) of § 305.34, respectively; and the certification requirements for dragon fruit, mangosteen, melon, and moringa pods, which are found in paragraphs § 305.34(b)(7)(i)(E) through (b)(7)(i)(H), respectively, would be included in a new § 318.13–26. This new section would indicate explicitly that irradiation treatment is required for these commodities, in addition to the other requirements.

In addition, because we are proposing to remove specific irradiation doses from the regulations, as discussed earlier, we would amend the specific certification and limited permit provisions by removing references to specific irradiation doses and replacing them with references to irradiation treatment for certain pests. For example, in order to be certified for interstate movement under current § 305.34(b)(7)(i)(C), breadfruit and jackfruit must be inspected in Hawaii and found to be free of certain pests and treated at the 150 gray dose to neutralize fruit flies. Inspection for plant pests of the class Insecta (except pupae and adults of the order Lepidoptera) is unnecessary if the fruits are treated at the 400 gray dose, which is approved to neutralize those plant pests. Rather than include the doses in the revised irradiation treatment requirements, we would simply refer in the new § 318.13–26 to treatment at a dose approved to neutralize fruit flies or at a dose approved to neutralize all plant pests of the class *Insecta,* except pupae and adults of the order Lepidoptera. We would also remove references to treatment schedule T102–c, which is a soapy water dip treatment for external pests, and instead refer to treatment in accordance with part 305 for external pests. This would allow the regulations to conform with any changes we might make to the approved irradiation doses or other treatments through the notice-based process outlined earlier in this proposal.

General certification and limited permit provisions for articles moved interstate from Hawaii and U.S. territories are found in § 318.13–3; similarly, general certification and limited permit provisions for articles moved interstate from areas quarantined for fruit flies are found in § 301.32–5 of the domestic fruit fly quarantine regulations. It is not necessary to duplicate those general provisions in the irradiation treatment requirements.

Proposed paragraph (i) of § 305.9 would require that the regulated articles receive the minimum absorbed ionizing radiation dose specified in the PPQ Treatment Manual. The similar requirements currently found in §§ 305.32(d), for articles moved interstate from areas quarantine for fruit flies, and 305.34(b)(5), for articles moved interstate from Hawaii, Puerto Rico, and the U.S. Virgin Islands, refer to receiving the dose specified in the regulations; we would change this reference as part of moving the lists of approved treatments and schedules to the PPQ Treatment Manual. The regulations for the irradiation treatment of imported articles do not contain a similar requirement, although it is implied; we believe it would be helpful to make the requirement explicit for all types of articles.

Proposed paragraph (j) of § 305.9 sets out requirements for dosimetry systems at the irradiation facility. Such requirements are currently contained in §§ 305.31(j), 305.32(e), and 305.34(b)(6). Although there are wording differences among the current requirements for dosimetry systems, they are substantively identical, and we have incorporated them into the proposed text with minor changes to ensure consistency.

Proposed paragraph (j)(1) would require dosimetry to indicate the doses needed to ensure that all the articles will receive the minimum dose prescribed.

Proposed paragraph (j)(2) would require the absorbed dose, as measured using an accurate dosimetry system, to meet or exceed the absorbed dose for the pest(s) of concern required by the PPQ Treatment Manual. The current dosimetry requirements refer to receiving the dose specified in the regulations; we would change this reference as part of moving the lists of approved treatments and scheduled to the PPQ Treatment Manual.

Proposed paragraph (j)(3) would require the facility operator, when designing the facility's dosimetry system and procedures for its operation, to address guidance and principles from the International Standards Organization/American Society for Testing and Materials standard or an equivalent standard recognized by APHIS.

Proposed paragraph (k) of § 305.9 set outs requirements for recordkeeping. These requirements are copied from §§ 305.31(k), 305.32(f), and 305.34(b)(8), which are identical.

Proposed paragraph (l) of § 305.9 sets out requirements for requesting certification and inspection of a facility. Under this paragraph, persons requesting certification of an irradiation treatment facility would have to submit the request for approval in writing to the Animal and Plant Health Inspection Service, Plant Protection and Quarantine, Center for Plant Health Inspection and Technology, 1730 Varsity Drive, Suite 400, Raleigh, NC 27606–5202. The initial request would have to identify the owner, location, and radiation source of the facility, and the applicant must supply additional information about the facility construction, treatment protocols, and operations upon request by APHIS if APHIS requires additional information to evaluate the request. Before the Administrator determines whether an irradiation facility is eligible for certification, an inspector would make a personal inspection of the facility to determine whether it complies with the standards of proposed § 305.9.

These requirements are taken from current § 305.31(l), which applies to facilities used to treat imported articles. Similar requirements are contained in §§ 305.32(g), which applies to facilities used to treat articles moved interstate from areas quarantined for fruit flies, and 305.34(c), which applies to facilities used to treat articles moved interstate from Hawaii, Puerto Rico, and the U.S. Virgin Islands. Proposed paragraph (l) differs in that it refers to the certification of a facility, rather than to approval of a facility. Current §§ 305.32(g) and 305.34(c) also do not include the requirement that the initial request for certification include the information described earlier. The submission of such information in requests for certification of irradiation facilities used to treat regulated articles moved interstate from Hawaii and U.S. territories or regulated articles to be moved interstate from areas quarantined for fruit flies would allow us to more efficiently evaluate requests for certification.

In this proposal, we would also update the address of the Center for Plant Health Science and Technology, which is now located at the address given above.

Proposed paragraph (m) of § 305.9 sets out provisions for denial and withdrawal of certification. These requirements are taken from current § 305.31(m). Except for referring to approval of a facility rather than certification, the requirements for denial and withdrawal in §§ 305.32(h) and 305.34(d) are identical to the requirements in proposed § 305.31(m).

Proposed paragraph (n) of § 305.9 informs the reader that the Department is not responsible for damage to treated articles. This proposed paragraph is copied from current §§ 305.31(n), 305.32(i), and 305.34(e), which are identical.

The proposed changes to the irradiation treatment regulations would make the requirements more consistent across different types of facilities and would eliminate redundant text. We invite public comment on these changes.

Removal of Treatment Schedules From 7 CFR Parts 301 and 319

Although part 305 serves as the main source for treatment schedules authorized under 7 CFR chapter III, there are also some other treatment schedules contained in parts 301 and 319. As part of this proposal, we would remove those schedules from the regulations and (if necessary) add them to the PPQ Treatment Manual. The schedules we are proposing to remove from the regulations are:

- Fumigation and cold treatment schedules for pine shoot beetle in paragraphs (a) through (c) of § 301.50–10;
- Various treatments for citrus canker in § 301.75–11;
- Chemical treatments in the appendix to the subpart for imported fire ant (§§ 301.81 through 301.81–10);
- Heat and disinfection treatments for sugarcane diseases in § 301.87–10;
- Cleaning and disinfection treatments for Karnal bunt in § 301.89–13;
- Heat treatments for *Phytophthora ramorum* in § 301.92–10;
- A methyl bromide fumigation treatment for Unshu oranges from Japan and Korea in § 319.28(b)(5);
- Heat treatment and fumigation schedules for regulated wood packing material in § 319.40–3(b)(1);
- Heat treatment, fumigation, and surface pesticide treatments for regulated wood in § 319.40–7(c) through (f);
- Treatments for disinfection of broomcorn and broomcorn products in § 319.41–5a;
- A specific temperature requirement for quick freeze treatment in § 319.56–12;
- Disinfection treatments for Karnal bunt in paragraphs (d)(3)(i) through (d)(3)(iii) of § 319.59–4; and
- Fumigation treatment schedules for cut flowers in paragraph (c)(2) of § 319.74–2.

Under the heading ''4. Imported-Fire-Ant-Free Nursery—Containerized Plants Only,'' the appendix to the imported fire ant subpart describes a systems approach for ensuring nursery freedom from imported fire ant and provides conditions under which containerized nursery stock may be certified for interstate movement under § 301.81–5. We would move this systems approach to a new section § 301.81–11, moving the chemical treatment schedules included in the systems approach to the PPQ Treatment Manual and making minor editorial changes to accommodate the movement of the systems approach requirements into the new section. This change would thus remove the appendix from the imported fire ant subpart.

Because we would remove the schedules listed above from the regulations, we would also need to update references to those schedules elsewhere in the regulations. The specific changes we are consequently proposing can be found in the regulatory text at the end of this document.

We would retain in the regulations treatments that are not intended for use on regulated articles but rather for use on premises, such as the malathion or spinosad bait spray treatments in § 301.32–10(b) for premises in fruit fly quarantined areas.

Miscellaneous Changes

In addition to removing treatment schedules, the changes proposed here would also make it necessary to update several references to treatments throughout 7 CFR chapter III. For example, several requirements within ''Subpart—Fruits and Vegetables'' (§§ 319.56–1 through 319.56–48) refer to authorized treatments listed in 7 CFR part 305. As we are proposing to revise it, part 305 would not list specific authorized treatments; it would instead refer the reader to the PPQ Treatment Manual for specific approved treatments. Accordingly, we would amend references to authorized treatments listed in 7 CFR part 305 to refer instead to treatment in accordance with 7 CFR part 305.

Other changes are required when the regulatory text refers to specific sections or treatments in the current 7 CFR part 305; for example, the ''Subpart—Hawaiian Fruits, Vegetables, and Flowers'' regulations sometimes refer specifically to irradiation treatment in accordance with § 305.34. These references would be amended to refer

generally to part 305, rather than to a specific section or treatment. All of the changes we are making to ensure consistency with the proposed changes can be found in the regulatory text at the end of this document.

Some requirements in 7 CFR chapter III refer to treatment of articles, but do not refer specifically to treatment in accordance with part 305. We are proposing to include references to treatment in accordance with part 305 in existing treatment requirements in §§ 318.47–3(a), 319.8–23(a)(1), and 319.55–6(b)(1).

Some other provisions in 7 CFR chapter III refer generally to treatment as well. Within part 330, which addresses the risks posed by movement of plant pests; soil, stone, and quarry products; and garbage, §§ 330.106(a) and 330.300 refer to treatment as a mitigation an inspector can direct to be employed in certain circumstances. In part 352, which contains provisions for safeguarding plants and plant products that transit the United States, § 352.10(b)(2)(viii) refers to the availability of treatment facilities as a factor in granting a transit permit, and § 352.30 refers to treatment as may be required by an inspector for shipping containers used to transport untreated citrus in order to prevent plant pest dissemination. We are proposing to amend these references to ''treatment'' to refer specifically to treatment in accordance with part 305.

The regulations for the interstate movement of sweetpotatoes from Hawaii with vapor heat treatment in § 318.13–25 contain packaging requirements similar to those for irradiated articles moved interstate from Hawaii. These packaging requirements refer to preventing infestation by fruit flies, but sweetpotato is not a host of fruit flies. For the same reasons discussed earlier with respect to the irradiation packaging requirements, we would amend these requirements to refer instead to ''the pests of concern.''

Executive Order 12866 and Regulatory Flexibility Act

This proposed rule has been reviewed under Executive Order 12866. The rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

APHIS is proposing amendments to 7 CFR parts 301, 305, 318, and 319 to streamline the process for adding, revising, and removing treatment schedules and for authorizing the use of existing treatments for additional commodities. As required by the Regulatory Flexibility Act, we have evaluated the potential economic effects of this action on small businesses, small organizations, and small governmental jurisdictions

The regulations in 7 CFR chapter III are intended, among other things, to prevent the introduction or dissemination of plant pests and noxious weeds into or within the United States. Under the regulations, certain plants, fruits, vegetables, and other articles must be treated before they may be moved into the United States or interstate. The phytosanitary treatments regulations contained in part 305 set out standards and schedules for treatments required in parts 301, 318, and 319 for fruits, vegetables, and other articles.

APHIS is proposing to remove the lists of authorized treatments and treatment schedules from part 305, while retaining the general requirements for performing treatments and treatment facilities. We would remove treatment schedules from other places where they are currently found in parts 301 and 319 as well. Treatment schedules would instead be found in the PPQ Treatment Manual. We are also proposing to establish a new process to make changes to the lists of approved treatments and the treatment schedules and to inform the public and solicit comments on the changes. We would also establish a process by which we could make immediate changes to the lists of approved treatments and to the treatment schedules, and establish criteria for when we could use this process. The current regulations do not address situations where there is an immediate need to withdraw treatments, modify treatments, or apply treatments differently. Finally, we would harmonize the separate requirements for performing irradiation treatment for imported articles, articles moved interstate from Hawaii, Puerto Rico, and the U.S. Virgin Islands, and articles moved interstate from an area quarantined for fruit flies. These changes would simplify and expedite our processes for adding, changing, and removing treatment schedules while continuing to provide for public participation in the process. These changes would also simplify our presentation of treatments to the public by consolidating all treatments into one document and eliminating redundant text from the regulations.

Eliminating the need for specific prior rulemaking for approving new treatments or treatment schedules or for revising existing ones under the proposed notice-based process, could result in considerable time savings. The rulemaking process is an inherently longer process than a notice-based process. Additionally, establishing a notice-based process for approving new treatments or treatment schedules would facilitate use of the already-established notice-based process for authorizing the importation of fruits and vegetables set out in § 319.56–4. Under § 319.56–4, APHIS can authorize the importation of fruits and vegetables via a notice-based process if APHIS makes the determination that the application of one or more designated phytosanitary measures is sufficient to mitigate the risk that plant pests or noxious weeds could be introduced into or disseminated within the United States via the imported fruits or vegetables. Currently, however, if one of the prescribed designated measures is a treatment that requires an amendment to part 305, rulemaking is still required to amend the lists of approved treatments or treatment schedules. Establishing a notice-based process to amend the lists of approved treatments or treatment schedules would streamline this process.

Consumers benefit from the opportunity to consume commodities from a variety of sources, foreign as well as domestic. Consumer expenditures for fruit and vegetables are growing faster than for any food group other than meats. In many cases, fruit and vegetable imports can occur only after those commodities have been treated to prevent the introduction or movement of plant pests and/or diseases. This proposed rule would allow treatments to be put in use more quickly when treatment changes are necessary and when existing treatments are applied to new commodities; treated products would become available to meet consumer demand sooner than at present. Treated imports supplement domestic supplies, especially of fresh products during the winter. Treatments also allow for movement of domestically produced products to markets around the country that otherwise would not occur. This movement results in increased choices for consumers. Even where new imports compete directly with domestic production, consumers benefit when increased competition results in lower prices.

Those entities most likely to be affected by the rule are domestic importers and producers of plants and plant products. The Small Business Administration (SBA) has established guidelines for determining which establishments are to be considered small. Import/export merchants, agents, and brokers are identified within the broader wholesaling trade sector. A firm primarily engaged in wholesaling is

considered small if it employs not more than 100 persons. In 2002, more than 96 percent of fresh fruit and vegetable merchant wholesalers, more than 99 percent of grain and field bean merchant wholesalers, and more than 98 percent of flower and nursery stock wholesalers were considered small by SBA standards.[3] All types of farms are considered small if they have annual receipts of $0.75 million or less. In 2002, more than 99 percent of oilseed and grain farms, more than 99 percent of vegetable and melon farms, more than 99 percent of fruit and tree nut farms, more than 99 percent of greenhouse, nursery, and floriculture producers, and more than 99 percent of other crop farms were considered small by SBA standards.[4]

Treatments are applicable to a wide variety of products including fruits, vegetables, live plants, bulbs, seeds, grains, logs, lumber, and other plants and plant products in a wide variety of circumstances. Vast quantities of treated products move into and through the United States annually. The United States is among the top producers and consumers of plants and plant products. U.S. per capita use of fruit and tree nuts totals nearly 300 pounds each year, ranking third in per capita consumption of major food groups, next to dairy and vegetables. Oranges, apples, grapes, and bananas are the most popular fruit while almonds, pecans, and walnuts are the most preferred tree nuts. Annual per capita use of all vegetables and melons averaged 445 pounds during the first 5 years of the 2000s.

TABLE 3—U.S. PRODUCTION VALUE OF SELECTED CROPS, 2004–2006

[$ million]

Item	2004	2005	2006
Field and miscellaneous crops:			
Cotton, tobacco, sugar	8,674	8,702	8,648
Dry beans, peas, lentils	596	650	637
Grains, hay	47,367	45,225	57,209
Oilseeds	20,115	19,681	22,412
Potatoes, misc.	4,054	4,472	4,731
Fruit and nuts:			
Apples, pears	1,696	1,969	2,567
Berries	2,082	2,300	2,668
Citrus	2,485	2,303	2,738
Grapes	3,010	3,494	3,304
Nuts, other noncitrus	4,047	4,784	4,132
Stone fruit	1,243	1,462	1,563
Fresh vegetables:			
Brassica	1,111	1,118	1,225
Lettuce, spinach	2,062	2,108	2,635
Melons	728	873	877
Onions, peppers	1,300	1,501	1,674
Tomatoes	2,445	2,609	2,670
Other vegetables	1,430	1,599	1,619

In 2006, U.S. production of field and miscellaneous crops was valued at more than $93 billion, with grains, hay, and oilseeds accounting for the majority of this value. Fruit and tree nuts production was valued at about $17 billion. More than 63 percent of this production was in grapes, apples, almonds, oranges, and strawberries. Commercial vegetable production for the fresh market was valued at almost $11 billion, with tomatoes, lettuce, onions, broccoli, and sweet corn accounting for about 60 percent of this value.

Imports have become increasingly important for domestic consumption. Imports of plants and plant products have expanded rapidly over the past two decades, and include many new and newly traded commodities. In 2006, the United States imported approximately $5.8 billion in fresh fruits and tree nuts, about $2.5 billion in fresh vegetables, and about $1.5 billion in live plants and other plant products. Logs, lumber, and other timber product imports were valued at nearly $12 billion in 2006.

TABLE 4—U.S. IMPORTS OF PLANTS AND PLANT PRODUCTS, 2004–2006

[$ million]

Item	2004	2005	2006
Live plants, bulbs, etc.:			
Bulbs, tubers	208	208	208
Cut flowers, dried	706	709	768
Foliage	102	114	123
Other live plants	362	352	358
Fruit and nuts:			
Bananas	1,102	1,134	1,201
Citrus, fresh	307	356	407

[3] 2002 Economic Census. Department of Commerce. U.S. Bureau of the Census. North American Industry Classification System (NAICS) Categories. 424480—Fresh fruit & Vegetable merchant wholesalers; 424510—Grain & field bean merchant wholesalers; 424930—Flower, nursery stock, and florists' supplies merchant wholesalers.

[4] 2002 Census of Agriculture. US Department of Agriculture. National Agricultural Statistics Service. NAICS Categories—1111: Oilseed & Grain farming; 1112: Vegetable and melon farming; 1113: Fruit and tree nut farming; 1114: Greenhouse, nursery & Floriculture production; and 1119: Other Crop farming.

TABLE 4—U.S. IMPORTS OF PLANTS AND PLANT PRODUCTS, 2004–2006—Continued

[$ million]

Item	2004	2005	2006
Coconuts, Brazil nuts	640	660	602
Dates, figs, pineapples	570	812	936
Grapes	743	980	953
Other fruits and nuts	1,127	1,174	1,297
Fresh vegetables:			
Cucumbers, gherkins	349	319	421
Melons	369	393	431
Onions, shallots	254	308	282
Tomatoes	1,054	1,075	1,234
Other vegetables	417	508	543
Logs, lumber, and other timber products:			
Wood in the rough	246	348	347
Wood, sawn or chipped	8,799	8,989	8,333
Other wood	2,894	3,074	3,235

While treatments are applicable to a wide variety of plants and plant products in a wide variety of circumstances, the changes proposed in this rule would not alter current treatment requirements, the manner in which new treatments are evaluated, or when and how treatments are ultimately used other than in emergency situations. The proposed rule would allow treatment changes to be implemented more rapidly and therefore facilitate the movement of treated products to meet consumer demand. These changes are not expected to significantly impact the total supply of plants and plant products in the United States. Therefore, we expect at most small effects on U.S. marketers and consumers.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action would not have a significant economic impact on a substantial number of small entities.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. If this proposed rule is adopted: (1) All State and local laws and regulations that are inconsistent with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) administrative proceedings will not be required before parties may file suit in court challenging this rule.

Paperwork Reduction Act

This proposed rule contains no new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Lists of Subjects

7 CFR Part 301

Agricultural commodities, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Transportation.

7 CFR Part 305

Agricultural commodities, Chemical treatment, Cold treatment, Heat treatment, Imports, Irradiation, Phytosanitary treatment, Plant diseases and pests, Quarantine, Quick freeze, Reporting and recordkeeping requirements, Transportation.

7 CFR Part 318

Cotton, Cottonseeds, Fruits, Guam, Hawaii, Plant diseases and pests, Puerto Rico, Quarantine, Transportation, Vegetables, Virgin Islands.

7 CFR Part 319

Coffee, Cotton, Fruits, Imports, Logs, Nursery stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

7 CFR Part 330

Customs duties and inspection, Imports, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Transportation.

7 CFR Part 352

Customs duties and inspection, Imports, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Transportation.

Accordingly, we propose to amend 7 CFR chapter III as follows:

PART 301—DOMESTIC QUARANTINE NOTICES

1. The authority citation for part 301 continues to read as follows:

Authority: 7 U.S.C. 7701–7772 and 7781–7786; 7 CFR 2.22, 2.80, and 371.3.

Section 301.75–15 issued under Sec. 204, Title II, Public Law 106–113, 113 Stat. 1501A–293; sections 301.75–15 and 301.75–16 issued under Sec. 203, Title II, Public Law 106–224, 114 Stat. 400 (7 U.S.C. 1421 note).

2. In § 301.32–10, in the introductory text, the first sentence is revised to read as follows:

§ 301.32–10 Treatments.

Regulated articles may be treated in accordance with part 305 of this chapter to neutralize fruit flies. * * *

* * * * *

§ 301.50–5 [Amended]

3. In § 301.50–5, paragraph (a)(1)(i) is amended by removing the citation ''§ 301.50–10(d)'' and adding the citation ''§ 301.50–10(b)'' in its place.

4. Section 301.50–10 is amended as follows:

a. By revising paragraph (a) to read as set forth below.

b. By removing paragraphs (b) and (c).

c. By redesignating paragraph (d) as paragraph (b).

§ 301.50–10 Treatments and management method.

(a) Regulated articles may be treated in accordance with part 305 of this chapter to neutralize the pine shoot beetle.

* * * * *

§ 301.75–4 [Amended]

5. In § 301.75–4, paragraphs (d)(2)(i)(C), (d)(2)(ii)(C), (d)(2)(ii)(D), (d)(2)(ii)(E), and (d)(4) are amended by removing the words ''§ 301.75–11(d) of this subpart'' and adding the words ''part 305 of this chapter'' in their place; and paragraph (d)(4) is amended by removing the words ''§ 301.75–11(c) of this subpart'' and adding the words ''part 305 of this chapter'' in their place.

§ 301.75–6 [Amended]

6. In § 301.75–6, paragraphs (b)(5) and (b)(6) are amended by removing the words ''§ 301.75–11(d)'' and adding the words ''part 305 of this chapter'' in their place; and paragraph (b)(5) is amended by removing the words ''§ 301.75–11(c)'' and adding the words ''part 305 of this chapter'' in their place.

§ 301.75–7 [Amended]

7. In § 301.75–7, paragraphs (a)(3), (c)(1)(ii), and (c)(2)(v) are amended by removing the words ''§ 301.75–11(a) of this subpart'' and adding the words ''part 305 of this chapter'' in their place; and paragraph (c)(2)(iv) is amended by removing the words ''§ 310.75–11(d) of this subpart'' and adding the words ''part 305 of this chapter'' in their place.

§ 301.75–8 [Amended]

8. In § 301.75–8, paragraph (b) is amended by removing the words ''§ 301.75–11(b) of this subpart'' and adding the words ''part 305 of this chapter'' in their place.

§ 301.75–11 [Removed and Reserved]

9. Section 301.75–11 is removed and reserved.

§ 301.81–4 [Amended]

10. Section 301.81–4 is amended as follows:

a. In paragraph (a)(2)(iii), by removing the words ''the methods and procedures prescribed in the Appendix to this subpart (''III. Regulatory Procedures'')'' and adding the words ''part 305 of this chapter'' in their place.

b. In paragraph (b), by removing the words ''the methods and procedures prescribed in the Appendix to this subpart (''III. Regulatory Procedures''), or in accordance with the methods and procedures prescribed in''.

11. Section 301.81–5 is amended as follows:

a. In paragraph (a)(3)(ii), at the end of the paragraph, by removing the word ''or''.

b. In paragraph (a)(3)(iii), by removing the words ''methods and procedures prescribed in the Appendix to this subpart (''III. Regulatory Procedures'')'' and adding the words ''part 305 of this chapter'' in their place; and by adding the word ''or'' at the end of the paragraph.

c. By adding a new paragraph (a)(3)(iv) to read as set forth below.

§ 301.81–5 Issuance of a certificate or limited permit.

(a) * * *

(3) * * *

(iv) If the article is containerized nursery stock, it has been produced in accordance with § 301.81–11 of this subpart.

* * * * *

§ 301.81–6 [Amended]

12. Section 301.81–6 is amended by removing the words ''the ''Imported Fire Ant Program Manual,'' as set forth in the appendix to this subpart'' and adding the words ''part 305 of this chapter'' in their place.

13. A new § 301.81–11 is added to read as follows:

§ 301.81–11 Imported fire ant detection, control, exclusion, and enforcement program for nurseries producing containerized plants.

This detection, control, exclusion, and enforcement program is designed to keep nurseries free of the imported fire ant and provides a basis to certify containerized nursery stock for interstate movement. Participating regulated establishments must be operating under a compliance agreement in accordance with § 301.81–6. Such compliance agreements shall state the specific requirements that a shipper agrees to follow to move plants in accordance with the requirements of the program. Certificates and a nursery identification number may be issued to the nursery for use on shipments of regulated articles.

(a) *Detection.* (1) Nursery owners are required to survey visually their entire premises twice monthly for the presence of imported fire ants.

(2) Nurseries participating in this program will be inspected by Federal or State inspectors at least twice per year. More frequent inspections may be necessary depending upon imported fire ant infestation levels immediately surrounding the nursery, the thoroughness of nursery management in maintaining imported-fire-ant-free premises, and the number of previous detections of imported fire ants in or near containerized plants. Inspections by Federal and State inspectors should be more frequent just before and during the peak shipping season. Any nurseries determined during nursery inspections to have imported fire ant colonies must be immediately treated to the extent necessary to eliminate the colonies.

(b) *Control.* Nursery plants that are shipped under this program must originate in a nursery that meets the requirements of this section. Nursery owners must implement a treatment program with registered bait and contact insecticides. The premises, including growing and holding areas, must be maintained free of the imported fire ant. As part of this treatment program, all exposed soil surfaces (including sod and mulched areas) on property where plants are grown, potted, stored, handled, loaded, unloaded, or sold must be treated in accordance with part 305 of this chapter at least once every 6 months. The first application must be performed early in the spring. Followup treatments with a contact insecticide in accordance with part 305 must be applied to eliminate all remaining colonies.

(c) *Exclusion.* (1) For plants grown on the premises, treatment of soil or potting media in accordance with part 305 of this chapter prior to planting is required.

(2) For plants received from outside sources, to prevent the spread into a nursery free of the imported fire ant by newly introduced, infested nursery plants, all plants must be:

(i) Obtained from nurseries that comply with the requirements of this section and that operate under a compliance agreement in accordance with § 301.81–6; or

(ii) Treated upon delivery in accordance with part 305 of this chapter, and within 180 days be either:

(A) Repotted in treated potting soil media;

(B) Retreated in accordance with part 305 of this chapter at 180-day intervals; or

(C) Shipped.

(d) *Enforcement.* (1) The nursery owner must maintain records of the nursery's surveys and treatments for the imported fire ant. These records must be made available to State and Federal inspectors upon request.

(2) If imported fire ants are detected in nursery stock during an inspection by a Federal or State inspector, issuance of certificates for movement will be suspended until necessary treatments are applied and the plants and nursery premises are determined to be free of the imported fire ant. A Federal or State inspector may declare a nursery to be free of the imported fire ant upon reinspection of the premises. This inspection must be conducted no sooner than 30 days after treatment. During this period, certification may be based upon treatments for plants in accordance with part 305 of this chapter.

(3) Upon notification by the department of agriculture in any State of destination that a confirmed imported fire ant infestation was found on a shipment from a nursery considered free of the imported fire ant, the department of agriculture in the State of origin must cease its certification of shipments from that nursery. An investigation by Federal or State inspectors will commence immediately to determine the probable source of the problem and to ensure that the problem is resolved. If the problem is an infestation, issuance of certification for movement on the basis of imported-fire-ant-free premises will be suspended until treatment and elimination of the infestation is completed. Reinstatement into the program will be granted upon determination that the nursery premises are free of the imported fire ant, and that all other provisions of this subpart are being followed.

(4) In cases where the issuance of certificates is suspended through oral notification, the suspension and the reasons for the suspension will be confirmed in writing within 20 days of the oral notification of the suspension. Any person whose issuance of certificates has been suspended may appeal the decision, in writing, within 10 days after receiving the written suspension notice. The appeal must state all of the facts and reasons that the person wants the Administrator to consider in deciding the appeal. A hearing may be held to resolve any conflict as to any material fact. Rules of practice for the hearing will be adopted by the Administrator. As soon as practicable, the Administrator will grant or deny the appeal, in writing, stating the reasons for the decision.

§ 301.87–5 [Amended]

14. In § 301.87–5, paragraph (a)(1)(i) is amended by removing the words ''§ 301.87–10 of this subpart'' and adding the words ''part 305 of this chapter'' in their place.

§ 301.87–10 [Removed and Reserved]

15. Section 301.87–10 is removed and reserved.

§ 301.89–5 [Amended]

16. In § 301.89–5, paragraph (b) is amended by removing the words ''the methods and procedures prescribed in § 301.89–13'' and adding the words ''part 305 of this chapter'' in their place.

§ 301.89–6 [Amended]

17. In § 301.89–6, paragraph (a)(3)(iii) is amended by removing the words ''methods and procedures prescribed in § 301.89–13'' and adding the words ''part 305 of this chapter'' in their place.

§ 301.89–7 [Amended]

18. Section 301.89–7 is amended by removing the citation ''§ 301.89–13'' and adding the words ''part 305 of this chapter'' in its place.

§ 301.89–12 [Amended]

19. In § 301.89–12, paragraphs (a), (b), and (c) are amended by removing the citation ''§ 301.89–13'' and adding the words ''part 305 of this chapter'' in its place.

§ 301.89–13 [Removed and Reserved]

20. Section 301.89–13 is removed and reserved.

§ 301.92–5 [Amended]

21. In § 301.92–5, paragraph (a)(1)(i) is amended by removing the words ''§ 301.92–10 or''.

§ 301.92–10 [Removed and Reserved]

22. Section 301.92–10 is removed and reserved.

23. Part 305 is revised to read as follows:

PART 305—PHYTOSANITARY TREATMENTS

Sec.
305.1 Definitions.
305.2 Approved treatments.
305.3 Processes for adding, revising, or removing treatment schedules.
305.4 Monitoring and certification of treatments.
305.5 Chemical treatment requirements.
305.6 Cold treatment requirements.
305.7 Quick freeze treatment requirements.
305.8 Heat treatment requirements.
305.9 Irradiation treatment requirements.

Authority: 7 U.S.C. 7701–7772 and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

§ 305.1 Definitions.

Administrator. The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, or any person delegated to act for the Administrator in matters affecting this part.

APHIS. The Animal and Plant Health Inspection Service, United States Department of Agriculture.

Cold treatment. Exposure of a commodity to a specified cold temperature that is sustained for a specific time period to kill targeted pests, especially fruit flies.

Dose mapping. Measurement of absorbed dose within a process load using dosimeters placed at specified locations to produce a one-, two-, or three-dimensional distribution of absorbed dose, thus rendering a map of absorbed-dose values.

Dosimeter. A device that, when irradiated, exhibits a quantifiable change in some property of the device that can be related to absorbed dose in a given material using appropriate analytical instrumentation and techniques.

Dosimetry system. A system used for determining absorbed dose, consisting of dosimeters, measurement instruments and their associated reference standards, and procedures for the system's use.

Fumigant. A gaseous chemical that easily diffuses and disperses in air and is toxic to the target organism.

Fumigation. Releasing and dispersing a toxic chemical in the air so that it reaches the target organism in a gaseous state.

Inspector. Any individual authorized by the Administrator of APHIS or the Commissioner of Customs and Border Protection, Department of Homeland Security, to enforce the regulations in this part.

Irradiation. The use of ionized energy to kill or neutralize organisms.

Methyl bromide. A colorless, odorless biocide used to fumigate a wide range of commodities.

Neutralize. In the case of treatments other than irradiation, to kill a plant pest; in the case of irradiation, to prevent the establishment of the pest by killing it, sterilizing it, or preventing its development from an immature stage into an adult capable of emerging from its host, reproducing, or becoming established.

Plant Protection and Quarantine (PPQ). The Plant Protection and Quarantine program of APHIS.

PPQ Treatment Manual. The document that contains the treatment schedules that are approved for use under this part. The Treatment Manual is available on the Internet at *http://www.aphis.usda.gov/import_export/plants/manuals/index.shtml* or by contacting the Animal and Plant Health Inspection Service, Plant Protection and Quarantine, Manuals Unit, 92 Thomas Johnson Drive, Suite 200, Frederick, MD 21702.

Quick freeze. A commercially acceptable method of quick freezing at subzero temperatures with subsequent storage and transportation at not higher than 20 °F. Methods that accomplish this are known as quick freezing, sharp freezing, cold pack, or frozen pack, but may be any equivalent commercially acceptable freezing method.

Section 18 of Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). An emergency exemption granted by the U.S. Environmental Protection Agency to Federal or State agencies authorizing an unregistered use of a pesticide for a limited time.

Vacuum fumigation. Fumigation performed in a gas-tight enclosure. Most air in the enclosure is removed and replaced with a small amount of fumigant. The reduction in pressure reduces the required duration of the treatment.

§ 305.2 Approved treatments.

(a) Certain commodities or articles require treatment, or are subject to treatment, prior to interstate movement within the United States or importation or entry into the United States. Treatment is required as indicated in parts 301, 318, and 319 of this chapter, on a permit, or by an inspector.

(b) Approved treatment schedules are set out in the PPQ Treatment Manual. Treatments may only be administered in accordance with the treatment requirements of this part and in accordance with treatment schedules found in the PPQ Treatment Manual.

(c) APHIS is not responsible for losses or damages incurred during treatment and recommends that a sample be treated first before deciding whether to treat the entire shipment.

§ 305.3 Processes for adding, revising, or removing treatment schedules.

(a) *Normal process for adding, revising, or removing treatment schedules.* Unless there is a need to immediately add, revise, or remove a treatment schedule, as provided in paragraph (b)(1) of this section, a treatment schedule may be added to the PPQ Treatment Manual, revised, or removed from the PPQ Treatment Manual as follows:

(1) *Notice of change to treatment schedule.* APHIS will publish in the **Federal Register** a notice describing the reasons we have determined that it is necessary to add, revise, or remove a treatment schedule and, if necessary, making available the new or revised treatment schedule as it would be added to the PPQ Treatment Manual. In our notice, we will provide for a public comment period on the new or revised treatment schedule or on the removal of the treatment schedule from the PPQ Treatment Manual.

(2) *Response to comments.* (i) APHIS will issue a notice after the close of the public comment period indicating that the treatment schedule specified in the initial notice will be added to the PPQ Treatment Manual, revised as described in the notice, or removed from the PPQ Treatment Manual if:

(A) No comments were received on the notice;

(B) The comments on the notice supported our action; or

(C) The comments on the notice were evaluated but did not change our determination that it is necessary to add, revise, or remove the treatment schedule, as described in the notice.

(ii) If the notice issued after the close of the public comment period indicates that a change will be made to the PPQ Treatment Manual, APHIS will make available a new version of the PPQ Treatment Manual that reflects the addition, revision, or removal of the particular treatment schedule.

(iii) If comments present information that causes us to determine that the change described in the notice is not appropriate, APHIS will issue a notice informing the public of this determination after the close of the comment period.

(b) *Process for immediately adding, revising, or removing treatment schedules.* Treatment schedules may be immediately added to the PPQ Treatment Manual, revised, or removed from the PPQ Treatment Manual under the circumstances described in paragraph (b)(1) of this section and in accordance with the process described in paragraphs (b)(2) and (b)(3) of this section.

(1) *Circumstances in which the immediate process may be used.* Treatment schedules may be immediately added to the PPQ Treatment Manual, revised, or removed from the PPQ Treatment Manual if any of the following circumstances apply:

(i) PPQ has determined that an approved treatment schedule is ineffective at neutralizing the targeted plant pest(s);

(ii) PPQ has determined that, in order to neutralize the targeted plant pest(s), the treatment schedule must be administered using a different process than was previously used;

(iii) PPQ has determined that a new treatment schedule is effective, based on efficacy data, and that ongoing trade in a commodity or commodities may be adversely impacted unless the new treatment schedule is approved for use; or

(iv) The use of a treatment schedule is no longer authorized by the U.S. Environmental Protection Agency or by any other Federal entity.

(2) *Process for immediate change to treatment schedules.* If PPQ determines that one or more of the circumstances in paragraph (b)(1) of this section applies and that it is necessary to take immediate action, APHIS will publish in the **Federal Register** a notice describing the reasons we have determined that it is necessary to immediately add, revise, or remove a treatment schedule and, if necessary, making available the new or revised treatment schedule as it has been added to the PPQ Treatment Manual. Treatment schedules that have been added to the PPQ Treatment Manual or revised under this process will be listed in a separate section of the PPQ Treatment Manual as having been added or revised through the immediate process described in this paragraph (b). The PPQ Treatment Manual will indicate that these treatment schedules are subject to change or removal based on public comment. In our notice, we will provide for a public comment period on the new or revised treatment schedule or on the removal of the treatment schedule from the PPQ Treatment Manual.

(3) *Response to comments.* (i) APHIS will issue a notice after the close of the public comment period affirming the action described in the initial notice if:

(A) No comments were received on the notice;

(B) The comments on the notice supported our action; or

(C) The comments on the notice were evaluated but did not change our determination that it was necessary to add, revise, or remove the treatment schedule, as described in the notice.

(ii) If the notice issued after the close of the public comment period indicates that the initial change to the PPQ Treatment Manual is affirmed, APHIS will make available a new version of the PPQ Treatment Manual that will reflect the addition, revision, or removal of the particular treatment schedule in the main body of the PPQ Treatment Manual.

(iii) If comments present information that causes us to determine that it is necessary to change a treatment schedule added to the PPQ Treatment Manual under this process or to further revise a treatment schedule that was revised under this process, APHIS will publish a notice in the **Federal Register** informing the public of this determination after the close of the comment period and will revise the treatment schedule accordingly.

(iv) If comments present information that causes us to determine that the change described in the initial notice was not appropriate, APHIS will publish a notice in the **Federal Register** informing the public of this determination after the close of the comment period and will, if necessary, remove the new or revised treatment schedule from the separate section of the PPQ Treatment Manual.

§ 305.4 Monitoring and certification of treatments.

(a) All treatments approved under part 305 are subject to monitoring and verification by APHIS.

(b) Any treatment performed outside the United States must be monitored and certified by an inspector or an official authorized by APHIS. If monitoring and certification involves an official authorized by APHIS, the treated commodities must be accompanied by a phytosanitary certificate issued by the national plant protection organization of the exporting country certifying that treatment was conducted in accordance with APHIS regulations. The phytosanitary certificate must be provided to an inspector when the commodity is offered for entry into the United States. During the entire interval between treatment and export, the consignment must be stored and handled in a manner that prevents any infestation by pests and noxious weeds.

§ 305.5 Chemical treatment requirements.

(a) *Certified facility.* The fumigation treatment facility must be certified by APHIS. Facilities are required to be inspected and recertified annually, or as often as APHIS directs, depending upon treatments performed, commodities handled, and operations conducted at the facility. In order to be certified, a fumigation facility must:

(1) Be capable of administering the required dosage range for the required duration and at the appropriate temperature, as specified in the treatment schedules in the PPQ Treatment Manual.

(2) Be adequate to contain the fumigant and be constructed from material that is not reactive to the fumigant.

(3) For vacuum fumigation facilities, be constructed to withstand required negative pressure.

(b) *Monitoring.* Treatment must be monitored by an official authorized by APHIS to ensure proper administration of the treatment, including that the correct amount of gas reaches the target organism and that an adequate number and placement of blowers, fans, sampling tubes, or monitoring lines are used in the treatment enclosure. An official authorized by APHIS approves, adjusts, or rejects the treatment.

(c) *Treatment procedures.* (1) To kill the pest, all chemical applications must be administered in accordance with an Environmental Protection Agency (EPA) approved pesticide label and the APHIS-approved treatment schedule prescribed in the PPQ Treatment Manual. If EPA cancels approval for the use of a pesticide on a commodity, then the treatment schedule prescribed in the PPQ Treatment Manual is no longer authorized for that commodity. If the commodity is not listed on the pesticide label and/or included in a Federal quarantine or crisis exemption in accordance with FIFRA section 18, then no chemical treatment is available.

(2) Temperature/concentration readings must be taken for items known to be sorptive or whose sorptive properties are unknown when treatment is administered in chambers at normal atmospheric pressure.

(3) Unless otherwise specified in the PPQ Treatment Manual, the volume of the commodity stacked inside the treatment enclosure must not exceed ⅔ of the volume of the enclosure. Stacking must be approved by an official authorized by APHIS before treatment begins. All commodities undergoing treatment must be listed on the label or authorized under Section 18 of FIFRA.

(4) Recording and measuring equipment must be adequate to accurately monitor the gas concentration, to ensure the correct amount of gas reaches the pests, and to detect any leaks in the enclosure. At least three sampling tubes or monitoring lines must be used in the treatment enclosure.

(5) An adequate number of blowers or fans must be used inside of the treatment enclosure to uniformly distribute gas throughout the enclosure. The circulation system must be able to recirculate the entire volume of gas in the enclosure in 3 minutes or less.

(6) The exposure period begins after all gas has been introduced.

(7) For vacuum fumigation: The vacuum pump must be able to reduce pressure in the treatment enclosure to 1–2 inches of mercury in 15 minutes or less.

§ 305.6 Cold treatment requirements.

(a) *Approval of treatment facilities.* All facilities or locations used for refrigerating fruits or vegetables in accordance with the cold treatment schedules in the PPQ Treatment Manual must be approved by APHIS. Reapproval of the facility or carrier is required every 3 years, or as often as APHIS directs, depending on treatments performed, commodities handled, and operations conducted at the facility. In order to be approved, facilities and carriers must:

(1) Be capable of keeping treated and untreated fruits, vegetables, or other articles separate so as to prevent reinfestation of articles and spread of pests;

(2) Have equipment that is adequate to effectively perform cold treatment.

(b) *Places of treatment; ports of entry.* Precooling and refrigeration may be performed prior to, or upon arrival of fruits and vegetables in the United States, provided treatments are performed in accordance with applicable requirements of this section. Fruits and vegetables that are not treated prior to arrival in the United States must be treated after arrival only in cold storage warehouses approved by the Administrator and located in the area north of 39° longitude and east of 104° latitude or at one of the following ports: The maritime ports of Wilmington, NC; Seattle, WA; Corpus Christi, TX; and Gulfport, MS; Seattle-Tacoma International Airport, Seattle, WA; and Hartsfield-Atlanta International Airport, Atlanta, GA.

(c) *Cold treatment enclosures.* All enclosures, in which cold treatment is performed, including refrigerated containers, must:

(1) Be capable of maintaining the treatment temperature specified in the PPQ Treatment Manual before the treatment begins and holding fruit at or below the treatment temperature during the treatment.

(2) Maintain fruit pulp temperatures according to treatment schedules with no more than a 0.39 °C (0.7 °F) variation in temperature.

(3) Be structurally sound and adequate to maintain required temperatures.

(d) *Treatment procedures.* (1) All material, labor, and equipment for cold treatment performed on a vessel must be provided by the vessel or vessel agent. An official authorized by APHIS monitors, manages, and advises in order to ensure that the treatment procedures are followed.

(2) Refrigeration must be completed in the container, compartment, or room in which it is begun.

(3) Fruit that may be cold treated must be safeguarded to prevent cross-contamination or mixing with other infested fruit.

(4) Fruit intended for in-transit cold treatment must be precooled to the temperature at which the fruit will be treated prior to beginning treatment. The in-transit treatment enclosure may not be used for precooling unless an official authorized by APHIS approves the loading of the fruit in the treatment enclosure as adequate to allow for fruit pulp temperatures to be taken prior to beginning treatment. If the fruit is precooled outside the treatment enclosure, an official authorized by APHIS will take pulp temperatures manually from a sample of the fruit as the fruit is loaded for in-transit cold treatment to verify that precooling was completed. If the pulp temperatures for the sample are 0.28 °C (0.5 °F) or more above the temperature at which the fruit will be treated, the pallet from which the sample was taken will be rejected

and returned for additional precooling until the fruit reaches the treatment temperature. If fruit is precooled in the treatment enclosure, or if treatment is conducted at a cold treatment facility in the United States, the fruit must be precooled to the temperature at which it will be treated, as verified by an official authorized by APHIS, prior to beginning treatment.

(5) Breaks, damage, etc., in the treatment enclosure that preclude maintaining correct temperatures must be repaired before the enclosure is used. An official authorized by APHIS must approve loading of compartment, number and placement of temperature probes or sensors, and initial fruit temperature readings before beginning the treatment. Hanging decks and hatch coamings within vessels may not be used as enclosures for in-transit cold treatment without prior written approval from APHIS. Double-stacking of pallets is not allowed.

(6) Only the same type of fruit in the same type of package may be treated together in a container; no mixture of fruits in containers may be treated. A numbered seal must be placed on the doors of the loaded container and may be removed only at the port of destination by an official authorized by APHIS.

(7) Temperature recording devices used during treatment must be password-protected and tamperproof. The devices must be able to record the date, time, and sensor number and automatic and continuous records of the temperature during all calibrations and during treatment. Recording devices must be capable of generating temperature charts for verification by an inspector. If records of calibrations or treatments are found to have been manipulated, the vessel or container in which the treatment is performed may be suspended from conducting cold treatments until proper equipment is installed and an official authorized by APHIS has recertified it. APHIS' decision to recertify a vessel or container will take into account the severity of the infraction that led to suspension.

(8) A minimum of four temperature probes or sensors is required for vessel holds used as treatment enclosures. A minimum of three temperature probes or sensors is required for other treatment enclosures. An official authorized by APHIS will have the option to require that additional temperature probes or sensors be used, depending on the size of the treatment enclosure.

(9) Fruit pulp temperatures must be maintained at the temperature specified in the treatment schedule with no more than a 0.39 °C (0.7 °F) variation in temperature between two consecutive hourly readings. Failure to comply with this requirement will result in invalidation of the treatment unless an official authorized by APHIS can verify that the pulp temperature was maintained at or below the treatment temperature for the duration of the treatment.

(10) The time required to complete the treatment begins when all temperature probes reach the prescribed cold treatment schedule temperature. Refrigeration continues until the vessel arrives at the port of destination and the fruit is released for unloading by an inspector even though this may prolong the period required for the cold treatment.

(11) Temperatures must be recorded at intervals no longer than 1 hour apart. Gaps of longer than 1 hour will invalidate the treatment or indicate treatment failure unless an official authorized by APHIS can verify that the pulp temperature was maintained at or below the treatment temperature for the duration of the treatment.

(12) Cold treatment is not completed until so declared by an official authorized by APHIS or the certifying official of the foreign country; consignments of treated commodities may not be discharged until APHIS clearance has been fully completed, including review and approval of treatment record charts.

(13) Cold treatment of fruits in break bulk vessels or containers must be initiated by an official authorized by APHIS if there is not a treatment technician who has been trained to initiate cold treatments for either break bulk vessels or containers.

(14) An official authorized by APHIS may perform audits to ensure that the treatment procedures comply with the regulations in this section and that the treatment is administered in accordance with the treatment schedules in the PPQ Treatment Manual. The official authorized by APHIS must be given the appropriate materials and access to the facility, container, or vessel necessary to perform the audits.

(15) An inspector will sample and cut fruit from each consignment cold treated for Mediterranean fruit fly (Medfly) to monitor treatment effectiveness. If a single live Medfly in any stage of development is found, the consignment will be held until an investigation is completed and appropriate remedial actions have been implemented. If APHIS determines at any time that the safeguards contained in this section do not appear to be effective against the Medfly, APHIS may suspend the importation of fruits from the originating country and conduct an investigation into the cause of the deficiency.

(16) The cold treatments required for the entry of fruit are considered necessary for the elimination of plant pests, and no liability shall attach to the U.S. Department of Agriculture or to any officer or representative of that Department in the event injury results to fruit offered for entry in accordance with these instructions. In prescribing cold treatments of certain fruits, it should be emphasized that inexactness and carelessness in applying the treatments may result in injury to the fruit or its rejection for entry.

(e) *Monitoring.* Treatment must be monitored by an inspector to ensure proper administration of the treatment. An inspector must also approve the recording devices and sensors used to monitor temperatures and conduct an operational check of the equipment before each use and ensure sensors are calibrated. An inspector may approve, adjust, or reject the treatment.

(f) *Compliance agreements.* Facilities located in the United States must operate under a compliance agreement with APHIS. The compliance agreement must be signed by a representative of the cold treatment facility and APHIS. The compliance agreement must contain requirements for equipment, temperature, circulation, and other operational requirements for performing cold treatment to ensure that treatments are administered properly. Compliance agreements must allow officials of APHIS to inspect the facility to monitor compliance with the regulations.

(g) *Workplans.* Facilities located outside the United States may operate in accordance with a bilateral workplan. The workplan, if and when required, must be signed by a representative of the cold treatment facility, the national plant protection organization (NPPO) of the country of origin, and APHIS. The workplans must contain requirements for equipment, temperature, circulation, and other operational requirements for performing cold treatment to ensure that cold treatments are administered properly. Workplans for facilities outside the United States may also include trust fund agreement information regarding payment of the salaries and expenses of APHIS employees on site. Workplans must allow officials of the NPPO and APHIS to inspect the facility to monitor compliance with APHIS regulations.

(h) *Additional requirements for treatments performed after arrival in the United States.*

(1) *Maritime port of Wilmington, NC.* Consignments of fruit arriving at the maritime port of Wilmington, NC, for cold treatment, in addition to meeting all other applicable requirements of this section, must meet the following special conditions:

(i) Bulk consignments (those consignments which are stowed and unloaded by the case or bin) of fruit must arrive in fruit fly-proof packaging that prevents the escape of adult, larval, or pupal fruit flies.

(ii) Bulk and containerized consignments of fruit must be cold-treated within the area over which the U.S. Department of Homeland Security is assigned the authority to accept entries of merchandise, to collect duties, and to enforce the various provisions of the customs and navigation laws in force.

(iii) Advance reservations for cold treatment space must be made prior to the departure of a consignment from its port of origin.

(iv) The cold treatment facility must remain locked during non-working hours.

(2) *Maritime port of Seattle, WA.* Consignments of fruit arriving at the maritime port of Seattle, WA, for cold treatment, in addition to meeting all other applicable requirements of this section, must meet the following special conditions:

(i) Bulk consignments (those consignments which are stowed and unloaded by the case or bin) of fruit must arrive in fruit fly-proof packaging that prevents the escape of adult, larval, or pupal fruit flies.

(ii) Bulk and containerized consignments of fruit must be cold treated within the area over which the U.S. Department of Homeland Security is assigned the authority to accept entries of merchandise, to collect duties, and to enforce the various provisions of the customs and navigation laws in force.

(iii) Advance reservations for cold treatment space must be made prior to the departure of a consignment from its port of origin.

(iv) The cold treatment facility must remain locked during non-working hours.

(v) Black light or sticky paper must be used within the cold treatment facility, and other trapping methods, including APHIS-approved fruit fly traps, must be used within the 4 square miles surrounding the cold treatment facility.

(vi) The cold treatment facility must have contingency plans, approved by the Administrator, for safely destroying or disposing of fruit.

(3) *Airports of Atlanta, GA, and Seattle, WA.* Consignments of fruit arriving at the airports of Atlanta, GA, and Seattle, WA, for cold treatment, in addition to meeting all other applicable requirements of this section, must meet the following special conditions:

(i) Bulk and containerized consignments of fruit must arrive in fruit fly-proof packaging that prevents the escape of adult, larval, or pupal fruit flies.

(ii) Bulk and containerized consignments of fruit arriving for cold treatment must be cold treated within the area over which the U.S. Department of Homeland Security is assigned the authority to accept entries of merchandise, to collect duties, and to enforce the various provisions of the customs and navigation laws in force.

(iii) The cold treatment facility and APHIS must agree in advance on the route by which consignments are allowed to move between the aircraft on which they arrived at the airport and the cold treatment facility. The movement of consignments from aircraft to a cold treatment facility will not be allowed until an acceptable route has been agreed upon.

(iv) Advance reservations for cold treatment space must be made prior to the departure of a consignment from its port of origin.

(v) The cold treatment facility must remain locked during non-working hours.

(vi) Black light or sticky paper must be used within the cold treatment facility, and other trapping methods, including APHIS-approved fruit fly traps, must be used within the 4 square miles surrounding the cold treatment facility.

(vii) The cold treatment facility must have contingency plans, approved by the Administrator, for safely destroying or disposing of fruit.

(4) *Maritime ports of Gulfport, MS, and Corpus Christi, TX.* Consignments of fruit arriving at the ports of Gulfport, MS, and Corpus Christi, TX, for cold treatment, in addition to meeting all other applicable requirements of this section, must meet the following special conditions:

(i) All fruit entering the port for cold treatment must move in maritime containers. No bulk consignments (those consignments which are stowed and unloaded by the case or bin) are permitted.

(ii) Within the container, the fruit intended for cold treatment must be enclosed in fruit fly-proof packaging that prevents the escape of adult, larval, or pupal fruit flies.

(iii) All consignments of fruit arriving at the port for cold treatment must be cold treated within the area over which the U.S. Department of Homeland Security is assigned the authority to accept entries of merchandise, to collect duties, and to enforce the various provisions of the customs and navigation laws in force.

(iv) The cold treatment facility and APHIS must agree in advance on the route by which consignments are allowed to move between the vessel on which they arrived at the port and the cold treatment facility. The movement of consignments from vessel to cold treatment facility will not be allowed until an acceptable route has been agreed upon.

(v) Advance reservations for cold treatment space at the port must be made prior to the departure of a consignment from its port of origin.

(vi) Devanning, the unloading of fruit from containers into the cold treatment facility, must adhere to the following requirements:

(A) All containers must be unloaded within the cold treatment facility; and

(B) Untreated fruit may not be exposed to the outdoors under any circumstances.

(vii) The cold treatment facility must remain locked during non-working hours.

(viii) Black lights or sticky paper must be used within the cold treatment facility, and other trapping methods, including APHIS-approved fruit fly traps, must be used within the 4 square miles surrounding the cold treatment facility at the maritime port of Gulfport, MS, and within the 5 square miles surrounding the cold treatment facility at the maritime port of Corpus Christi, TX.

(ix) During cold treatment, a backup system must be available to cold treat the consignments of fruit should the primary system malfunction. The facility must also have one or more reefers (cold holding rooms) and methods of identifying lots of treated and untreated fruits.

(x) The cold treatment facility must have the ability to conduct methyl bromide fumigations on site.

(xi) The cold treatment facility must have contingency plans, approved by the Administrator, for safely destroying or disposing of fruit.

§ 307.8 Quick freeze treatment requirements.

Quick freeze treatment for fruits and vegetables imported into the United States or moved interstate from Hawaii or Puerto Rico must be conducted in accordance with §§ 319.56–12, 318.13–

4a, or 318.58–4a, respectively. The PPQ Treatment Manual indicates the fruits and vegetables for which quick freeze is an authorized treatment.

§ 305.8 Heat treatment requirements.

(a) *Certified facility.* The treatment facility must be certified by APHIS. Recertification is required annually, or as often as APHIS directs, depending upon treatments performed, commodities handled, and operations conducted at the facility. In order to be certified, a heat treatment facility must:

(1) Have equipment that is capable of adequately circulating air or water (as relevant to the treatment), changing the temperature, and maintaining the changed temperature sufficient to meet the treatment schedule parameters in the PPQ Treatment Manual.

(2) Have equipment used to record, monitor, or sense temperature, maintained in proper working order.

(3) Keep treated and untreated fruits, vegetables, or articles separate so as to prevent reinfestation and spread of pests.

(b) *Monitoring.* Treatment must be monitored by an official authorized by APHIS to ensure proper administration of the treatment. An official authorized by APHIS approves, adjusts, or rejects the treatment.

(c) *Compliance agreements.* Facilities located in the United States must operate under a compliance agreement with APHIS. The compliance agreement must be signed by a representative of the heat treatment facilities located in the United States and APHIS. The compliance agreement must contain requirements for equipment, temperature, water quality, circulation, and other measures for performing heat treatments to ensure that treatments are administered properly. Compliance agreements must allow officials of APHIS to inspect the facility to monitor compliance with the regulations.

(d) *Workplans.* Facilities located outside the United States must operate in accordance with a workplan. The workplan must be signed by a representative of the heat treatment facilities located outside the United States, the national plant protection organization of the country of origin (NPPO), and APHIS. The workplan must contain requirements for equipment, temperature, water quality, circulation, and other measures to ensure that heat treatments are administered properly. Workplans for facilities outside the United States must include trust fund agreement information regarding payment of the salaries and expenses of APHIS employees on site. Workplans must allow officials of the NPPO and APHIS to inspect the facility to monitor compliance with APHIS regulations.

(e) *Treatment procedures.* (1) Before each treatment can begin, an official authorized by APHIS must approve the loading of the commodity in the treatment container.

(2) Sensor equipment must be adequate to monitor the treatment, its type and placement must be approved by an official authorized by APHIS, and the equipment must be tested by an official authorized by APHIS prior to beginning the treatment. Sensor equipment must be locked before each treatment to prevent tampering.

(3) Fruits, vegetables, or articles of substantially different sizes must be treated separately; oversized fruit may be rejected by an official authorized by APHIS.

(4) The treatment period begins when the temperature specified by the treatment schedule has been reached. An official authorized by APHIS may abort the treatment if the facility requires an unreasonably long time to achieve the required temperature.

§ 305.9 Irradiation treatment requirements.

Irradiation, carried out in accordance with the provisions of this section, is approved as a treatment for any imported regulated article (i.e., fruits, vegetables, cut flowers, and foliage); for any regulated article moved interstate from Hawaii, Puerto Rico, the U.S. Virgin Islands, Guam, and the Commonwealth of the Northern Marianas Islands (referred to collectively, in this section, as Hawaii and U.S. territories); and for any berry, fruit, nut, or vegetable listed as a regulated article in § 301.32–2(a) of this chapter.

(a) *Location of facilities.* (1) Where certified irradiation facilities are available, an approved irradiation treatment may be conducted for any imported regulated article either prior to shipment to the United States or in the United States. For any regulated article moved interstate from Hawaii or U.S. territories, irradiation treatment may be conducted either prior to movement to the mainland United States or in the mainland United States. For articles that are imported or moved interstate from Hawaii or U.S. territories, irradiation facilities may be located in any State on the mainland United States except Alabama, Arizona, California, Florida, Kentucky, Louisiana, Nevada, New Mexico, South Carolina, Tennessee, Texas, and Virginia. In the States of Georgia, Mississippi, and North Carolina, irradiation facilities may only be located at the maritime ports of Gulfport, MS, or Wilmington, NC, or the airport of Atlanta, GA, and only if the following special conditions are met: The articles to be irradiated must be imported or moved interstate packaged in accordance with paragraph (f)(3) of this section; the irradiation facility and APHIS must agree in advance on the route by which shipments are allowed to move between the vessel on which they arrive and the irradiation facility; untreated articles may not be removed from their packaging prior to treatment under any circumstances; blacklight or sticky paper must be used within the irradiation facility, and other trapping methods, including APHIS-approved fruit fly traps, must be used within the 4 square miles surrounding the facility; and the facility must have contingency plans, approved by APHIS, for safely destroying or disposing of regulated articles. Prior to treatment, the fruits and vegetables to be irradiated may not move into or through any of the States listed in this paragraph, except that movement is allowed through Dallas/Fort Worth, TX, as an authorized stop for air cargo, or as a transloading location for shipments that arrive by air but that are subsequently transloaded into trucks for overland movement from Dallas/Fort Worth into an authorized State by the shortest route.

(2) For articles that are moved interstate from areas quarantined for fruit flies, irradiation facilities may be located either within or outside of the quarantined area. If the articles are treated outside the quarantined area, they must be accompanied to the facility by a limited permit issued in accordance with § 301.32–5(b) and must be moved in accordance with any safeguards determined to be appropriate by APHIS.

(b) *Approved facilities.* The irradiation treatment facility must be approved by APHIS. In order to be approved, a facility must fulfill the requirements in paragraphs (c) and (d) of this section.

(c) *Compliance agreements*—(1) *Irradiation facilities treating imported articles*—(i) *Compliance agreements with importers and facility operators for irradiation in the United States.* If irradiation of imported articles is conducted in the United States, both the importer and the operator of the irradiation facility must sign compliance agreements with APHIS. In the facility compliance agreement, the facility operator must agree to comply with any additional requirements found necessary by APHIS to prevent the escape, prior to irradiation, of any fruit flies that may be associated with the articles to be irradiated. In the importer compliance agreement, the importer

must agree to comply with any additional requirements found necessary by APHIS to ensure the shipment is not diverted to a destination other than an approved treatment facility and to prevent escape of plant pests from the articles to be irradiated during their transit from the port of first arrival to the irradiation facility in the United States.

(ii) *Compliance agreement with irradiation facilities outside the United States.* If irradiation of imported articles is conducted outside the United States, the operator of the irradiation facility must sign a compliance agreement with APHIS and the national plant protection organization (NPPO) of the country in which the facility is located. In this agreement, the facility operator must agree to comply with the requirements of this section, and the NPPO of the country in which the facility is located must agree to monitor that compliance and to inform the Administrator of any noncompliance.

(2) *Irradiation facilities treating articles moved interstate from Hawaii and U.S. territories.* Irradiation facilities treating articles moved interstate from Hawaii and U.S. territories must complete a compliance agreement with APHIS as provided in § 318.13–3(d) of this chapter.

(3) *Irradiation facilities treating articles moved interstate from areas quarantined for fruit flies.* Irradiation facilities treating articles moved interstate from areas quarantined for fruit flies must complete a compliance agreement with APHIS as provided in § 301.32–6 of this chapter.

(d) *Certified facility.* The irradiation treatment facility must be certified by APHIS. Recertification is required in the event of an increase or a significant decrease in the amount of radioisotope, a major modification to equipment that affects the delivered dose, or a change in the owner or managing entity of the facility. Recertification also may be required in cases where a significant variance in dose delivery has been measured by the dosimetry system. In order to be certified, a facility must:

(1) Be capable of administering the minimum absorbed ionizing radiation doses specified in the PPQ Treatment Manual to the regulated articles; [1]

(2) Be constructed so as to provide physically separate locations for treated and untreated articles, except that articles traveling by conveyor directly into the irradiation chamber may pass through an area that would otherwise be separated. The locations must be separated by a permanent physical barrier such as a wall or chain link fence 6 or more feet high to prevent transfer of cartons, or some other means approved during certification to prevent reinfestation of articles and spread of pests.

(3) If the facility is to be used to treat imported articles and is located in the United States, the facility will only be certified if APHIS determines that regulated articles will be safely transported to the facility from the port of arrival without significant risk that plant pests will escape in transit or while the regulated articles are at the facility.

(e) *Monitoring and interagency agreements.* Treatment must be monitored by an inspector. This monitoring will include inspection of treatment records and unannounced inspections of the facility by an inspector, and may include inspection of articles prior to or after irradiation.

(1) *Irradiation facilities located in foreign countries.* Facilities in foreign countries that carry out irradiation operations must notify the Director of Preclearance, PPQ, APHIS, 4700 River Road Unit 140, Riverdale, MD 20737–1236, of scheduled operations at least 30 days before operations commence, except where otherwise provided in the facility preclearance workplan. To ensure the appropriate level of monitoring, before articles may be imported in accordance with this section, the following agreements must be signed:

(i) *Irradiation treatment framework equivalency workplan.* The NPPO of a country from which articles are to be imported into the United States in accordance with this section must sign a framework equivalency workplan with APHIS. In this plan, both the NPPO and APHIS will specify the following items for their respective countries:

(A) Citations for any requirements that apply to the importation of irradiated fruits and vegetables;

(B) The type and amount of inspection, monitoring, or other activities that will be required in connection with allowing the importation of irradiated fruits and vegetables into that country; and

(C) Any other conditions that must be met to allow the importation of irradiated fruits and vegetables into that country.

(ii) *Facility preclearance workplan.* Prior to commencing importation into the United States of articles treated at a foreign irradiation facility, APHIS and the NPPO of the country from which articles are to be imported must jointly develop a preclearance workplan that details the activities that APHIS and the foreign NPPO will carry out in connection with each irradiation facility to verify the facility's compliance with the requirements of this section. Typical activities to be described in this workplan may include frequency of visits to the facility by APHIS and foreign plant protection inspectors, methods for reviewing facility records, and methods for verifying that facilities are in compliance with the requirements for separation of articles, packaging, labeling, and other requirements of this section. This facility preclearance workplan will be reviewed and renewed by APHIS and the foreign NPPO on an annual basis.

(iii) *Trust fund agreement.* Irradiated articles may be imported into the United States in accordance with this section only if the NPPO of the country in which the irradiation facility is located or a private export group has entered into a trust fund agreement with APHIS. That agreement requires the NPPO or the private export group to pay, in advance of each shipping season, all costs that APHIS estimates it will incur in providing inspection and treatment monitoring services at the irradiation facility during that shipping season. Those costs include administrative expenses and all salaries (including overtime and the Federal share of employee benefits), travel expenses (including per diem expenses), and other incidental expenses incurred by APHIS in performing these services. The agreement will describe the general nature and scope of APHIS services provided at irradiation facilities covered by the agreement, such as whether APHIS inspectors will monitor operations continuously or intermittently, and will generally describe the extent of inspections APHIS will perform on articles prior to and after irradiation. The agreement requires the NPPO or private export group to deposit a certified or cashier's check with APHIS for the amount of those costs, as estimated by APHIS. If the deposit is not sufficient to meet all costs incurred by APHIS, the agreement further requires the NPPO or the private export group to deposit with APHIS a certified or cashier's check for the amount of the remaining costs, as determined by APHIS, before any more articles irradiated in that country may be imported into the United States. After a final audit at the conclusion of each shipping season, any overpayment of funds would be returned to the NPPO or the private export group or held on

[1] The maximum absorbed ionizing radiation dose and the irradiation of food is regulated by the Food and Drug Administration under 21 CFR part 179.

account until needed, at the option of the NPPO or the private export group .

(2) *Irradiation facilities located within the United States.* Facilities located within the United States that carry out continual irradiation operations must notify an inspector at least 24 hours before the date of operations. Facilities that carry out periodic irradiation operations must notify an inspector of scheduled operations at least 24 hours before scheduled operations.[2]

(f) *Packaging.* Articles that are irradiated in accordance with this section must be packaged in cartons in the following manner:

(1) Irradiated articles may not be packaged for shipment in a carton with nonirradiated articles.

(2) For all imported articles irradiated prior to arrival in the United States, all articles moved interstate from Hawaii or U.S. territories and irradiated prior to arrival in the mainland United States, and all regulated articles to be moved interstate from an area quarantined for fruit flies that are treated within the quarantined area:

(i) The fruits and vegetables must be packaged either:

(A) In insect-proof cartons that have no openings that will allow the entry of the pests of concern. The cartons must be sealed with seals that will visually indicate if the cartons have been opened. The cartons may be constructed of any material that prevents entry or oviposition (if applicable) by the pests of concern into the articles in the carton;[3] or

(B) In noninsect-proof cartons that are stored immediately after irradiation in a room completely enclosed by walls or screening that completely precludes access by the pests of concern. If stored in noninsect-proof cartons in a room that precludes access by the pests of concern, prior to leaving the room, each pallet of cartons must be completely enclosed in polyethylene shrink wrap, or another solid or netting covering that completely precludes access to the cartons by the pests of concern.

(ii) To preserve the integrity of treated lots, each pallet-load of cartons containing the fruits and vegetables must be wrapped before leaving the irradiation facility in one of the following ways:

(A) With polyethylene shrink wrap;

(B) With net wrapping; or

(C) With strapping so that each carton on an outside row of the pallet load is constrained by a metal or plastic strap.

(iii) Packaging must be labeled with treatment lot numbers, packing and treatment facility identification and location, and dates of packing and treatment.

(A) For imported articles that are treated prior to arrival in the United States, pallets that remain intact as one unit until entry into the United States may have one such label per pallet. Pallets that are broken apart into smaller units prior to or during entry into the United States, or that will be broken apart into smaller units after entry into the United States, must have the required label information on each individual carton.

(B) For articles moved interstate from Hawaii or U.S. territories that are treated prior to arrival in the mainland United States, pallets that remain intact as one unit until entry into the mainland United States may have one such label per pallet. Pallets that are broken apart into smaller units prior to or during entry into the mainland United States, or that will be broken apart into smaller units after entry into the mainland United States, must have the required label information on each individual carton.

(3) For all articles imported to be irradiated upon arrival in the United States, moved interstate from Hawaii or U.S. territories to be irradiated upon arrival in the mainland United States, or moved interstate from areas quarantined for fruit flies to be irradiated outside the quarantined area, the articles must be packed in cartons that have no openings that will allow the exit of the pests of concern and that are sealed with seals that will visually indicate if the cartons have been opened. They may be constructed of any material that prevents the pests of concern from exiting the carton. Cartons of untreated articles must be shipped in shipping containers sealed prior to their shipment with seals that will visually indicate if the shipping containers have been opened.

(g) *Containers or vans.* Containers or vans that will transport treated commodities must be free of pests prior to loading the treated commodities.

(h) *Certification of treatment for articles treated outside the United States.* For each consignment treated in an irradiation facility outside the United States, a phytosanitary certificate, with the treatment section completed and issued by the NPPO, must accompany the consignment.

(i) *Dosage.* The regulated articles must receive the minimum absorbed ionizing radiation dose specified in the PPQ Treatment Manual.

(j) *Dosimetry systems at the irradiation facility.* (1) Dosimetry must indicate the doses needed to ensure that all the articles will receive the minimum dose prescribed.

(2) The absorbed dose, as measured using an accurate dosimetry system, must meet or exceed the absorbed dose for the pest(s) of concern required by the PPQ Treatment Manual.

(3) When designing the facility's dosimetry system and procedures for its operation, the facility operator must address guidance and principles from the International Standards Organization/American Society for Testing and Materials standard[4] or an equivalent standard recognized by APHIS.

(k) *Records.* An irradiation processor must maintain records of each treated lot for 1 year following the treatment date, and must make these records available for inspection by an inspector during normal business hours (8 a.m. to 4:30 p.m., Monday through Friday, except holidays). These records must include the lot identification, scheduled process, evidence of compliance with the scheduled process, ionizing energy source, source calibration, dosimetry, dose distribution in the product, and the date of irradiation.

(l) *Request for certification and inspection of facility.* Persons requesting certification of an irradiation treatment facility must submit the request for approval in writing to the Animal and Plant Health Inspection Service, Plant Protection and Quarantine, Center for Plant Health Inspection and Technology, 1730 Varsity Drive, Suite 400, Raleigh, NC 27606–5202. The initial request must identify the owner, location, and radiation source of the facility, and the applicant must supply additional information about the facility construction, treatment protocols, and operations upon request by APHIS if APHIS requires additional information to evaluate the request. Before the Administrator determines whether an irradiation facility is eligible for certification, an inspector will make a personal inspection of the facility to determine whether it complies with the standards of this section.

(m) *Denial and withdrawal of certification.* (1) The Administrator will withdraw the certification of any

[2] Inspectors are assigned to local offices of the Animal and Plant Health Inspection Service, which are listed in telephone directories.

[3] If there is a question as to the adequacy of a carton, send a request for approval of the carton, together with a sample carton, to the Animal and Plant Health Inspection Service, Plant Protection and Quarantine, Center for Plant Health Inspection and Technology, 1730 Varsity Drive, Suite 400, Raleigh, NC 27606–5202.

[4] Designation ISO/ASTM 51261–2002(E), ''Standard Guide for Selection and Calibration of Dosimetry Systems for Radiation Processing,'' American Society for Testing and Materials, *Annual Book of ASTM Standards.*

irradiation treatment facility upon written request from the irradiation processor.

(2) The Administrator will deny or withdraw certification of an irradiation treatment facility when any provision of this section is not met. Before withdrawing or denying certification, the Administrator will inform the irradiation processor in writing of the reasons for the proposed action and provide the irradiation processor with an opportunity to respond. The Administrator will give the irradiation processor an opportunity for a hearing regarding any dispute of a material fact, in accordance with rules of practice that will be adopted for the proceeding. However, the Administrator will suspend certification pending final determination in the proceeding if he or she determines that suspension is necessary to prevent the spread of any dangerous insect. The suspension will be effective upon oral or written notification, whichever is earlier, to the irradiation processor. In the event of oral notification, written confirmation will be given to the irradiation processor within 10 days of the oral notification. The suspension will continue in effect pending completion of the proceeding and any judicial review of the proceeding.

(n) *Department not responsible for damage.* This treatment is approved to assure quarantine security against the listed plant pests. From the literature available, the fruits and vegetables authorized for treatment under this section are believed tolerant to the treatment; however, the facility operator and shipper are responsible for determination of tolerance. The Department of Agriculture and its inspectors assume no responsibility for any loss or damage resulting from any treatment prescribed or monitored. Additionally, the Nuclear Regulatory Commission is responsible for ensuring that irradiation facilities are constructed and operated in a safe manner. Further, the Food and Drug Administration is responsible for ensuring that irradiated foods are safe and wholesome for human consumption.

(Approved by the Office of Management and Budget under control numbers 0579–0155, 0579–0215, and 0579–0198)

PART 318—STATE OF HAWAII AND TERRITORIES QUARANTINE NOTICES

24. The authority citation for part 318 continues to read as follows:

Authority: 7 U.S.C. 7701–7772 and 7781–7786; 7 CFR 2.22, 2.80, and 371.3.

§ 318.13–3 [Amended]

25. In § 318.13–3, paragraph (b)(2) is amended by removing the words ''approved in'' and adding the words ''approved under'' in their place.

26. Section 318.13–16 is amended as follows:

a. In the table in paragraph (a), by adding, under Hawaii, new entries for litchi and longan to read as set forth below.

b. By adding a new paragraph (b)(1)(ii) to read as set forth below.

§ 318.13–16 Regulated articles allowed interstate movement subject to specified conditions.

(a) * * *

State, territory, or district of origin	Common name	Botanical name	Plant part(s)	Additional requirements
Hawaii				
	Litchi	*Litchi chinensis*	Fruit	(b)(1)(ii), (b)(3)(ii).
	Longan	*Dimocarpus longan*	Fruit	(b)(1)(ii), (b)(3)(ii).
*	*	*	*	*

(b) * * *

(1) * * *

(ii) May not be moved interstate into Florida. Cartons must be stamped ''Not for movement into or distribution in FL.''

* * * * *

§ 318.13–22 [Amended]

27. Section 318.13–22 is amended by revising paragraphs (b)(1) and (b)(2) to read as follows:

§ 318.13–22 Bananas from Hawaii.

* * * * *

(b) * * *

(1) The bananas are irradiated in accordance with part 305 of this chapter for the Mediterranean fruit fly (*Ceratitis capitata*), the melon fruit fly (*Bactrocera curcurbitae*), the Oriental fruit fly (*Bactrocera dorsalis*), and the green scale (*Coccus viridis*) and are inspected, after removal from the stalk, in Hawaii and found to be free of the banana moth (*Opogona sacchari* (Bojen)) by an inspector before or after undergoing irradiation treatment; or

(2) The bananas are irradiated in accordance with part 305 of this chapter for the Mediterranean fruit fly (*Ceratitis capitata*), the melon fruit fly (*Bactrocera curcurbitae*), and the Oriental fruit fly (*Bactrocera dorsalis*) and are inspected, after removal from the stalk, in Hawaii and found to be free of the green scale (*Coccus viridis*) and the banana moth (*Opogona sacchari* (Bojen)) before or after undergoing irradiation treatment.

* * * * *

28. Section 318.13–25 is revised to read as follows:

§ 318.13–25 Sweetpotatoes from Hawaii.

Sweetpotatoes may be moved interstate from Hawaii in accordance with this section only if the sweetpotatoes meet the conditions in paragraph (a) or paragraph (b) of this section or if the sweetpotatoes are fumigated with methyl bromide in accordance with part 305 of this chapter.

(a) *Vapor heat treatment and inspection.* (1) The sweetpotatoes must be treated with vapor heat in accordance with part 305 of this chapter.

(2) The sweetpotatoes must be sampled, cut, and inspected and found to be free of the ginger weevil (*Elytrotreinus subtruncatus*). Sampling, cutting, and inspection must be performed under conditions that will prevent any pests that may emerge from the sampled sweetpotatoes from infesting any other sweetpotatoes intended for interstate movement in accordance with this section.

(3) The sweetpotatoes must be inspected and found to be free of the gray pineapple mealybug (*Dysmicoccus neobrevipes*) and the Kona coffee-root knot nematode (*Meloidogyne konaensis*).

(4)(i) Sweetpotatoes that are treated in Hawaii must be packaged in the following manner:

(A) The cartons must have no openings that will allow the entry of the pests of concern and must be sealed with seals that will visually indicate if the cartons have been opened. They may be constructed of any material that

prevents the entry of the pests of concern.[5]

(B) The pallet-load of cartons must be wrapped before it leaves the treatment facility in one of the following ways:

(*1*) With polyethylene sheet wrap;

(*2*) With net wrapping; or

(*3*) With strapping so that each carton on an outside row of the pallet load is constrained by a metal or plastic strap.

(C) Packaging must be labeled with treatment lot numbers, packing and treatment facility identification and location, and dates of packing and treatment.

(ii) Cartons of untreated sweetpotatoes that are moving to the mainland United States for treatment must be shipped in shipping containers sealed prior to interstate movement with seals that will visually indicate if the shipping containers have been opened.

(5)(i) *Certification on basis of treatment.* Certification shall be issued by an inspector for the movement of sweetpotatoes from Hawaii that have been treated in accordance with part 305 of this chapter and handled in Hawaii in accordance with this section.

(ii) *Limited permit.* A limited permit shall be issued by an inspector for the interstate movement of untreated sweetpotato from Hawaii for treatment on the mainland United States in accordance with this section.

(b) *Irradiation treatment and inspection.* (1) The sweetpotatoes must be treated with irradiation in accordance with part 305 of this chapter.

(2) Sweetpotatoes that are not treated with an irradiation dose approved to neutralize the ginger weevil (*Elytrotreinus subtruncatus*) must be sampled, cut, and inspected and found to be free of the ginger weevil by an inspector in Hawaii. Sampling, cutting, and inspection must be performed under conditions that will prevent any pests that may emerge from the sampled sweetpotatoes from infesting any other sweetpotatoes intended for interstate movement in accordance with this section.

(3)(i) To be certified for interstate movement under this paragraph, sweetpotato from Hawaii must be inspected in Hawaii and found free of the gray pineapple mealybug (*Dysmicoccus neobrevipes*) and the Kona coffee-root knot nematode (*Meloidogyne konaensis*) by an inspector before undergoing irradiation treatment in Hawaii.

(ii) To be eligible for a limited permit under this section, untreated sweetpotato from Hawaii must be inspected in Hawaii and found free of the gray pineapple mealybug (*Dysmicoccus neobrevipes*) and the Kona coffee-root knot nematode (*Meloidogyne konaensis*) by an inspector.

(Approved by the Office of Management and Budget under control number 0579–0281)

29. A new § 318.13–26 is added to read as follows:

§ 318.13–26 Breadfruit, jackfruit, fresh pods of cowpea, dragon fruit, mangosteen, and moringa pods from Hawaii.

(a) *Breadfruit and jackfruit.* (1) To be eligible for interstate movement, breadfruit and jackfruit from Hawaii must be treated with irradiation in accordance with part 305 of this chapter.

(2) To be certified for interstate movement, breadfruit and jackfruit from Hawaii must be inspected in Hawaii and found free of spiraling whitefly (*Aleurodicus dispersus*), inornate scale (*Aonidiella inornata*), red wax scale (*Ceroplastes rubens*), green scale (*Coccus viridis*), gray pineapple mealybug (*Dysmicoccus neobrevipes*), pink hibiscus mealybug (*Maconellicoccus hirsutus*), spherical mealybug (*Nipaecoccus viridis*), citrus mealybug (*Pseudococcus cryptus*), melon thrips (*Thrips palmi*) and signs of thrip damage before undergoing irradiation treatment in Hawaii at a dose approved to neutralize fruit flies. Fruit treated for fruit flies also must either receive a post-harvest dip in accordance with part 305 of this chapter to treat external feeders or originate from an orchard or growing area that was previously treated with a broad-spectrum insecticide during the growing season and a pre-harvest inspection of the orchard or growing area found the fruit free of any surface pests as prescribed in a compliance agreement. Post-treatment inspection in Hawaii is not required if the fruit undergoes irradiation treatment at a dose approved to neutralize all plant pests of the class *Insecta,* except pupae and adults of the order Lepidoptera. Regardless of irradiation dose, the fruit must be free of stems and leaves and must originate from an orchard that was previously treated with a fungicide appropriate for the fungus *Phytophthora tropicalis* during the growing season and the fruit must be inspected prior to harvest and found free of the fungus or, after irradiation treatment, must receive a post-harvest fungicidal dip appropriate for *Phytophthora tropicalis.*

(3) To be eligible for a limited permit, breadfruit and jackfruit from Hawaii must be free of stems and leaves and must originate from an orchard that was previously treated with a fungicide appropriate for the fungus *Phytophthora tropicalis* during the growing season and the fruit must be inspected prior to harvest and found free of the fungus or, after irradiation treatment, must receive a post-harvest fungicidal dip appropriate for *Phytophthora tropicalis.*

(b) *Fresh pods of cowpea.* (1) To be eligible for interstate movement, fresh pods of cowpea and its relatives from Hawaii must be treated with irradiation in accordance with part 305 of this chapter.

(2) To be certified for interstate movement, fresh pods of cowpea and its relatives from Hawaii must be inspected in Hawaii and found free of the cassava red mite (*Oligonychus biharensis*) and adults and pupae of the order Lepidoptera before undergoing irradiation treatment. The pods must be free of stems and leaves.

(3) To be eligible for a limited permit, fresh pods of cowpea and its relatives from Hawaii must be free of stems and leaves and must be inspected in Hawaii and found free of the cassava red mite (*Oligonychus biharensis*) and adults and pupae of the order Lepidoptera.

(c) *Dragon fruit.* To be certified for interstate movement, dragon fruit from Hawaii presented for inspection must have the sepals removed and must be inspected in Hawaii and found free of gray pineapple mealybug (*Dysmicoccus neobrevipes*), pink hibiscus mealybug (*Maconellicoccus hirsutus*), and citrus mealybug (*Pseudococcus cryptus*) before undergoing irradiation treatment in Hawaii at a dose approved to neutralize fruit flies. Fruit treated for fruit flies also must either receive a post-harvest dip in accordance with part 305 of this chapter to treat external feeders or originate from an orchard or growing area that was previously treated with a broad-spectrum insecticide during the growing season and a pre-harvest inspection of the orchard or growing area found the fruit free of any surface pests as prescribed in a compliance agreement. Post-treatment inspection in Hawaii is not required if the fruit undergoes irradiation treatment at a dose approved to neutralize all plant pests of the class *Insecta,* except pupae and adults of the order Lepidoptera. Regardless of irradiation dose, the fruit must be free of stems and leaves.

(d) *Mangosteen.* To be certified for interstate movement, mangosteen from Hawaii must have the sepals removed

[5] If there is a question as to the adequacy of a carton, send a request for approval of the carton, together with a sample carton, to the Animal and Plant Health Inspection Service, Plant Protection and Quarantine, Center for Plant Health Science and Technology, 1730 Varsity Drive, Suite 400, Raleigh, NC 27606.

and must be inspected in Hawaii and found free of gray pineapple mealybug (*Dysmicoccus neobrevipes*), pink hibiscus mealybug (*Maconellicoccus hirsutus*), citrus mealybug (*Pseudococcus cryptus*), and *Thrips florum* before undergoing irradiation treatment in Hawaii at a dose approved to neutralize fruit flies. Fruit treated for fruit flies also must either receive a post-harvest dip in accordance with part 305 of this chapter to treat external feeders or originate from an orchard or growing area that was previously treated with a broad-spectrum insecticide during the growing season and a pre-harvest inspection of the orchard or growing area found the fruit free of any surface pests as prescribed in a compliance agreement. Post-treatment inspection in Hawaii is not required if the fruit undergoes irradiation treatment at a dose approved to neutralize all plant pests of the class *Insecta,* except pupae and adults of the order Lepidoptera. Regardless of irradiation dose, the fruit must be free of stems and leaves.

(e) *Melon.* To be certified for interstate movement, melon from Hawaii must be inspected in Hawaii and found free of spiraling whitefly (*Aleurodicus dispersus*) before undergoing irradiation treatment in Hawaii at a dose approved to neutralize fruit flies. Fruit treated for fruit flies also must either receive a post-harvest dip in accordance with part 305 of this chapter to treat external feeders or originate from an orchard or growing area that was previously treated with a broad-spectrum insecticide during the growing season and a pre-harvest inspection of the orchard or growing area found the fruit free of any surface pests as prescribed in a compliance agreement. Post-treatment inspection in Hawaii is not required if the fruit undergoes irradiation treatment at a dose approved to neutralize all plant pests of the class *Insecta,* except pupae and adults of the order Lepidoptera. Regardless of irradiation dose, melons must be washed to remove dirt and must be free of stems and leaves.

(f) *Moringa pods.* To be certified for interstate movement, moringa pods from Hawaii must be inspected in Hawaii and found free of spiraling whitefly (*Aleurodicus dispersus*), inornate scale (*Aonidiella inornata*), green scale (*Coccus viridis*), and citrus mealybug (*Pseudococcus cryptus*) before undergoing irradiation treatment in Hawaii at a dose approved to neutralize fruit flies. Fruit treated for fruit flies also must either receive a post-harvest dip in accordance with part 305 of this chapter to treat external feeders or originate from an orchard or growing area that was previously treated with a broad-spectrum insecticide during the growing season and a pre-harvest inspection of the orchard or growing area found the fruit free of any surface pests as prescribed in a compliance agreement. Post-treatment inspection in Hawaii is not required if the fruit undergoes irradiation treatment at a dose approved to neutralize all plant pests of the class *Insecta,* except pupae and adults of the order Lepidoptera.

§ 318.47–3 [Amended]

30. In § 318.47–3, paragraph (a) is amended by adding the words ''in accordance with part 305 of this chapter'' after the word ''origin''.

PART 319—[AMENDED]

31. The authority citation for part 319 continues to read as follows:

Authority: 7 U.S.C. 450, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

32. In § 319.8–23, paragraph (a)(1) is revised to read as follows:

§ 319.8–23 Treatments.

(a)(1) Vacuum fumigation as required in this subpart must be conducted in accordance with part 305 of this chapter.

* * * * *

§ 319.28 [Amended]

33. Section 319.28 is amended as follows:

a. In paragraph (b)(5), by adding the words ''in accordance with part 305 of this chapter'' after the words ''fumigated with methyl bromide''; and by removing the second sentence.

b. In paragraphs (b)(7)(i) and (b)(7)(ii), by removing the words ''paragraph (b)(5) of this section'' and adding the words ''part 305 of this chapter'' in their place.

§ 319.37–13 [Amended]

34. In § 319.37–13, paragraph (c) is amended by removing the words ''the Plant Protection and Quarantine Treatment Manual'' and adding the words ''7 CFR part 305'' in their place.

35. In § 319.40–3, paragraph (b)(1) is revised to read as follows:

§ 319.40–3 General permits; articles that may be imported without a specific permit; articles that may be imported without either a specific permit or an importer document.

* * * * *

(b) * * *

(1) The wood packaging material must have been treated in accordance with part 305 of this chapter.

* * * * *

36. Section 319.40–5 is amended as follows:

a. In paragraph (b)(1)(i)(C), by removing the citation ''§ 319.40–7(f)(1)'' and adding the words ''part 305 of this chapter'' in its place.

b. In paragraph (b)(1)(iii)(A), by removing the citations ''§ 319.40–7(c)'' and ''§ 319.40–7(d)'' and adding the words ''part 305 of this chapter'' in their place.

c. In paragraph (b)(1)(iii)(C), by removing the citations ''§ 319.40–7(c)'', ''§ 319.40–7(d)'', and ''§ 319.40–7(f)(3)'' each time they occur and adding the words ''part 305 of this chapter'' in their place.

d. In paragraph (b)(2)(i), by removing the citation ''§ 319.40–7(f)(2)'' and adding the words ''part 305 of this chapter'' in its place.

e. In paragraph (b)(2)(ii), by removing the citations ''§ 319.40–7(c)'' and ''§ 319.40–7(d)'' and adding the words ''part 305 of this chapter'' in their place.

f. In paragraph (c)(2), by removing the citation ''§ 319.40–7(f)(1)'' and adding the words ''part 305 of this chapter'' in its place.

g. In paragraph (d), by removing the citation ''§ 319.40–7(f)'' and adding the words ''part 305 of this chapter'' in its place.

h. In paragraph (f), by removing the citation ''§ 319.40–7(c)'' and adding the words ''part 305 of this chapter'' in its place.

i. By revising paragraph (l)(3) to read as set forth below.

j. In paragraph (m)(2)(iv)(A)(*1*), by removing the citation ''319.40–7(f)'' and adding the citation ''part 305'' in its place.

k. In paragraph (m)(2)(iv)(A)(*4*), by removing the citation ''§ 319.40–6'' and adding the words ''7 CFR part 305'' in its place.

l. In paragraph (n)(1)(ii), by removing the citation ''§ 319.40–7(c)'' and adding the words ''part 305 of this chapter'' in its place.

§ 319.40–5 Importation and entry requirements for specific articles.

* * * * *

(l) * * *

(3) Are fumigated in accordance with part 305 of this chapter prior to arrival in the United States.

* * * * *

§ 319.40–6 [Amended]

37. Section 319.40–6 is amended as follows:

a. In paragraph (a), by removing the citation ''§ 319.40–7(c)'' and adding the words ''part 305 of this chapter'' in their place.

b. In paragraphs (b)(1), (b)(1)(i), (b)(1)(ii), (b)(2)(ii), (c)(2)(i)(B), (c)(2)(iii),

(c)(2)(iv), and (d), by removing the citation ''§ 319.40–7(c)'' each time it occurs and adding the words ''part 305 of this chapter'' in its place; and by removing the citation ''§ 319.40–7(d)'' each time it occurs and adding the words ''part 305 of this chapter'' in its place.

c. In paragraph (c)(1)(i)(A), by removing the citation ''§ 319.40–7(e)'' and adding the words ''part 305 of this chapter'' in its place.

d. In paragraphs (c)(2)(i)(B), (c)(2)(iii), (c)(2)(iv), and (d), by removing the citation ''§ 319.40–7(f)(3)'' each time it occurs and adding the words ''part 305 of this chapter'' in its place.

38. Section 319.40–7 is amended as follows:

a. By removing paragraphs (c) through (f).

b. By adding a new paragraph (c) to read as set forth below.

c. By redesignating paragraph (g) as paragraph (d).

§ 319.40–7 Treatments and safeguards.

* * * * *

(c) *Treatments.* Treatment of regulated articles under this subpart must be conducted in accordance with part 305 of this chapter.

* * * * *

§ 319.41–5 [Amended]

39. Section 319.41–5 is amended as follows:

a. In paragraph (a), by removing the words ''other necessary'' and by adding the words ''in accordance with part 305 of this chapter,'' after the word ''treatment''.

b. In paragraphs (b), (c), (d)(1), and (d)(3), by adding the words ''in accordance with part 305 of this chapter'' after the words ''other treatment'' each time they occur.

§ 319.41–5a [Removed]

40. Section 319.41–5a is removed.

§ 319.55–6 [Amended]

41. In § 319.55–6, in paragraph (b)(1), the first sentence is amended by adding the words ''in accordance with part 305 of this chapter'' after the word ''treatment'' the first time it appears.

§ 319.56–3 [Amended]

42. In § 319.56–3, paragraph (c)(2) is amended by removing the citation ''§ 305.15'' and adding the words ''part 305'' in its place.

§ 319.56–7 [Amended]

43. In § 319.56–7, paragraph (b)(1)(ii) is amended by removing the words ''with an approved treatment listed in'' and adding the words ''in accordance with'' in their place.

§ 319.56–11 [Amended]

44. In § 319.56–11, paragraph (b)(1) is amended by removing the words ''with an approved treatment listed in'' and adding the words ''in accordance with'' in their place.

§ 319.56–12 [Amended]

45. Section 319.56–12 is amended by removing the words ''at a temperature not higher than 20 °F during shipping and upon arrival in the United States, and''; and by removing the third sentence.

§ 319.56–13 [Amended]

46. Section 319.56–13 is amended as follows:

a. In paragraph (b)(1)(ii), by removing the words ''an approved treatment listed in''.

b. In paragraphs (b)(5)(xiii) and (b)(5)(xv), by removing the words ''with an approved treatment listed in 7 CFR'' and adding the words ''in accordance with'' in their place; and by adding the words ''of this chapter'' after the words ''part 305''.

§ 319.56–21 [Amended]

47. In § 319.56–21, paragraphs (b)(2) and (d)(2) are amended by removing the words ''an approved treatment listed in''.

48. In § 319.56–22, paragraph (g)(2) is revised to read as follows:

§ 319.56–22 Apples and pears from certain countries in Europe.

* * * * *

(g) * * *

(2) Treatments must be conducted in accordance with part 305 of this chapter.

* * * * *

49. Section 319.56–23 is amended as follows:

a. In footnote 3, by removing the words ''a treatment listed in''.

b. By revising paragraph (f)(2) to read as set forth below.

§ 319.56–23 Apricots, nectarines, peaches, plumcot, and plums from Chile.

* * * * *

(f) * * *

(2) Treatments must be conducted in accordance with part 305 of this chapter.

* * * * *

§ 319.56–38 [Amended]

50. In § 319.56–38, paragraph (d)(4)(ii)(B) is amended by removing the words ''an authorized treatment for the pest is available in'' and adding the words ''a treatment for the pest is authorized by'' in their place.

§ 319.56–46 [Amended]

51. In § 319.56–46, paragraph (a) is amended by removing the words ''by receiving a minimum absorbed dose of 400 Gy'' and adding the words ''for plant pests of the class Insecta, except pupae and adults of the order Lepidoptera'' in their place; and by removing the citation ''§ 305.31'' and adding the words ''part 305'' in its place.

§ 319.56–47 [Amended]

52. Section 319.56–47, is amended as follows:

a. In paragraph (b) by removing the citation ''§ 305.31'' and adding the words ''part 305'' in its place.

b. In paragraph (d) by removing the citation ''§ 305.31'' and adding the words ''part 305 of this chapter'' in its place.

53. In § 319.59–4, paragraph (d)(3) is revised to read as follows:

§ 319.59–4 Karnal bunt.

* * * * *

(d) * * *

(3) Items that require disinfection prior to entry into the United States must be disinfected in accordance with part 305 of this chapter.

* * * * *

54. Section 319.74–2 is amended as follows:

a. In paragraph (c) by removing the paragraph designation (1) following the heading ''Fumigation for agromyziads'' and removing paragraph (c)(2).

b. Redesignating paragraphs (c)(1)(i) and (c)(1)(ii) as paragraphs (c)(1) and (c)(2), respectively.

c. In the newly redesignated introductory text of paragraph (c), by removing the words ''paragraph (c)(2) of this section'' and adding the words ''part 305 of this chapter'' in their place.

d. By revising the first two sentences of paragraph (e) to read as set forth below.

§ 319.74–2 Conditions governing the entry of cut flowers.

* * * * *

(e) *Irradiation.* Cut flowers and foliage that are required under this part to be treated or subjected to inspection to control one or more of the plant pests for which irradiation is an approved treatment under part 305 of this chapter may instead be treated with irradiation. Irradiation treatment must be conducted in accordance with the requirements of part 305 of this chapter. * * *

* * * * *

PART 330—FEDERAL PLANT PEST REGULATIONS; GENERAL; PLANT PESTS; SOIL, STONE, AND QUARRY PRODUCTS; GARBAGE

55. The authority citation for part 330 continues to read as follows:

Authority: 7 U.S.C. 450, 7701–7772, 7781–7786, and 8301–8317; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.3.

§ 330.106 [Amended]

56. In § 330.106, paragraph (a) the fourth sentence is amended by adding the words ''in accordance with part 305 of this chapter'' after the word ''treatment.''

§ 330.300 [Amended]

57. In § 330.300, paragraph (a) is amended by removing the words ''methods of'' and by adding the words ''in accordance with part 305 of this chapter'' after the word ''treatment.''

PART 352—PLANT QUARANTINE SAFEGUARD REGULATIONS

58. The authority citation for part 352 continues to read as follows:

Authority: 7 U.S.C. 7701–7772 and 7781–7786; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.3.

§ 352.10 [Amended]

59. In § 352.10, paragraph (b)(2)(viii) is amended by adding the words ''in accordance with part 305 of this chapter'' after the word ''treatment.''

§ 352.30 [Amended]

60. In § 352.30, paragraph (a)(4)(iii) is amended by removing the word ''such'' and by adding the word ''any'' in its place; and by adding the words ''in accordance with part 305 of this chapter'' after the word ''treatment.''

Done in Washington, DC, this 28th day of April 2009.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E9–10188 Filed 5–11–09; 8:45 am]

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Federal Register

Tuesday,
May 12, 2009

Part IV

Department of Transportation

National Highway Traffic Safety Administration

49 CFR Parts 571 and 585

Federal Motor Vehicle Safety Standards; Roof Crush Resistance; Phase-In Reporting Requirements; Final Rule

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Parts 571 and 585

[Docket No. NHTSA–2009–0093]

RIN 2127–AG51

Federal Motor Vehicle Safety Standards; Roof Crush Resistance; Phase-In Reporting Requirements

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Final rule.

SUMMARY: As part of a comprehensive plan for reducing the risk of rollover crashes and the risk of death and serious injury in those crashes, this final rule upgrades the agency's safety standard on roof crush resistance in several ways.

First, for the vehicles currently subject to the standard, i.e., passenger cars and multipurpose passenger vehicles, trucks and buses with a Gross Vehicle Weight Rating (GVWR) of 2,722 kilograms (6,000 pounds) or less, the rule doubles the amount of force the vehicle's roof structure must withstand in the specified test, from 1.5 times the vehicle's unloaded weight to 3.0 times the vehicle's unloaded weight. Second, the rule extends the applicability of the standard so that it will also apply to vehicles with a GVWR greater than 2,722 kilograms (6,000 pounds), but not greater than 4,536 kilograms (10,000 pounds). The rule establishes a force requirement of 1.5 times the vehicle's unloaded weight for these newly included vehicles. Third, the rule requires all of the above vehicles to meet the specified force requirements in a two-sided test, instead of a single-sided test, i.e., the same vehicle must meet the force requirements when tested first on one side and then on the other side of the vehicle. Fourth, the rule establishes a new requirement for maintenance of headroom, i.e., survival space, during testing in addition to the existing limit on the amount of roof crush. The rule also includes a number of special provisions, including ones related to leadtime, to address the needs of multi-stage manufacturers, alterers, and small volume manufacturers.

DATES: If you wish to petition for reconsideration of this rule, your petition must be received by June 26, 2009.

Effective date: The date on which this final rule amends the CFR is July 13, 2009. The incorporation by reference of a publication listed in the rule is approved by the Director of the Federal Register as of July 13, 2009.

Compliance dates:

Passenger cars and multipurpose passenger vehicles, trucks and buses with a GVWR of 2,722 kilograms (6,000 pounds) or less. This final rule adopts a phase-in of the upgraded roof crush resistance requirements for these vehicles. The phase-in begins on September 1, 2012. By September 1, 2015, all of these vehicles must meet the upgraded requirements, with certain exceptions. Vehicles produced in more than one stage and altered vehicles need not meet the upgraded requirements until September 1, 2016.

Multipurpose passenger vehicles, trucks and buses with a GVWR greater than 2,722 kilograms (6,000 pounds) and less than or equal to 4,536 kilograms (10,000 pounds). All of these vehicles must meet the requirements beginning September 1, 2016, with certain exceptions. Vehicles produced in more than one stage and altered vehicles need not meet the requirements until September 1, 2017.

ADDRESSES: If you wish to petition for reconsideration of this rule, you should refer in your petition to the docket number of this document and submit your petition to: Administrator, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., West Building, Washington, DC 20590.

The petition will be placed in the docket. Anyone is able to search the electronic form of all documents received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://www.dot.gov/privacy.html.*

FOR FURTHER INFORMATION CONTACT: For non-legal issues, you may call Christopher J. Wiacek, NHTSA Office of Crashworthiness Standards, telephone 202–366–4801. For legal issues, you may call J. Edward Glancy, NHTSA Office of Chief Counsel, telephone 202–366–2992. You may send mail to these officials at the National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., West Building, Washington, DC 20590.

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I. Executive Summary

a. Final Rule

As part of a comprehensive plan for reducing the serious risk of rollover crashes and the risk of death and serious injury in those crashes, this final rule upgrades Federal Motor Vehicle Safety Standard (FMVSS) No. 216, *Roof Crush Resistance.*

For the vehicles currently subject to the standard, passenger cars and multipurpose passenger vehicles, trucks and buses with a GVWR of 2,722 kilograms (6,000 pounds) or less, the rule doubles the amount of force the vehicle's roof structure must withstand in the specified test, from 1.5 times the

vehicle's unloaded weight to 3.0 times the vehicle's unloaded weight. The rule also extends the applicability of the standard so that it will also apply to vehicles with a GVWR greater than 2,722 kilograms (6,000 pounds), but not greater than 4,536 kilograms (10,000 pounds), establishing a force requirement of 1.5 times the vehicle's unloaded weight for these heavier vehicles.

Under today's rule, all of the above vehicles must meet the specified force requirements in a two-sided test instead of a single-sided test, i.e., the same vehicle must meet the force requirements when tested first on one side and then on the other side of the vehicle. The rule also establishes a new requirement for maintenance of headroom, i.e., survival space, during testing, in addition to the existing limit on the amount of roof crush. The rule also includes special provisions to address the needs of multi-stage manufacturers, alterers, and small volume manufacturers.

NHTSA developed its proposal to upgrade roof crush resistance requirements after considerable analysis and research, including considering comments received in response to a Request for Comments (RFC) notice published in 2001. Prior to publishing the RFC, the agency conducted a research program to examine potential methods for improving the roof crush resistance requirements. The agency testing program included full vehicle dynamic rollover testing, inverted vehicle drop testing, and comparing inverted vehicle drop testing to a modified FMVSS No. 216 test. After considering the results of the testing and other available information, the agency concluded that the quasi-static procedure provides a suitable representation of the real-world dynamic loading conditions, and the most appropriate one on which to focus our upgrade efforts.

Today's rule reflects careful consideration of comments we received in response to the notice of proposed rulemaking (NPRM) published in 2005 and a supplemental notice of proposed rulemaking (SNPRM) published in January 2008. NHTSA published the SNPRM to obtain public comment on a number of issues that might affect the content of the final rule, including possible variations in the proposed requirements. In the SNPRM, the agency also announced the release of the results of various vehicle tests conducted since the NPRM.

While this rulemaking action to improve roof strength is part of our comprehensive plan for addressing the serious problem of rollover crashes, this action, by itself, addresses a relatively small subset of that problem. There are more than 10,000 fatalities in rollover crashes each year. To address that problem, our comprehensive plan includes actions to (1) reduce the occurrence of rollovers, (2) mitigate ejection, and (3) enhance occupant protection when rollovers occur (improved roof crush resistance is included in this third category).

Our analysis shows that of the more than 10,000 fatalities that occur in rollover crashes each year, roof strength is relevant to only about seven percent (about 667) of those fatalities. We estimate that today's rule will prevent 135 of those 667 fatalities.

The portions of our comprehensive plan that will have the highest life-saving benefits are the ones to reduce the occurrence of rollovers (*prevention*) and to mitigate ejection (*occupant containment*). We estimate that by preventing rollovers, electronic stability control (ESC) will reduce the more than 10,000 fatalities that occur in rollover crashes each year by 4,200 to 5,500 fatalities (and also provide significant additional life-saving benefits by preventing other types of crashes). In the area of mitigating ejection, significant life-benefits are and/or will occur by our continuing efforts to increase seat belt use and our upcoming rulemaking on ejection mitigation. A more complete discussion of our comprehensive plan is discussed later in this document.

b. How This Final Rule Differs From the NPRM and/or SNPRM

The more noteworthy changes from the NPRM are outlined below and explained in detail later in this preamble. More minor changes are discussed in the appropriate sections of this preamble.

Higher force requirement (strength-to-weight ratio (SWR level)). While we proposed an SWR level of 2.5 in the NPRM for the vehicles that have been subject to the standard, we noted in the SNPRM that the agency could adopt a higher or lower value for this final rule. We are adopting an SWR of 3.0 for them in this final rule. An SWR of 1.5 will apply to the heavier light vehicles that have previously not been subject to the standard.

Two-sided test. While we proposed a single-sided test in the NPRM, we conducted additional testing and addressed the possibility of a two-sided test in the SNPRM. Today's rule adopts a two-sided test requirement for all vehicles subject to the standard.

Maintaining intrusion limit in addition to new headroom requirement. In the NPRM, we proposed to replace the current limit on intrusion (platen travel requirement) with a new headroom requirement. For this final rule, we are maintaining the intrusion limit as well as adopting the proposed headroom requirement.

Use of headform positioning fixture instead of a test dummy. In the NPRM, we proposed to use test dummies as part of the test procedure for measuring headroom. For this final rule, we are using headform positioning fixtures for this purpose.

Phase-in. We did not include a phase-in in the NPRM. For this final rule, we are phasing in the upgraded roof strength requirements for the lighter vehicles previously subject to FMVSS No. 216, and providing longer leadtime (without a phase-in) for the heavier light vehicles.

Limited exclusion for certain multi-stage trucks. Due to concerns about practicability, we are excluding from FMVSS No. 216 a very limited group of multistage trucks with a GVWR greater than 2,722 kilograms (6,000 pounds), ones not built on either a chassis cab or an incomplete vehicle with a full exterior van body.

Updated benefits and costs. We have updated our analysis of benefits and costs. Our analysis appears in summary form in this document, and in its entirety in the agency's Final Regulatory Impact Analysis (FRIA).

We estimate that the changes in FMVSS No. 216 will prevent 135 fatalities and 1,065 nonfatal injuries annually. The agency estimates that compliance with the upgraded roof strength standard will increase lifetime consumer costs by $69–114 per affected vehicle. Redesign costs are expected to increase affected vehicle prices by an average of about $54. Added weight is estimated to increase the lifetime cost of fuel usage by $15 to $62 for an average affected vehicle. Total consumer costs are expected to range from $875 million to $1.4 billion annually.

Implied Preemption. We have reconsidered the tentative position presented in the NPRM. We do not foresee any potential State tort requirements that might conflict with today's final rule. Without any conflict, there could not be any implied preemption.

II. Overall Rollover Problem and the Agency's Comprehensive Response

Addressing vehicle rollovers is one of NHTSA's highest safety priorities. According to 2007 FARS crash data, 10,196 people were killed as occupants

in light vehicle rollover crashes, which represents 35 percent of all occupants killed that year in crashes. FARS reported that approximately 57 percent were partially or completely ejected from the vehicle (including approximately 47 percent who were completely ejected).

Rollover crashes are complex and chaotic events. Rollovers can range from a single quarter turn to eight or more quarter turns, with the duration of the rollover crash lasting from one to several seconds. The wide range of rollover conditions occurs because these crashes largely occur off road where the vehicle motion is highly influenced by roadside conditions. Also, rollover crashes tend to occur at higher speeds than other crash types due to the energy required to initiate the rollover motion.

NHTSA has been pursuing a comprehensive and systematic approach towards reducing the fatalities and serious injuries that result from rollover crashes. As part of our safety standard rulemaking, this approach establishes various repeatable test procedures and performance requirements that will generate countermeasures effective in the chaotic real-world events. Due to the complex nature of a rollover event and the particularized effect of each element of the comprehensive approach taken by the agency to address these crashes, each element addresses a specific segment of the total rollover problem. Accordingly, each initiative has a different target population and interacts with each of the other rollover strategies. NHTSA has initiatives in place to:

1. Reduce the occurrence of rollover crashes (e.g., the requirement for ESC on all light vehicles and the NCAP rollover ratings),
2. Keep occupants inside the vehicle when rollovers occur (e.g., NHTSA's unyielding commitment to get passengers to buckle their seat belts every time they ride in a vehicle, as well as the requirement for enhanced door latches and the forthcoming rulemaking for ejection mitigation), and
3. Better protect the occupants kept inside the vehicle during the rollover (e.g., the requirement for upper interior head protection and this rulemaking for enhanced roof crush resistance).

Each of these three initiatives must work together to address the various aspects of the rollover problem.

a. Prevention

The most effective way to reduce deaths and injuries in rollover crashes is to prevent the rollover crash from occurring. On April 6, 2007, NHTSA published a final rule establishing FMVSS No. 126, ''Electronic stability control systems,'' to require ESC on passenger cars, multipurpose passenger vehicles, trucks, and buses with a GVWR of 4,536 kilograms (10,000 pounds) or less. ESC systems use automatic computer-controlled braking of individual wheels to assist the driver in maintaining control in critical driving situations in which the vehicle is beginning to lose directional stability at the rear wheels or directional control at the front wheels. ESC systems effectively monitor driver steering input and limit vehicle oversteer and understeer, as appropriate. To comply with the new ESC standard, vehicles will need individually adjustable braking at all four wheels, and computer electronics to utilize this capability, a means for engine torque adjustability and various onboard sensors (to measure yaw rate, lateral acceleration, steering wheel angle and speed). The agency estimates that ESC will save 5,300 to 9,600 lives in all types of crashes annually once all light vehicles on the road are equipped with ESC. The agency further anticipates that ESC systems will substantially reduce (by 4,200 to 5,500 deaths) the more than 10,000 deaths each year resulting from rollover crashes.

b. Occupant Containment

Studies have shown that the fatality rate for an ejected vehicle occupant is three times as great as that for an occupant who remains inside of the vehicle. Thus, mitigating ejections offers potential for significant safety gains. Safety belts are the most effective crashworthiness countermeasure in reducing ejected rollover fatalities. Studies have found that safety belts reduce fatalities in rollovers by 74 percent in passenger cars and 80 percent for light trucks.[1] NHTSA requires all vehicles manufactured after 1968 to have safety belts as standard equipment.

However, of the 6,164 ejected occupant fatalities in light vehicle rollover crashes, as reported by 2006 FARS, 1,135 were classified as partial ejections. Fatal injuries from partial ejection can occur even to belted occupants, e.g., when their head protrudes outside the window and strikes the ground in a rollover. Therefore, as mandated by SAFETEA-LU, NHTSA is working to establish performance standards to reduce partial and complete ejection from outboard seating position windows.

Doors represent another common ejection route. As part of the agency's comprehensive approach to rollover, and to harmonize with the first Global Technical Regulation, NHTSA upgraded FMVSS No. 206, ''Door locks and door retention components,'' in a final rule published on February 6, 2007. This final rule added test requirements for sliding doors, upgraded the door retention requirements, added secondary latch requirements for doors other than hinged side doors and back doors, and provided a new test procedure for assessing inertial forces. To comply with the new requirements, it is anticipated that passenger vehicles with sliding doors designed with one latch and pin locking mechanism will need to be redesigned with two latches. The technology needed to meet the upgraded standard would benefit vehicles in rollover crashes where door openings were identified as a problem.

c. Occupant Protection

Finally, when a rollover crash does occur and the occupants have been contained within the vehicle compartment, it is important for the roof structure to remain intact and maintain survival space. That is the safety need addressed by today's final rule.

III. The Role of Roof Intrusion in the Rollover Problem

Due to the high effectiveness of ESC in preventing an increasing number of rollover crashes, and seat belts at preventing ejection, the remaining target population relevant to roof crush occupant protection is a relatively small subset of the occupants injured in rollovers. For fatalities, the estimated total for the target population[2] is about seven percent (about 667) of all non-convertible light vehicle rollover fatalities. Although the target population and potential for lives saved are substantially smaller than can be attained by the first two strategies of our comprehensive rollover plan, it is nevertheless a very important aspect of the plan.

Looking at the target population relevant to roof crush occupant protection more specifically, Table 1 below shows a breakdown of the target population that could potentially benefit from roof crush improvements. The target population for all light vehicles is stratified by injury severity. The injury mechanism due to roof crush for belted occupants is that the roof crushes during the roll event, intrudes

[1] Kahane, C. J., Fatality Reduction by Safety Belts for Front-Seat Occupants of Cars and Light Trucks: Updated and Expanded Estimates Based on 1986–99 FARS Data (NHTSA Report No. DOT HS 809 199).

[2] The target population estimates were based upon the results from the 1997–2006 National Automotive Sampling System-Crashworthiness Data System (NASS–CDS).

into the occupant compartment, and causes head, face, or neck injury. The table demonstrates how the final target population is derived from the broad category of rollovers by eliminating cases in which roof strength improvements would not be effective in reducing serious and fatal injuries. For example, a stronger roof would not be expected to provide benefits in cases where the roof was not involved; where the occupant was totally ejected from the vehicle,[3] or where the most serious injury was not to the head, neck, or face due to the intruding roof.

The final target populations are shown in bold at the bottom of the table. A full discussion of the basis for the target population is included in the FRIA.

TABLE 1—TARGET POPULATION POTENTIALLY AFFECTED BY IMPROVED ROOF STRENGTH[4]

	AIS 1	AIS 2	AIS 3–5	Fatalities
All Light Vehicles				
All Vehicles:				
Non-Convertible Light Vehicles in Rollovers	199,822	37,305	21,673	10,150
Roof-Involved Rollover	164,213	32,959	19,262	8,645
Some Fixed Object Collision on Top	153,520	29,419	17,766	7,559
Not Totally Ejected	149,850	26,033	12,355	3,654
Using Safety Restraints	116,670	14,327	8,970	2,096
Outboard Seats	115,018	14,241	8,781	2,096
Roof Component Intrusion	68,730	10,922	6,842	1,444
Head, Neck, or Face Injury From Intruding Roof Component	24,035	6,580	2,993	957
Injury—Not MAIS[5]	0	−1,900	−1,252	−237
Injury at MAIS—Not Sole Injury	−17,818	−292	−253	−53
Sole MAIS Injury	6,216	4,388	1,487	667
Light Vehicles With a GVWR of 2,722 Kilograms (6,000 Pounds) or Less				
PC & LT < 6,000 lbs:				
Non-Convertible Light Vehicles in Rollovers	172,846	33,170	18,929	8,719
Roof-Involved Rollover	144,410	29,098	17,360	7,536
Some Fixed Object Collision on Top	136,080	26,270	16,122	6,484
Not Totally Ejected	133,241	23,400	11,406	3,142
Using Safety Restraints	104,571	12,421	8,379	1,936
Outboard Seats	103,249	12,373	8,190	1,936
Roof Component Intrusion	60,061	9,370	6,372	1,304
Head, Neck, or Face Injury From Intruding Roof Component	20,687	5,868	2,615	842
Injury—Not MAIS	0	−1,771	−1,119	−157
Injury at MAIS—Not Sole Injury	−16,082	−262	−212	−50
Sole MAIS Injury	4,605	3,835	1,283	635
Light Vehicles With a GVWR above 2,722 Kilograms (6,000 Pounds)				
LT > 6,000 lbs:				
Non-Convertible Light Vehicles in Rollovers	26,975	4,135	2,744	1,431
Roof-Involved Rollover	19,803	3,861	1,902	1,110
Some Fixed Object Collision on Top	17,440	3,149	1,644	1,075
Not Totally Ejected	16,608	2,634	949	511
Using Safety Restraints	12,099	1,906	591	160
Outboard Seats	11,770	1,868	591	160
Roof Component Intrusion	8,669	1,552	471	140
Head, Neck, or Face Injury From Intruding Roof Component	3,348	712	378	116
Injury—Not MAIS	0	−128	−133	−80
Injury at MAIS—Not Sole Injury	−1,736	−31	−40	−3
Sole MAIS Injury	1,611	553	205	33

The most significant exclusions resulted from requirements that fatalities occurred in rollovers in which (1) the roof was damaged in a rollover, (2) the damage was not caused by collision with a fixed object, (3) the fatally injured occupants were not ejected, and (4) those occupants were belted.

It is important to understand what Table 1 indicates about the safety

[3] Strashny, ''The Role of Vertical Roof Intrusion in Predicting Occupant Ejection,'' 2009. Strashny found that there was no statistically significant relationship between the level of roof intrusion and the probability of complete ejection. For this reason completely ejection occupants were excluded from the target population. However, partial ejections that meet the established criteria are included.

[4] Note: The relevant target population used for the estimation of benefits is identified in the row titled ''Sole MAIS Injury.'' Also, the numbers reflect rounding errors.

[5] Injury—Not MAIS: This means that the most serious injury was to a portion of the body other than the head, neck or face.

potential of addressing roof crush. Even if there were some way to prevent every single rollover death resulting from roof crush, the total lives saved would be 667, not the approximately 10,000 deaths that result from rollover each year. This is why each initiative in NHTSA's comprehensive program to address the different aspects of the rollover problem is so important.

The details of today's rule upgrading roof crush occupant protection, including costs and benefits and the agency's analysis of the public comments on our NPRM and SNPRM, are discussed in the rest of this document.

IV. The Agency's Proposed Rule

a. NPRM

On August 23, 2005, NHTSA published in the **Federal Register** (70 FR 49223) a NPRM to upgrade FMVSS No. 216, *Roof Crush Resistance.*[6] FMVSS No. 216 seeks to reduce deaths and serious injuries resulting from the roof being crushed and pushed into the occupant compartment when the roof strikes the ground during rollover crashes.

Current requirements.

FMVSS No. 216 currently applies to passenger cars, and to multipurpose passenger vehicles, trucks and buses with a GVWR of 2,722 kilograms (6,000 pounds) or less.

The standard requires that when a large steel test plate (sometimes referred to as a platen) is placed in contact with the roof of a vehicle and then pressed downward, simulating contact of the roof with the ground during a rollover crash, with steadily increasing force until a force equivalent to 1.5 times the unloaded weight of the vehicle is reached, the distance that the test plate has moved from the point of contact must not exceed 127 mm (5 inches). The criterion of the test plate not being permitted to move more than a specified amount is sometimes referred to as the ''platen travel'' criterion. Under S5 of the standard, the application of force is limited to 22,240 Newtons (5,000 pounds) for passenger cars, even if the unloaded weight of the car times 1.5 is greater than that amount.

Proposed upgrade.

As discussed in the August 2005 NPRM, we developed our proposal to upgrade roof crush resistance requirements after considerable analysis and research, including considering comments received in response to a RFC published in the **Federal Register** (66 FR 53376)[7] on October 22, 2001. Prior to publishing the RFC, the agency conducted a research program to examine potential methods for improving the roof crush resistance requirements. The agency testing program included full vehicle dynamic rollover testing, inverted vehicle drop testing, and comparing inverted drop testing to a modified FMVSS No. 216 test. After considering the results of the testing and other available information, the agency concluded that the quasi-static procedure provides a suitable representation of the real-world dynamic loading conditions, and the most appropriate one on which to focus our upgrade efforts.

In our August 2005 NPRM, to better address fatalities and injuries occurring in roof-involved rollover crashes, we proposed to extend the application of the standard to vehicles with a GVWR of up to 4,536 kilograms (10,000 pounds), and to strengthen the requirements of FMVSS No. 216 by mandating that the vehicle roof structures withstand a force equivalent to 2.5 times the unloaded vehicle weight, and to eliminate the 22,240 Newton (5,000 pound) force limit for passenger cars.

Further, in recognition of the fact that the pre-test distance between the interior surface of the roof and a given occupant's head varies from vehicle model to vehicle model, we proposed to regulate roof strength by requiring that the crush not exceed the available headroom. Under the proposal, this requirement would replace the current limit on test plate movement.

The proposed new limit would prohibit any roof component from contacting the head of a seated 50th percentile male dummy when the roof is subjected to a force equivalent to 2.5 times the unloaded vehicle weight. We note that this value is sometimes referred to as the strength-to-weight ratio (SWR), e.g., a SWR of 1.5, 2.5, and so forth.

We also proposed to:

- Allow vehicles manufactured in two or more stages, other than chassis-cabs, to be certified to the roof crush requirements of FMVSS No. 220, *School bus rollover protection,* instead of FMVSS No. 216.
- Clarify the definition and scope of exclusion for convertibles.
- Revise the vehicle tie-down procedure to minimize variability in testing.

To accompany our proposal, we prepared a Preliminary Regulatory Impact Analysis (PRIA) describing the costs and benefits. We estimated that, if adopted, the proposal would result in 13–44 fewer fatalities and 498–793 fewer non-fatal injuries each year. The total estimated recurring fleet cost was $88 to $95 million. We estimated that approximately 32 percent of the current vehicle fleet would need improvements to meet the proposed upgraded requirements.

b. SNPRM

On January 30, 2008, NHTSA published in the **Federal Register** (73 FR 5484) an SNPRM for our ongoing roof crush resistance rulemaking.[8] In that document, we asked for public comment on a number of issues that might affect the content of the final rule, including possible variations in the proposed requirements. We also announced the release of the results of various vehicle tests conducted since the proposal.

In the SNPRM, we noted that we had been carefully analyzing the numerous comments we had received on the NPRM, as well as the various additional vehicle tests, including both single-sided tests and two-sided tests, conducted since the NPRM. We invited comments on how the agency should factor the new information into its decision. We noted that while the NPRM focused on a specified force equivalent to 2.5 times the unloaded vehicle weight, the agency could adopt a higher or lower value for the final rule. We explained, with respect to two-sided testing, that we believed there was now sufficient available information for the agency to consider a two-sided requirement as an alternative to the single-sided procedure described in the NPRM. We stated that we planned to evaluate both the single-sided and two-sided testing alternatives for the final rule and requested comments that would help us reach a decision on that issue.

We also noted in the SNPRM that the agency had conducted additional analysis concerning the role of vertical roof intrusion and post-crash headroom in predicting roof contact injuries to the head, neck or face during FMVSS No. 216 rollovers. At the time of the NPRM, the agency estimated benefits based on post-crash headroom, the only basis for which a statistical relationship with injury reduction had been established. After the NPRM, with additional years of data available, a statistically significant relationship between intrusion and injury for belted occupants was established.

c. Congressional Mandate

Section 10301 of SAFETEA–LU generally required the Secretary to issue

[6] Docket No. NHTSA–2005–22143.

[7] Docket No. NHTSA–1999–5572.

[8] Docket No. NHTSA–2008–0015.

a final rule upgrading roof crush resistance by July 1, 2008, while providing for a later date under certain circumstances. That section provides:

Sec. 10301. VEHICLE ROLLOVER PREVENTION AND CRASH MITIGATION.

(a) In General.—Subchapter II of chapter 301 is amended by adding at the end the following:

§ 30128. Vehicle rollover prevention and crash mitigation

(a) IN GENERAL.—The Secretary shall initiate rulemaking proceedings, for the purpose of establishing rules or standards that will reduce vehicle rollover crashes and mitigate deaths and injuries associated with such crashes for motor vehicles with a gross vehicle weight rating of not more than 10,000 pounds.

* * * * *

(d) Protection of Occupants.—One of the rulemaking proceedings initiated under subsection (a) shall be to establish performance criteria to upgrade Federal Motor Vehicle Safety Standard No. 216 relating to roof strength for driver and passenger sides. The Secretary may consider industry and independent dynamic tests that realistically duplicate the actual forces transmitted during a rollover crash. The Secretary shall issue a proposed rule by December 31, 2005, and a final rule by July 1, 2008.

The statute provides that if the Secretary determines that the July 1, 2008 deadline for the final rule cannot be met, the Secretary is to notify Congress and explain why that deadline cannot be met, and establish a new date. The Secretary provided such notifications to Congress, and established a date of April 30, 2009.

V. Overview of Comments

NHTSA received comments from a wide variety of interested parties, including vehicle manufacturers and their trade associations, suppliers of automobile equipment and a supplier trade association, consumer advocacy and other organizations, trial lawyers, engineering firms and consultants, members of academia, elected officials and government organizations, and private individuals. All of the comments may be found in the docket for the NPRM or SNPRM. In this section, we provide a broad overview of the significant comments. Where we identify specific commenters, we cite representative comments.

General Approach and SWR

Vehicle manufacturers were generally supportive of the agency's proposal, while recommending a number of specific modifications. They generally supported a SWR of 2.5, with caveats about sufficient leadtime and test procedure issues. They expressed concerns about SWRs higher than 2.5, including potential adverse effects on safety resulting from increased mass.

Consumer advocacy organizations and a number of other commenters argued that it is not enough to upgrade the current quasi-static requirement, and that a dynamic test requirement is needed. While specific recommendations varied, one was for the agency to adopt an upgraded quasi-static requirement now, and to proceed with further rulemaking for a dynamic test.

Advocates for Highway Safety (Advocates) stated that the proposed quasi-static test cannot demonstrate actual roof crush resistance in rollover crashes and that a dynamic test would address occupant kinematics and injury responses in actual rollover crashes. Public Citizen stated that a dynamic test could simultaneously evaluate the performance of seat belts, doors, ejection and the roof. A number of commenters supported specific dynamic tests.

The Center for Auto Safety (CAS) stated that while it strongly supports a dynamic test, it believes rollover protection can be dramatically improved with a well-crafted quasi-static test. It argued that test procedure changes related to roll angle and pitch angle are needed to ensure that the roof receives appropriate shear stress.

As to the SWR for an upgraded quasi-static test requirement, consumer advocacy organizations and a number of other commenters argued that the SWR should be significantly higher than 2.5. Many of these commenters recommended a SWR of 3.5, with some recommending higher levels.

The Insurance Institute for Highway Safety (IIHS) submitted a new study which it said supports increasing the SWR beyond 2.5. It stated that based on the current evidence, it supports a SWR of 3.0 to 3.5.

Performance Criterion

The agency received a variety of comments on the proposed headroom reduction criterion. Some commenters, including consumer groups, supported a headroom reduction criterion but argued that a platen travel criterion is also needed. Several commenters expressed concern that, for some vehicles, the proposed headroom reduction criterion would be less stringent and less protective than the current platen travel criterion. The agency also received comments recommending that the agency make these criteria more stringent to protect taller occupants, e.g., by using a 95th percentile adult male dummy instead of a 50th percentile adult male dummy to measure headroom and by reducing the amount of platen travel that is permitted.

Vehicle manufacturers urged the agency to retain the current platen travel criterion instead of adopting a headroom reduction criterion. They argued, among other things, that using the headroom reduction criterion would add unnecessary complexity to the test procedure and result in problems related to repeatability and practicability. Some manufacturers stated that if the agency adopts a headroom reduction criterion, it should adopt a test procedure using a head positioning fixture instead of a test dummy.

IIHS stated that relating the allowable amount of roof crush in the quasi-static test to the headroom in specific vehicles is a good concept but that, in practice, the agency's research tests have not shown that replacing the 5-inch platen travel criterion with the headroom requirement would be a meaningful change to the standard and may not justify the added complications to the test procedure.

Single- or Two-Sided Testing

Several consumer advocacy organizations and other commenters strongly supported two-sided testing. Public Citizen stated that in a vast majority of rollover cases, the injured party was typically seated on the far side, that is, the side of the second impact. It argued that it is not possible to upgrade FMVSS No. 216 without a two-sided test requirement.

IIHS stated that while it supports any changes that would increase the level of roof strength of the vehicle fleet, it has no real-world data to address the potential benefits of two-sided testing. It stated that a single-sided test with a higher SWR may be more effective at promoting robust roof designs than a two-sided test with a lower SWR requirement.

The comments of vehicle manufacturers were somewhat mixed on the issue of single- or two-sided testing. The Alliance of Automobile Manufacturers (Alliance) stated that it believes the agency has provided insufficient justification for two-sided testing. It stated that the agency has not provided analysis demonstrating that two-sided testing relates to real-world safety. The Alliance also expressed concern that two-sided testing would amplify variability and repeatability problems.

The Association of International Automobile Manufacturers (AIAM) stated that based on the information and

analysis provided by the agency regarding the two-sided test, it believes that the test shows enough potential to merit further consideration by the agency. AIAM argued that additional analysis would be needed before it could provide a preferred regulatory approach, but indicated that the two-sided approach would more directly address the multiple roof contact weakening phenomenon.

Leadtime

Vehicle manufacturers argued that a phase-in is needed for the upgraded roof crush requirements. The Alliance stated that if the final rule reflected a reasonable accommodation of the issues raised in its comments, it would be reasonable for a phase-in to begin, with a compliance percentage of 20 percent, on the first September 1, that occurred more than 36 months after issuance of the final rule. That organization stated that it would not be practicable to apply the upgraded requirements to all new vehicles at once, since far more vehicle models require redesigns than anticipated by NHTSA. The Alliance requested a phase-in that incorporates carryforward credits. It stated that additional leadtime would be necessary if the agency adopted a head contact criterion instead of platen travel, a two-sided test or a SWR higher than 2.5.

Costs and Benefits

Many commenters addressed the PRIA, which analyzed the costs and benefits and other impacts of the proposed rule, and a later discussion of these impacts included in the SNPRM. Among other things, commenters addressed the target population, the pass/fail rate of the current fleet, cost and weight impacts, and estimates of benefits.

Preemption

We received numerous comments on our discussion in the NPRM of the possible preemptive effect of an upgraded roof crush standard on State common law tort claims. Vehicle manufacturers and one organization strongly supported the view that an upgraded roof crush standard would conflict with and therefore impliedly preempt State rules of tort law imposing more stringent requirements than the one ultimately adopted by NHTSA. Consumer advocacy groups, members of Congress and State officials, trial lawyers, consultants, members of academia, and private individuals strongly opposed that view. The opposing comments from State officials included one signed by 27 State Attorneys General and the National Conference of State Legislatures.

Other Issues

We received comments on many other issues. Commenters addressed a number of issues concerning the FMVSS No. 216 test procedure, including the vehicle tie-down procedure, platen angle and size, and whether the vehicle should be tested with the windshield and/or other glazing in place. Commenters also addressed requirements for multi-stage vehicles.

June 2008 Congressional Hearing and Letters

On June 4, 2008. the Subcommittee on Consumer Affairs, Insurance, and Automotive Safety of the Senate Commerce, Science and Transportation Committee held an oversight hearing on passenger vehicle roof strength. Former NHTSA Deputy Administrator James Ports testified at the hearing. At the hearing and also in a subsequent letter to Secretary Peters dated June 19, 2008, several Senators encouraged the agency to extend the July 1, 2008 date for completing a final rule. They encouraged the agency to ensure a rulemaking that would maximize vehicle safety and significantly reduce deaths and injuries for drivers and passengers in vehicle rollover crashes.

Several Senators encouraged NHTSA to consider a two-sided test requirement and a higher SWR requirement than the proposed 2.5 level, and to provide detailed information concerning alternatives considered by the agency. They also raised concerns about the use of 50th percentile adult male test dummies instead of ones representing taller occupants. The Senators also expressed significant concerns about possible preemption of common law tort actions, and asked that such a provision not be included in the final rule.

In a letter to Secretary Peters dated June 27, 2008, Chairman Henry Waxman of the House Committee on Oversight and Government Reform, raised similar concerns to those of the Senators.

New IIHS Roof Strength Consumer Information Program

On February 19, 2009, IIHS met with NHTSA representatives to provide the agency information about a new roof strength consumer information program that the organization is initiating. IIHS believes the FMVSS No. 216 test procedure is a meaningful structural assessment of real-world rollover crashworthiness as shown by recent studies it has conducted showing that improved roof strength reduces injury risk in midsize SUVs and small cars. That organization indicated that the boundary for a good rating in the IIHS program will be a SWR of 4.0 in a one-sided platen test similar to the existing FMVSS No 216 test procedure. IIHS indicated that it does not plan to rate the larger, heavier light vehicles, i.e., ones likely to have GVWRs greater than 2,722 kilograms (6,000 pounds).

On March 24, 2009, IIHS issued a press release announcing a number of details about its new rating system, including ratings for 12 small SUVs. For an acceptable rating, the minimum SWR is 3.25. A marginal rating value is 2.5. Anything lower than that is rated as poor. In order to earn IIHS's ''top safety pick'' award for 2010, vehicles will need to have a good roof strength rating, i.e., SWR of 4.0. Of the 12 small SUVs tested by IIHS, eight were rated by that organization as good, five as acceptable, two as marginal, and one as poor.

VI. Agency Decision and Response to Comments

a. Primary Decisions

1. Basic Nature of the Test Requirements—Quasi-Static vs. Dynamic Tests

As noted above and discussed in detail in the NPRM, we developed our proposal to upgrade roof crush resistance requirements after considerable analysis and research, including conducting a research program to examine potential methods for improving the roof crush resistance requirements. The agency testing program included full vehicle dynamic rollover testing, inverted vehicle drop testing, and comparing inverted drop testing to a modified FMVSS No. 216 test. After considering the results of the testing and other available information, the agency concluded that the quasi-static procedure provides a suitable representation of the real-world dynamic loading conditions, and the most appropriate one on which to focus our upgrade efforts.

We did not propose a dynamic test procedure in either the NPRM or the SNPRM. We did discuss in the NPRM a number of types of dynamic tests and why we were not including them in the proposal. We stated our belief that the current quasi-static test procedure is repeatable and capable of simulating real-world deformation patterns. We also stated that we were unaware of any dynamic test procedure that provides a sufficiently repeatable test environment.

Consumer advocacy organizations and a number of other commenters argued that it is not enough to upgrade the current quasi-static requirement, and

that a dynamic test requirement is needed. While specific recommendations varied, one was for the agency to adopt an upgraded quasi-static requirement now, and to proceed with further rulemaking at this time for a dynamic test.

Advocates stated that the proposed quasi-static test cannot demonstrate actual roof crush resistance in rollover crashes and that a dynamic test would address occupant kinematics and injury responses in actual rollover crashes. Public Citizen stated that a dynamic test could simultaneously evaluate the performance of seat belts, doors, ejection mitigation and the roof. A number of commenters made specific recommendations concerning the type of dynamic test that the agency should propose, e.g., with a number recommending the FMVSS No. 208 dolly test and/or the Jordan Rollover System (JRS) test.

As part of our considering the merits of a dynamic test and comments on the JRS, on February 23, 2007, NHTSA representatives met with Xprts, LLC (Xprts) at its test facility in Goleta, CA, to view and discuss the device. CAS and Center for Injury Research (CFIR) also submitted additional test data to the agency using the JRS.

We note that the agency is also aware of tests used by manufacturers to assess a vehicle's rollover performance during vehicle development and conditions they are designed to represent such as the curb trip, soil trip, the bounce over, etc.[9]

As noted earlier in this document, rollover crashes are complex and chaotic events. Rollovers can range from a single quarter turn to eight or more quarter turns, with the duration of the rollover crash lasting from one to several seconds. The wide range of rollover conditions occurs because these crashes largely occur off road where the vehicle motion is highly influenced by roadside conditions.

The variety and complexity of real-world rollover crashes create significant challenges in developing dynamic tests suitable for a Federal motor vehicle safety standard. Rollover crash tests can have an undesirable amount of variability in vehicle and occupant kinematics.

In assessing whether a potential dynamic test would be appropriate for a Federal motor vehicle safety standard, the agency must consider such issues as (1) whether the test is representative of real-world crashes with respect what happens to the vehicle and any specified test dummies; (2) for the specific aspect of performance at issue, whether the test is sufficiently representative of enough relevant real-world crashes to drive appropriate countermeasures and, if not, the number and nature of necessary tests to achieve that purpose; (3) whether the test is repeatable and reproducible so that the standard will be objective; and (4) whether the test dummies to be specified are biofidelic for the purposes used.

We have reviewed the comments recommending a dynamic test and are including our analysis of those comments in an appendix to this document. NHTSA appreciates the information and data that have been provided on this subject. We decline, however, to pursue a dynamic test as part of this rulemaking, or to initiate at this time a separate rulemaking for a dynamic test.

As noted above, we explained in the NPRM that we were unaware of any dynamic test procedure that provides a sufficiently repeatable test environment. After reviewing the public comments and for reasons discussed in the appendix, we continue to take that position. While some commenters argued that certain procedures are repeatable, the agency was not persuaded by the arguments and data they presented. Moreover, for reasons discussed in the appendix, there are significant issues associated with each of the cited dynamic test procedures related to possible use in a Federal motor vehicle safety standard.

Also of importance for this rulemaking, even if NHTSA were to identify a particular dynamic test procedure, among the many known to be available, as likely to be suitable for assessing roof crush resistance (something we have not been able to do thus far), we would need additional years of research to evaluate and refine, as necessary, the procedure to develop a proposal, including evaluating it in the context of the current vehicle fleet. It is also not known whether any dynamic test requirement that might be identified by NHTSA's research would produce significant additional benefits beyond those that will be produced by the substantial upgrade of the quasi-static procedure that we are adopting in this rule.

NHTSA agrees, however, with pursuing a dynamic test as our ultimate goal. We would like to have one for rollover crashes just as we do for front and side crashes. Unfortunately, we cannot adopt or even propose one now because of issues related to test repeatability, a dummy, and lack of injury criteria. We are pursuing further research for a dynamic test, but we expect that it will take a number of years to resolve these issues. In the meantime, we do not want to delay a significant upgrade of FMVSS No. 216 that will save 135 lives each year.

2. Vehicle Application

FMVSS No. 216 currently applies to passenger cars, and to multipurpose passenger vehicles, trucks and buses with a GVWR of 2,722 kilograms (6,000 pounds) or less. In our August 2005 NPRM, in addition to proposing upgraded performance requirements, we proposed to extend the application of the standard to vehicles with a GVWR of up to 4,536 kilograms (10,000 pounds). We proposed to permit vehicles manufactured in two or more stages, other than chassis-cabs, to be certified to the roof crush requirements of FMVSS No. 220, instead of FMVSS No. 216. We stated that we believed that the requirements of FMVSS No. 220 appeared to offer a reasonable avenue to balance the desire to respond to the needs of multi-stage manufacturers and the need to increase safety in rollover crashes.

The commenters generally supported extending the application of FMVSS No. 216 to vehicles with a GVWR of up to 4,536 kilograms (10,000 pounds). The National Transportation Safety Board (NTSB) stated that heavier vehicles such as 12- and 15-passenger vans, not currently subjected to the standard, are experiencing patterns of roof intrusion greater than vehicles already subject to the requirements. That commenter also cited two investigations it conducted concerning the safety need for vehicles between 6,000 and 10,000 pounds GVWR to meet roof crush resistance requirements.

We received a number of comments concerning requirements for multi-stage vehicles and vehicles with altered roofs, including ones from Advocates, the National Truck Equipment Association (NTEA), the Recreation Vehicle Industry Association (RVIA) and the National Mobility Equipment Dealers Association (NMEDA). The concerns and recommendations of these commenters varied considerably. We discuss and address the comments later in this document. For purposes of this more general section concerning applicability, we note that we are providing a FMVSS No. 220 option for some but not all multi-stage vehicles and for vehicles which are altered in certain ways to raise the height of the roof. We also note that, for reasons discussed in that section, we are excluding a narrow

[9] Viano D., Parenteau C., ''Rollover Crash Sensing and Safety Overview,'' SAE International, 2004–01–0342.

category of multi-stage trucks from FMVSS No. 216 altogether.

Subject to the limited exceptions/alternatives/exclusions noted in the previous paragraph or already included in FMVSS No. 216, and for the reasons discussed in the NPRM and in this document, we are extending the application of the standard to vehicles with a GVWR of up to 4,536 kilograms (10,000 pounds).[10]

3. Single-Sided or Two-Sided Tests

Under the current version of FMVSS No. 216, vehicles must meet the standard's requirements for both the driver and passenger sides of the vehicle. Thus, roof crush resistance protection is required for both the driver and passenger sides of the vehicle. The standard specifies a single-sided test. While a vehicle must meet the standard's test requirements, regardless of whether it is tested on the driver or passenger side, a particular vehicle is tested on only one side.

As discussed in the NPRM, a number of commenters on our 2001 RFC suggested that the agency specify a two-sided test requirement, i.e., a requirement that each vehicle must meet the standard's test requirements when tested sequentially, first on one side of the vehicle, and then on the other side. Commenters making this recommendation included Public Citizen and CFIR. The commenters stated that vehicle occupants on the far side of the rollover have a much greater risk of serious injury than occupants on the near side,[11] and argued that a two-sided requirement is needed to protect far side occupants.

In the NPRM, the agency summarized the results of six two-sided tests it had conducted in light of those comments. The testing sought to evaluate the strength of the second side of the roof of vehicles whose first side had already been tested. In this testing, after the force was applied to one side of the roof over the front seat area of a vehicle, the vehicle was repositioned and force was then applied on the opposite side of the roof over the front seat area. In performing these tests on both sides of a vehicle, the agency used the platen angle currently specified in FMVSS No. 216 (5 degree pitch forward and 25 degree rotation outward, along its lateral axis). We concluded that the strength of the roof on the second side of some vehicles may have been increased or decreased as a result of the deformation of the first side of the roof. The agency indicated that it planned to conduct further research before proposing rulemaking in this area.

In commenting on the NPRM, a number of consumer advocacy organizations and other commenters strongly supported a two-sided test requirement. These commenters included, among others, Public Citizen, CFIR, CAS, and Advocates. Supporters of a two-sided test requirement argued that more damage occurs to the far (or trailing) side of the vehicle in a rollover crash, and a two-sided test would better reflect this real-world intrusion. They further argued that when the near side roof and windshield are compromised in a rollover, the far side will not be able to withstand the forces of the event, and, consequently, facilitate roof collapse. ARCCA, Inc., Consumers Union, and Safety Analysis and Forensic Engineering (SAFE) suggested a two-sided test would simulate the impact that occurs in the majority of rollover incidents.

In light of the substantial interest in a two-sided test requirement, NHTSA expanded the series of two-sided roof crush tests discussed in the NPRM. In our January 2008 SNPRM, we explained that we had, by that time, conducted a total of 26 sequential two-sided tests, and announced that we were releasing these data to the public in conjunction with the SNPRM.

We stated in the SNPRM that the two-sided test results showed the first side test generally produces a weakening of the structure. This was shown by the fact that the recorded SWR for the second side was generally lower than for the first side. On average, the peak strength for the second side was reduced by 8.7 percent. However, for several of the vehicles, we observed considerably higher reductions in peak strength. Of the 26 vehicles that had been tested by that time, excluding the Chevrolet Express, six experienced reductions in strength of 19 percent or greater. We excluded the Chevrolet Express because of a test anomaly.[12]

With respect to two-sided vehicle testing, we stated that we believed that the post-NPRM tests provided the agency with sufficient additional information for the agency to consider a two-sided test requirement for the final rule. We stated that we would evaluate both the single-sided and two-sided testing alternatives for the final rule, and requested comments to help us reach a decision on that issue.

Comments

In commenting on the SNPRM, a number of consumer advocacy organizations continued to strongly support a two-sided test requirement. Public Citizen stated that in a vast majority of rollover cases, the injured party was typically seated on the far side, that is, the side of the second impact. It argued that it is not possible to upgrade FMVSS No. 216 without a two-sided test requirement. Some commenters argued, as they had in commenting on the NPRM, that they believe SAFETEA–LU requires a two-sided test.

IIHS stated that while it supports any changes that would increase the level of roof strength of the vehicle fleet, it has no real-world data to address the potential benefits of two-sided testing. It stated that a single-sided test with a higher SWR may be more effective at promoting robust roof designs than a two-sided test with a lower SWR requirement.

The Alliance stated that it believes the agency has provided insufficient justification for two-sided testing. It stated that the agency has not provided analysis demonstrating that two-sided testing relates to real-world safety.

The Alliance also expressed concern that two-sided testing would amplify variability and repeatability problems. That organization argued that the agency's limited repeatability testing for a potential two-sided requirement indicates poor repeatability in SWR between the first and second side tests for the same vehicle. The Alliance cited agency tests of the Lincoln LS and Buick LaCrosse.

According to the Alliance, these differences may be due solely to lack of test procedure repeatability and test lab reproducibility, rather than any real weakening or strengthening of the roof structure due to the first side test. That commenter stated that in a two-sided scenario, the deformed shape of a vehicle tested for roof strength on one side between any two tests is not identical. The starting point for the roof-strength testing on the second side is therefore, according to the Alliance, inherently different and results in substantial variability in measured roof strength.

AIAM stated that based on the information and analysis provided by

[10] This final rule will address the NTSB's recommendation H–03–16, to include 12- and 15-passenger vans in FMVSS No. 216, to minimize the extent to which survivable space is compromised in the event of a rollover accident.

[11] Near side is the side toward which the vehicle begins to roll and the far side is the trailing side of the roll.

[12] Between the first and second side tests, the front door on the tested side was opened. Because of damage to the vehicle during the first side test, the door would not properly close. The door was clamped until the latch engaged, locking the door in place. This may have compromised the structural integrity of the roof and reduced the measured peak load on the second side.

the agency regarding the two-sided test, it believes that the test shows enough potential to merit further consideration by the agency. AIAM argued that additional analysis would be needed before it could provide a preferred regulatory approach, but indicated that the two-sided approach would more directly address the multiple roof contact weakening phenomenon.

Agency Response

After carefully considering the comments and available information, we have decided, for the reasons discussed below, to adopt a two-sided test requirement.

In responding to the comments, we begin by addressing the argument raised by some commenters that SAFETEA–LU requires a two-sided test. Public Citizen stated that the agency has ''ignored the express requirement of a two-sided test.'' That organization cited the statutory language requiring NHTSA to upgrade FMVSS No. 216 related to roof strength ''for driver *and* passenger *sides.''* (Emphasis added by Public Citizen.)

As discussed earlier in this document, under the current version of FMVSS No. 216, vehicles must meet the standard's requirements for both the driver and passenger sides of the vehicle, i.e., a vehicle must meet the standard's test requirements regardless of whether it is tested on the driver or passenger side. Thus, while the standard specifies a single-sided test, roof crush resistance protection is required for both the driver and passenger sides of the vehicle. Similarly, upgrading the current performance requirements so that vehicles must provide protection at a significantly higher SWR under a single-sided test procedure would result in upgraded protection for both the driver and passenger sides. Thus, while we understand the safety arguments raised by Public Citizen and other commenters favoring a two-sided test, we believe that the language in SAFETEA–LU does not mandate a two-sided test requirement, only that upgraded protection be provided for both the driver and passenger sides.

We also note that the issue of whether to adopt a two-sided test is related to the decision of what stringency to adopt. For any baseline single-sided test requirement at a particular SWR, either increasing the SWR for the single-sided test or adding a two-sided test requirement at the same SWR would represent an increase in stringency. Therefore, in reaching a decision on these issues, we have considered them together.

To help evaluate the merits of a two-sided test requirement, the agency analyzed 1997 through 2006 NASS–CDS rollover crash data, involving restrained occupants.[13] Only vehicles that overturned and experienced 2 or more quarter turns were included. This study included 4,030 NASS–CDS investigated vehicles, and excluded convertibles and vehicles that had a concentrated loading due to a collision between a fixed object (pole or tree) and the roof.

The data were analyzed for differences in injury risk for the near and far side occupants and also to ascertain any disparity in the amount of roof intrusion. For all rollovers involving two or more quarter turns, the data showed that there are a similar number of near and far side occupants involved in the event. A further review of the injury outcomes showed that the injuries to far side occupants occur at a slightly higher frequency than injuries to near side occupants.

The occupant injury data were further analyzed to determine whether the relative proportion of near and far side injured occupants varied with the amount of roof intrusion. The injury outcomes for occupants in vehicles with less than 12 cm (5 inches) of near side roof intrusion show higher frequency of injury for the far side occupant at the various injury levels. The outcomes for injured occupants in vehicles with 12 cm (5 inches) or greater near side intrusion have similar percentages of severe injuries between near and far occupants. Based on this analysis, the data indicate there may be some higher risk for far side occupants at lower levels of intrusion; however, none of the results was statistically significant.

The analysis investigated the difference in roof intrusion between the near and far side of the vehicle that experienced two quarter turns or more. For the 4,030 NASS–CDS vehicles, there was a weighted average maximum vertical intrusion of 7.9 cm (3.1 inches) on the near side and 10.9 cm (4.3 inches) on the far side of the rollover-involved vehicle. The far side of the vehicle averaged 3 cm (1.2 inches) more vertical intrusion than the near side.

The analysis also investigated the intrusion difference between the near and far side grouped by the severity of the rollover. (Severity of the rollover was defined by single or multiple roof-to-ground contacts). The data showed a 3 cm (1.2 inch) bias toward the far side intrusion, independent of the severity of the rollover. For example, vehicles experiencing five or more quarter turns had 9.2 cm (3.6 inches) of near-side intrusion compared to 12.2 cm (4.8 inches) of far-side intrusion. The analysis concluded for crashes with multiple roof-to-ground contacts (or severe rollovers), there is a statistically insignificant bias on the far side.

Since the publication of the SNPRM, the agency has conducted an additional five tests [14] as part of its evaluation, for a total of 31 two-sided tests.[15] The test results for all 31 two-sided tests are summarized in Appendix B of this document.

On average, the peak strength for the second side was reduced by 8.4 percent. This reduction in strength is consistent with our NASS–CDS analysis, showing a slight increase of intrusion on the second side. This also may explain the increased risk to injury for far side occupants. In all the tests, the windshield fractured during the first side test and there was not a catastrophic collapse of the roof on the second side.

In general, there was a good correlation in peak strength between the first and second side. The agency did test four vehicles that resulted in increased strength on the second side. However, for several of the vehicles, we observed considerably higher reductions in peak strength. Of the 31 vehicles tested, again excluding the Chevrolet Express, seven experienced reductions in strength of 19 percent or greater. The two-sided testing conducted by NHTSA indicated an average difference of approximately 7.1 percent lower peak force for the second side in vehicles under 2,722 kilograms (6,000 pounds) GVWR and 14.9 percent lower peak force for the second side in vehicles over 2,722 kilograms (6,000 pounds) GVWR.

We have decided to adopt a two-sided test in light of several considerations. First, we believe a two-sided test is more representative of the higher severity rollover crashes in which a vehicle experiences multiple quarter turns. In such crashes, the vehicles sometimes experiences a significant impact on one side of the vehicle and,

[13] *See* report *Evaluation of 2 Side Roof Crush Testing* placed in the docket with this notice.

[14] The test reports for the additional vehicle tests conducted by NHTSA are being made available to the public through the agency's internet vehicle crash test database. We are placing a memorandum in the docket which provides the Web address for that database and lists the vehicle models and test numbers that are needed to reference the information in the database. The agency incorporates by reference these test reports as part of the record for this rulemaking.

[15] We note that we also conducted a test of a Smart ForTwo. However, we did not include these test results as part of our evaluation because the vehicle is not typical of a significant number of vehicles in the fleet.

as the vehicle continues to turn, another significant impact on the other side of the vehicle. A two-sided test will help ensure that the impact on the first side of the vehicle does not cause excess damage that will prevent the vehicle from providing protection during the impact on the second side of the vehicle.

Moreover, as discussed in the FRIA, the greater stringency associated with a two-sided test requirement will provide greater benefits.

While we recognize that a two-sided test requirement affects the stringency of the standard, as compared to a single-sided test requirement at the same SWR, we believe that it does not raise concerns related to test procedure repeatability and test lab reproducibility.

In addressing this issue, we note that the test conducted on the second side is identical to the test conducted on the first side. Thus, the second side test by itself is repeatable and reproducible, for the same reasons the first side test is repeatable and reproducible.

As noted by the Alliance, the ''starting point'' for the second side test is different than for the first side test in that the vehicle may have experienced damage during the first side test. However, it is the purpose of a two-sided test requirement to limit such damage, to the extent such damage would prevent compliance with the standard's performance requirements during the second side test.

As to the Lincoln LS and Buick Lacrosse repeat tests cited by the Alliance, the change in peak SWR between the first and second side test was −21.3 percent and −8.7 percent for the two Lincoln LS vehicles tested, and −13.5 percent and −3.4 percent for the two Buick Lacrosse vehicles tested. For the Lincoln LS, there was good correlation between the load-deformation curves on the first side in the two tests. However, on the second side, the load-deformation curves diverge prior to the peak SWR. Further, in one Lincoln LS test, the second side correlated well with the first side. The other test did not show the same correlation on the second side, which led us to believe internal structural damage to the roof during the first side test was the cause. With respect to the Buick Lacrosse, the agency identified a pre-test windshield crack as the likely reason for the difference in outcome between the two tests. The load-deformation curves for the first side did not reach the same peak load; however, there is good correlation on the second side. Thus, we believe the differences relate to vehicle performance instead of test procedure issues.

It is important to note that the Lincoln LS and Buick Lacrosse vehicles were not subject to an FMVSS incorporating a two-sided requirement or an SWR requirement above 1.5, so they were not designed to meet such a requirement (two-sided test requirement at the tested SWR). Manufacturers can ensure that a vehicle meets a two-sided test requirement by designing it so that they will be able to meet the second-side test despite whatever damage may occur in the first side test. As a general matter, the greater the structural damage that occurs in the first-side test, the greater the variability one would expect in the second-side test. We note that the performance requirement is not expressed in terms of the percentage difference in damage between the first-side test and the second test; instead, the vehicle must meet the same specified performance criteria in both tests. We also note that the first-side test is conducted only up to the SWR specified in the standard.

Finally, we note that issues raised by commenters concerning varying platen angle and size for the second-side test are addressed later in this document in the section addressing aspects of the test procedure.

4. Upgraded Force Requirement—Specified Strength to Weight Ratio (SWR)

As discussed earlier, FMVSS No. 216 currently requires that the lower surface of the test platen not move more than 127 mm (5 inches), when it is used to apply a force equal to 1.5 times the unloaded vehicle weight to the roof over the front seat area. In the NPRM, the agency proposed to require that the roof over the front seat area withstand a force increase equal to 2.5 times the unloaded weight of the vehicle, and to eliminate the 22,240 Newton (5,000 pound) force limit for passenger cars.

NHTSA explained that it believes that FMVSS No. 216 could protect front seat occupants better if the applied force requirement reduced the extent of roof crush occurring in real world crashes. That is, the increased applied force requirement would lead to stronger roofs and reduce the roof crush severity observed in real world crashes. We observed that in many real-world rollovers, vehicles subject to the requirements of FMVSS No. 216 experienced vertical roof intrusion greater than the test plate movement limit of 127 mm (5 inches).

In explaining the proposed 2.5 value for SWR, the agency noted that it previously conducted a study [16] (Rains study) that measured peak forces generated during quasi-static testing under FMVSS No. 216 and under Society of Automotive Engineers (SAE) J996 inverted drop testing. In the Rains study, nine quasi-static tests were first conducted. The energy absorption was measured and used to determine the appropriate corresponding height for the inverted drop conditions. Six of the vehicles were then dropped onto a load plate. The roof displacement was measured using a string potentiometer connected between the A-pillar and roof attachment and the vehicle floor. The peak force from the drop tests was limited to only the first 74 mm (3 inches) of roof crush because some of the vehicles rolled and contacted the ground with the front of the hood. Similarly, the peak quasi-static force was limited during the first 127 mm (5 inches) of plate movement.

This report showed that for the nine quasi-static tests, the peak force-to-weight ratio ranged from 1.8 to 2.5. Six of these vehicle models were dropped at a height calculated to set the potential energy of the suspended vehicle equal to the static tests. For these dynamic tests, the peak force-to-weight ratio ranged from 2.1 to 3.1. In sum, the agency tentatively concluded that 2.5 was a good representation of the observed range of peak force-to-weight ratio.

As to eliminating the 22,240 Newton force limit for passenger cars, the agency noted that the limit was included when the standard was first issued. The effect of the limit was that passenger cars weighing more than 1,512 kilograms (3,333 pounds) were subjected to less stringent requirements. The purpose of the limit was to avoid making it necessary for manufacturers to redesign large cars that could not meet the full roof strength requirements of the standard.[17] At the time, the agency believed that requiring larger passenger cars to comply with the full (1.5 times the unloaded vehicle weight) requirement would be unnecessary because heavy passenger cars had lower rollover propensity. However, as discussed in the NPRM, the agency tentatively concluded that occupants of passenger cars weighing more than 1,512 kilograms (3,333 pounds) are sustaining rollover-related injuries and that those cars should be able to comply with the proposed requirements.

[16] Glen C. Rains and Mike Van Voorhis, ''Quasi Static and Dynamic Roof Crush Testing,'' DOT HS 808–873, 1998.

[17] *See* 54 FR 46276.

The agency stated in the NPRM that it believed that manufacturers would comply with the upgraded standard by strengthening reinforcements in roof pillars, by increasing the gauge of steel used in roofs or by using higher strength materials.

In the SNPRM, we noted that we had been carefully analyzing the numerous comments received in response to the proposal, and the various additional vehicle tests conducted after publication of the NPRM. We invited comments on how the agency should factor in this new information into its decision. We stated that while the NPRM focused on a specified force equivalent to 2.5 times the unloaded vehicle weight, the agency could adopt a higher or lower value for the final rule.

In the SNPRM, we observed from the recent vehicle testing (focusing on the single-sided test results) that the range of SWRs for vehicles with a GVWR of 2,722 kilograms (6,000 pounds) or less tended to be higher than the range of SWRs for vehicles with a GVWR greater than 2,722 kilograms (6,000 pounds). The SWR of many late model vehicles with a GVWR of 2,722 kilograms (6,000 pounds) or less was substantially higher than the 2.5 value the agency focused on in the NPRM. Conversely, only two vehicles we tested with a GVWR greater than 2,722 kilograms (6,000 pounds) exceeded the 2.5 value.

We noted in the SNPRM that the PRIA had examined the proposed SWR of 2.5 and the alternative SWR of 3.0 times the unloaded vehicle weight. The agency included in the SNPRM discussion and analysis concerning a number of factors expected to change the estimated impacts, and sought comments concerning impacts of SWR levels of 2.5, 3.0 and 3.5.

Comments on the NPRM

In general, vehicle manufacturers supported an SWR of 2.5, while safety advocacy groups recommended a more stringent standard with the majority supporting a 3.5 SWR requirement.

Vehicle manufacturers, including General Motors Corporation (GM), Ford Motor Company (Ford), DaimlerChrysler Corporation,[18] Porsche Cars North America (Porsche), Toyota Motor North America (Toyota), and Nissan North America (Nissan), and the Alliance supported the proposed 2.5 SWR level, with caveats about sufficient leadtime and other requested changes to the test procedure, but expressed concern about raising the SWR further. The Alliance cautioned against increasing the SWR beyond 2.5 due to the potential adverse effects of increased mass. It stated that recommendations in the docket for higher levels did not attempt to account for the potential effect on the static stability factor (SSF) of adding structure necessary to comply with higher standards.

Commenters supporting a 3.5 SWR included Lipsig, Shapey, Manus & Moverman (LSMM), Consumers Union, Center for the Study of Responsive Law (CSRL), Mr. Sances, Perrone Forensic Consulting (Perrone), Ms. Lawlor, Mr. Clough, Xprts, Mr. Nash, Mr. Friedman, and Forensic Engineering (FEI). Consumers Union, LSMM, Ms. Lawlor, Mr. Clough, and Mr. Sances supported a 3.5 SWR based on, among other things, the performance of the Volvo XC90. Commenters stated that the Volvo XC90 has heightened roof strength resistance through light-weight materials making it possible to avoid any unnecessary increases in vehicle weight which could adversely affect rollover propensity. In supporting more stringent roof crush resistance requirements, the CSRL stated that NHTSA should consider using its technology-forcing authority.

Several commenters supported an SWR of 4.0 or higher. These commenters included Mr. Slavik, ARCCA, Technical Services, and FEI. The commenters suggested that higher strength steel alloy, changes to the cross sectional thickness of roof components, and other design changes would make increasing the SWR feasible and cost effective.

In connection with arguments that the agency should base the level of the standard on the performance of the Volvo XC90, Ford commented that in considering the stringency of an SWR requirement, roof SWR does not discriminate vehicles by roof strength. It noted that the roof strength required to achieve a specific SWR depends on the vehicle's unloaded vehicle weight (UVW). Ford stated that two vehicles with the same SWR, but different UVWs, may have roof strength levels that are actually several thousand pounds apart. That company argued that the agency's 2.5 SWR proposal is very stringent. Ford stated that vehicle roof designs are essentially the same for all passenger carrying vehicles, and that A pillars are A pillars and B pillars are B pillars, regardless of vehicle type, i.e., the constraints on a roof system design are applicable to all affected vehicles. That company argued that because a particular vehicle can achieve a roof SWR of 3.5, because it has a lower UVW as compared to a full size pickup, does not mean that 3.5 should be the regulatory requirement.

Comments on the SNPRM

In commenting on the SNPRM, vehicle manufacturers continued to support an SWR of 2.5, with safety advocacy groups recommending a more stringent requirement.

The Alliance recommended that all vehicles should be held to the same requirements and that a separate requirement should not be afforded for heavy vehicles. Mercedes-Benz suggested that, for a two-sided test requirement, the SWR on the second side should be lower than what would be required for the first side. This would reflect the lower force levels in a rollover that it said the second side would experience.

IIHS supported raising the SWR to 3.0 or higher in a one-sided test. IIHS stated that its new analysis justifies such a requirement.

Agency Decision and Response

After carefully considering the comments and available information, and for the reasons discussed below, we have decided to adopt an SWR requirement of 3.0 for vehicles with a GVWR of 2,722 kilograms (6,000 pounds) or less, and 1.5 for vehicles with a GVWR greater than 2,722 kilograms (6,000 pounds).

While this rulemaking involves a number of key decisions, the selection of an SWR requirement is the most important one for both costs and benefits. Our analysis, presented in detail in the FRIA, shows that for the alternatives we evaluated, benefits in terms of reduced fatalities continue to rise with higher SWR levels due to reduced intrusion. The benefits continue to rise because, for vehicles designed to have higher SWR levels, the vehicle roofs experience less intrusion in higher severity crashes. However, costs also increase substantially with higher SWR levels, so NHTSA must select the appropriate balance of safety benefits to added costs.

Under the Safety Act, NHTSA must issue safety standards that are both practicable and meet the need for motor vehicle safety. 49 U.S.C. 30111(a). The agency considers economic factors, including costs, as part of ensuring that standards are reasonable, practicable, and appropriate.

In *Motor Vehicle Manufacturers Association* v. *State Farm*, 463 U.S. 29, 54–55 (1983), the Supreme Court indicated that the agency must, in making decisions about safety

[18] In August 2007, Daimler and Chrysler separated. All comments submitted to the agency prior to that date will be noted in this document as DaimlerChrysler. Mercedes-Benz USA and Chrysler LLC submitted comments separately afterwards and will be referenced accordingly.

standards, consider reasonableness of monetary and other costs associated with the standard. It stated, however, that ''(i)n reaching its judgment, NHTSA should bear in mind that Congress intended safety to be the preeminent factor under the Motor Vehicle Safety Act:''

> The Committee intends that safety shall be the overriding consideration in the issuance of standards under this bill. The Committee recognizes * * * that the Secretary will necessarily consider reasonableness of cost, feasibility and adequate leadtime. S. Rep. No. 1301, at 6, U.S. Code Cong. & Admin. News 1966, p. 2714.
>
> In establishing standards the Secretary must conform to the requirement that the standard be practicable. This would require consideration of all relevant factors, including technological ability to achieve the goal of a particular standard as well as consideration of economic factors. Motor vehicle safety is the paramount purpose of this bill and each standard must be related thereto. H.Rep. No. 1776, at 16.

Thus, in making our decision concerning SWR, we are guided by the statutory language, legislative history, and the Supreme Court's construction of the Safety Act, as well as by the specific requirement in SAFETEA–LU for us to upgrade FMVSS No. 216 relating to roof strength for driver and passenger sides for motor vehicles with a GVWR of not more than 4,536 kilograms (10,000 pounds). We consider both costs and benefits, bearing in mind that Congress intended safety to be the preeminent factor under the Safety Act.

As indicated above, while benefits continue to rise with higher SWR levels, costs also increase substantially. The challenge is to push to a level where the safety benefits are still reasonable in relation to the associated costs. As part of this, we consider issues related to cost effectiveness. The agency's analysis of cost effectiveness is presented in the FRIA and summarized in this document.

Another important factor in the selection of the SWR requirements is that there are much higher costs relative to benefits associated with any level SWR requirement for vehicles with a GVWR greater than 2,722 kilograms (6,000 pounds) as compared to the lighter vehicles currently subject to the standard.

There are a number of reasons for this differential between heaver and lighter vehicles. The absolute strength needed to meet a specific SWR is a function of the vehicle's weight. By way of example, to meet a 2.0 SWR, a vehicle that weighs 1,360 kilograms (3,000 pounds) must have a roof structure capable of withstanding 26,690 N (6,000 pounds) of force, while a vehicle that weighs 2,268 kilograms (5,000 pounds) must have a roof structure capable of withstanding 44,482 N (10,000 pounds) of force. This means more structure or reinforcement are needed for the heavier vehicle, which means more cost and weight. Moreover, vehicles in the heavier category have not previously been subject to FMVSS No. 216, so they have not been required to meet the existing 1.5 SWR single-sided requirement.

At the same time, these heavier vehicles account for only a very small part of the target population of occupants who might benefit from improved roof strength. Only 5 percent of the fatalities in the overall target population (33 in terms of a specific number) occur in vehicles over 2,722 kilograms (6,000 pounds) GVWR. Ninety-five percent of the fatalities (635 in terms of a specific number) occur in vehicles *under* 2,722 kilograms (6,000 pounds) GVWR. These differences reflect the fact that there are far fewer vehicles in this category in the on-road fleet, and may also reflect the vehicles' size and weight as well as their frequency of use as working vehicles. Heavier vehicles generally are less likely to roll over than lighter vehicles.

We recognize the argument that all light vehicles should meet the same SWR requirements, to ensure the same minimum level of protection in a rollover crash. However, in selecting particular requirements for a final rule, we believe that our focus must be on saving lives while also considering costs and relative risk. What is necessary to meet the need for safety and is practicable for one type or size of vehicle may not be necessary or reasonable, practicable and appropriate for another type or size of vehicle. Thus, to the extent the goal of establishing the same SWR requirements for all light vehicles would have the effect of either unnecessarily reducing the number of lives saved in lighter vehicles or imposing substantially higher, unreasonable costs on heavier vehicles despite their lesser relative risk, we believe it is appropriate to adopt different requirements for different vehicles. We also observe that because the same SWR requirement is significantly more stringent for heavier vehicles than lighter vehicles (due to SWR being a multiple of unloaded vehicle weight), establishing the same SWR requirement for heavier vehicles is not simply a matter of expecting manufacturers to provide the same countermeasures as they do for light vehicles.

Vehicles with a GVWR of 2,722 kilograms (6,000 pounds) or less.

Our decision to adopt a 3.0 SWR requirement for vehicles with a GVWR of 2,722 kilograms (6,000 pounds) or less, i.e., the vehicles currently subject to the standard, reflects the higher life-saving benefits associated with that requirement. It also reflects our consideration of the test results of current vehicles. We believe the high SWR levels that are currently being achieved for a range of light vehicles demonstrate that manufacturers can achieve this SWR level for these vehicles.

An SWR requirement of 3.0 prevents about 66 percent more fatalities than one at 2.5, 133 instead of 80. However, costs increase by a considerably higher percentage, resulting in a less favorable cost per equivalent life saved, $5.7 million to $8.5 million for 3.0 SWR as compared to $3.8 million to $7.2 million for 2.5 SWR.

In these particular circumstances, we believe that a 3.0 SWR requirement is appropriate and the costs reasonable given the increased benefits. While the cost per equivalent life saved is relatively high compared to other NHTSA rulemakings, we conclude that the higher safety benefits, the legislative mandate for an upgrade, the technical feasibility of making roofs this strong, and the fact that these costs are generally within the range of accepted values justify moving NHTSA's roof crush standards to a 3.0 SWR for vehicles that have been subject to the 1.5 SWR requirements.

We decline, however, to adopt an even higher SWR requirement. In considering higher SWR requirements at this level, costs continue to increase at a considerably higher rate than benefits. The FRIA estimates that while a 3.5 SWR requirement for these vehicles would result in higher benefits, preventing 175 instead of 133 fatalities, total costs would increase to $1.6 billion to $2.3 billion (about $800 million to $1.1 billion above the total costs for the 3.0 SWR requirement) and the overall cost per equivalent life saved for these vehicles would increase to $8.8 to $12.3 million. A 3.5 SWR requirement would thus result in an approximate doubling of the costs beyond those of a 3.0 SWR requirement, and deliver about ⅓ more benefits.

Vehicles with a GVWR greater than 2,722 kilograms (6,000 pounds) and less than or equal to 4,536 kilograms (10,000 pounds).

Vehicles with a GVWR greater than 2,722 kilograms (6,000 pounds) are not currently subject to FMVSS No. 216 and, because of their greater unloaded vehicle weight, these vehicles pose greater design challenges. Moreover,

given the relatively small target population for these vehicles, the benefits will necessarily be small regardless of the SWR selected.

After considering our original proposal of a SWR of 2.5 and the available information, we have concluded that a SWR of 1.5 is appropriate for these heavier vehicles. The requirement we are adopting is more stringent than the longstanding requirement that has applied to lighter vehicles until this rulemaking because it is a two-sided requirement. The FRIA estimates that two fatalities and 46 nonfatal injuries will be prevented annually by this requirement. Because of the high cost relative to the benefits for all of the alternatives for these heavier vehicles, from the 1.5 SWR alternative and above, any alternative we select would adversely affect the overall cost effectiveness of this rulemaking (covering all light vehicles).

We believe that a SWR of 1.5 is appropriate for these heavier vehicles. Given the requirements of SAFETEA–LU, we need to ensure that the standard results in improved real world roof crush resistance for these vehicles. We decline, however, to adopt a SWR higher than 1.5 for vehicles with a GVWR greater than 2,722 kilograms (6,000 pounds), given the small additional benefits (4 additional lives saved) and substantially higher costs. Adopting a SWR of 2.0 for these vehicles would more than double the costs of this rule for these vehicles to prevent 4 additional fatalities and 137 nonfatal injuries.

Other issues related to strength requirements and SWR.

As indicated above, the Alliance cautioned against increasing the SWR beyond 2.5 for lighter vehicles due to the potential adverse effects of increased mass. It stated that recommendations in the docket for higher levels did not attempt to account for the potential effect on the SSF of adding structure necessary to comply with higher standards.

We do not believe that it is necessary to account for that effect. We note that the agency has considered a number of issues related to added weight as part of the FRIA, including possible adverse effects to safety. Based on our analysis, we believe that today's rule will not result in adverse effects to safety as a result of added weight.

For a number of reasons, including ones related to CAFE standards, fuel prices, and rollover propensity, we believe manufacturers will strive to minimize the weight impacts of added roof strength. While there is a great deal of uncertainty regarding the actual changes that manufacturers will initiate in response to this rule, there are numerous ways to address both roof strength and rollover propensity simultaneously. This final rule provides substantial leadtime within which to choose among those ways and make design changes that avoid adversely affecting that propensity. There is evidence from current NCAP ratings that manufacturers are routinely doing so. Manufacturers generally strive to maintain or improve their NCAP ratings to help market their vehicles. The agency believes that this concern over NCAP ratings would preclude a design strategy that unnecessarily increases CG and degrades SSF. Further, agency testing of 10 redesigned vehicles with higher roof strengths found that manufacturers had maintained SSF levels while increasing roof strength in newly redesigned models.

A detailed discussion of issues related to added weight and SSF is included in the FRIA, and there is also additional discussion later in this document.

Mercedes-Benz suggested that, for a two-sided test requirement, the SWR on the second side should be lower than what would be required for the first side. According to Mercedes, this would reflect the lower force levels in a rollover that it said the second side would experience. However, as discussed above in the section on single-sided or two-sided tests, the agency's analysis of NASS data indicates that vehicles experience more intrusion on the far side (second side) of the vehicle than the near side. Therefore, we decline to adopt a lower SWR requirement for the second side. We note that the agency took into account the costs and benefits of a two-sided test requirement with the SWR at the same level for both sides.

As to the issue raised by CSRL about safety standards that are technology-forcing, that commenter did not provide specific information concerning what it contemplated in this area. As part of the agency's analysis of costs and benefits, we considered the use of advanced higher strength and lighter weight materials. Our analysis assumes significantly greater implementation and use of these advanced materials.

Finally, we note that several commenters suggested that the agency use alternative approaches other than unloaded vehicle weight for purposes of calculating SWR. Recommendations included using weight of the vehicle plus two occupants, or GVWR plus two occupants. We decline to change FMVSS No. 216's existing approach of using a multiple of unloaded vehicle weight for calculating the force requirement that applies to each vehicle. Using a weight higher than unloaded vehicle weight would simply represent another means of increasing stringency and would be equivalent to a requirement for a higher SWR. However, the agency has already considered alternative higher SWR levels, as well as a two-sided test requirement, which also represent an increase in stringency. Thus, the other issues we have considered ensure an appropriate level of stringency.

5. Performance Criteria—Headroom, Platen Travel, or Both

In the NPRM, we proposed to replace the current limit on platen travel (test plate movement) during the specified quasi-static test with a requirement that the crush not exceed the available headroom. We were concerned that the platen travel limit does not provide adequate protection to front outboard occupants of vehicles with a small amount of occupant headroom. We also stated that the current requirement may impose a needless burden on vehicles with a large amount of occupant headroom.

Under our proposal, no roof component or portion of the test device could contact the head or neck of a seated Hybrid III 50th percentile adult male dummy during the specified test. We believed that this direct headroom reduction limit would ensure that motorists receive an adequate level of roof crush protection regardless of the type of vehicle in which they ride. We included a definition of the term ''roof component'' as part of the proposal.

We noted a concern that there may be some low roofline vehicles in which the 50th percentile Hybrid III dummy would have relatively little available headroom when positioned properly in the seat. That is, we were concerned that, in some limited circumstances, the headroom between the head of a 50th percentile male dummy and the roof liner is so small that even minimal deformation resulting from the application of the required force would lead to test failure. We requested comments on whether any additional or substitute requirements would be appropriate for low roofline vehicles.

In the NPRM, the agency estimated benefits based on post-crash headroom, the only basis for which a statistical relationship with injury reduction had been established. In our January 2008 SNPRM, we explained that with additional years of available data, a statistically significant relationship between intrusion and injury for belted occupants had been established. A

study regarding this relationship was placed in the docket.[19]

We also noted in the January 2008 SNPRM that in the most recent agency testing, headroom reduction had been assessed using a head positioning fixture (HPF) in lieu of a 50th percentile adult male dummy. We stated that reports on these tests explain the procedure and type of fixture used to assess headroom reduction, and that the test reports were being made available to the public. We noted further that the agency was considering whether this fixture should be specified in the final rule.

Comments

The agency received a variety of comments on the proposed headroom reduction criterion.

One group of commenters, including safety advocacy organizations, generally supported adding a headroom reduction criterion but, in some cases, argued that a platen travel criterion is also needed. Some of these commenters also argued that these criteria should be made more stringent to protect taller occupants.

Another group of commenters, including vehicle manufacturers, urged the agency to retain the current platen travel criterion instead of adopting a headroom reduction criterion. They argued, among other things, that using the headroom reduction criterion would add unnecessary complexity to the test procedure and result in problems related to repeatability and practicability.

Specific issues raised by commenters include:

Repeatability and practicability issues. Several commenters, including the Alliance, DaimlerChrysler, GM, Ford, and Porsche, cited concerns related to reliability and practicability of using a test dummy for purposes of the FMVSS No. 216 quasi-static test. DaimlerChrysler, Ford and GM stated that variations in test dummy placement cause variability in the distance between the dummy head and the roof side rails. In test results cited by GM, horizontal and vertical variations of an inch or more occurred in the dummy's seating position. GM stated that this variability is further complicated when vehicles with different trim and seating options (cloth or leather, manual or power adjusters) are provided using the same vehicle architecture structure. It suggested that such options add to the variability and make the proposed requirement of measuring roof crush resistance with a seated Hybrid III dummy non-repeatable and impracticable.

Porsche also expressed concern with controlling unwanted movement of the dummy with its roof crush test set-up. The Porsche roof crush test procedure rotates the vehicle by 90 degrees because their platen press applies a load parallel to the ground. The dummy is not fixed into position and, as a result, would rotate and not be properly positioned.

Complexity. IIHS stated that relating the allowable amount of roof crush in the quasi-static test to the headroom in specific vehicles is a good concept but that, in practice, the agency's research tests have not shown that replacing the 127 mm (5 inch) platen travel criterion with the headroom requirement would be a meaningful change to the standard and may not justify the added complications to the test procedure.

Possible conflicts with FMVSS No. 201 "Occupant protection in interior impact." A number of commenters, including DaimlerChrysler, Ford, GM, Ferrari and Toyota commented that the proposed headroom requirement conflicts with the intent of the upper interior requirements of FMVSS No. 201, *Occupant Protection in Interior Impact.* DaimlerChrysler and GM stated that FMVSS No. 201U[20] countermeasures have been specifically developed to manage head impact energy and mitigate injury potential by the dissipation of the impact energy through deformation of the trim and FMVSS No. 201U countermeasures themselves. Ford stated that head impact mitigation technologies often result in the upper interior trim, particularly the roof side rail trim, being closer to the head of occupants, thereby reducing the available distance for achieving the SWR requirement prior to headform contact. It stated that these technologies are designed to reduce the likelihood of head impact injuries, and that the proposed no-contact requirement does not account for the potential benefits of these technologies in a roof deformation situation. GM further stated that NHTSA's headroom analysis does not establish a correlation between injuries and head contact with trim components.

Effects on vehicle manufacturing process GM stated that since the vehicle roof structure is designed very early in the vehicle development process, it is not possible to reliably predict the performance or movement of interior trim in a roof crush test. It stated that structural designs must be completed early in the vehicle development process to facilitate tooling lead time. According to GM, the interior trim components (included in the proposed definition of roof component) are not designed in final form until much later in the vehicle development process. Therefore, according to that commenter, the roof structure force deflection characteristics are defined (and roof crush properties established) before manufacturers can take into account the package space and deformation requirements of the interior trim.

Reduced stringency of the standard Several commenters, including Public Citizen, IIHS, and LSMM expressed concern that the proposed head contact criteria could reduce the residual occupant headroom required after testing, be less stringent for vehicles with existing headroom greater than 127 mm (5 inches), and thereby allow more than 127 mm (5 inches) of crush. As a result, according to these commenters, the stringency would be reduced for vehicles with greater than 127 mm (5 inches) of headroom, such as many trucks and Sport Utility Vehicles (SUVs). We note that Ford commented that most of its light trucks, multipurpose passenger vehicles and vans (LTVs) have more than 127 mm (5 inches) of platen travel prior to head contact, while passenger cars generally have less.

Alternative headroom requirement approaches A number of commenters recommended alternative approaches to the proposed headroom requirement. Biomech Incorporated (Biomech) suggested using a one gravity static inversion test (using the FMVSS No. 301 fixture) to learn where the inverted dummy head position would be. It suggested that deformation in the roof crush test should not be permitted to reach the measured position of the inverted dummy's head.

GM, DaimlerChrysler, Toyota, Ferrari and Porsche recommended that if the agency establishes a headroom reduction criterion, it consider using a headform position procedure (HPF) that essentially represents a headform secured to an adjustable vertical support that is rigidly attached to the floor pan of the tested vehicle at the seat anchorages.

A number of these commenters also suggested that the agency consider removing any roof trim components (i.e., all headliner, trim, deployable countermeasures and grab handles) prior to testing. Further, these commenters also recommended that

[19] Strashny, Alexander, "The Role of Vertical Roof Intrusion and Post-Crash Headroom in Predicting Roof Contact Injuries to the Head, Neck, or Face during FMVSS 216 Rollovers."

[20] FMVSS 201U, refers to those aspects of FMVSS No. 201 pertaining to the upper interior trim head protection requirements.

head contact with the roof structure itself be the only assessment criteria for compliance certification. GM recommended that manufacturers provide the headform location to NHTSA prior to a compliance test based upon the nominal design seating positions. Toyota, by contrast, recommended the agency determine the location for the 50th percentile male head position with the Head Restraint Measuring Device (HRMD) [21] after first determining the H-point using the SAE J826 procedure, and then position the headform in the vehicle.

DaimlerChrysler recommended verifying compliance by a 200 N (44 pounds) resultant contact force in the upper neck load cell of a 50th percentile adult male Hybrid III head fixture at the location specified in the NPRM. DaimlerChrysler recommended that in the event the platen does not stop quickly enough after the resultant neck force reaches 200 N (44 pounds); the head fixture should be designed to either withdraw or become compliant by using a force limiting device in order to prevent any damage to the load cell in the dummy's head. GM also recommended a similar approach and suggested the agency consider a range of loads on the headform of 100 N (22 pounds) to 400 N (88 pounds).

Advocates recommended a maximum intrusion limit of no more than 76.2 mm (3 inches) in order to protect occupants taller than the 50th percentile male. Public Citizen recommended that NHTSA require that vehicle roof structures resist more than 76.2 mm (3 inches) of roof crush, and maintain the minimum amount of headroom proposed in the NPRM in order to reduce side window breakage and prevent B-pillar deformation, which it believes can alter seat belt geometry.

ARCCA, Mr. Slavik and the Advocates also recommended the agency use a 95th percentile adult male dummy instead of the smaller 50th percentile male to increase the stringency of the standard and further limit intrusion.

Testing with HPF: As noted above, the agency indicated in the SNPRM that it was considering whether to specify a test using a HPF in the final rule. We received a number of comments concerning this issue.

The Alliance reiterated its recommendation that NHTSA maintain the use of the 127 mm (5 inch) platen travel criterion. That organization stated that it does not support a ''no head contact'' criterion, whether it is determined by use of a test dummy or via the use of an HPF with an associated contact force. The Alliance stated that the platen travel requirement would yield essentially the same roof strength and avoid unnecessary test-to-test variability and testing complexity. That organization stated that if the agency adopts a head contact criterion in the final rule, it is essential that the head contact device be a headform on a stand located at a position specified by the manufacturer and not a crash test dummy or a headform located based on what it claimed would be very unreliable and unrepeatable location data estimated from a test dummy or SAE J826 manikin (OSCAR) location. The Alliance stated that possible use of a 222 N (50 pound) contact criterion has not been supported by any scientific data.

In commenting on the SNPRM, GM stated that use of the 127 mm (5 inch) platen travel criterion rather than either a dummy or head contact fixture is required to prevent unnecessary test variation and complication while maintaining a comparable level of stringency.

AIAM did not endorse the HPF approach but suggested that the fixture might be equipped to measure neck load, to exclude incidental contact with trim items.

Public Citizen stated that defining head contact with the HPF by using force-deflection criteria would result in a significant number of front seat occupants suffering head and neck injuries.

Agency Response

After carefully considering the comments, the agency has decided to adopt the proposed headroom requirement, but with a different test procedure. Instead of specifying a procedure using a seated Hybrid III adult male dummy, we are specifying use of a HPF that positions the headform at the location of a 50th percentile adult male. To help ensure objectivity and in light of concerns about incidental contact with trim, head contact is defined as occurring when a 222 N (50 pound) resultant load is measured by a load cell on the HPF. Finally, to better ensure safety, we are retaining the current 127 mm (5 inch) platen travel requirement as well as adopting a headroom requirement.

Primary Rationale: At the time of the NPRM, the agency estimated benefits based on post-crash headroom, the only basis for which a statistical relationship with injury reduction had been established. After the NPRM, with additional years of data available, a statistically significant relationship between intrusion and injury for belted occupants was established.

NHTSA cited its new headroom and roof intrusion analysis [22] in the SNPRM. The agency added two years of NASS–CDS data to each analysis and found a new, stronger negative correlation between post-crash headroom and maximum injury severity of head, neck or face from roof contact. Also, for the first time, the agency was able to find a statistically significant correlation between vertical roof intrusion and head, neck, or face injury from roof contact. Based upon this new analysis, we believe that maintaining headroom, as well as restricting the amount of intrusion (retaining the platen travel requirement) will yield benefits in rollover crashes. Therefore, we believe both criteria should be included in the final rule.

Commenters opposing adoption of a headroom requirement raised a number of concerns, including ones related to the test procedure, practicability concerns, and whether a headroom requirement would result in benefits beyond those of the platen travel requirement. The issues related to the test procedure and practicability concerns are addressed below.

As to the issue of additional benefits associated with the headroom criterion, we note that, based on our testing, in the vast majority of vehicles it is likely that the limit on platen travel will be encountered before the one on headroom reduction. For these vehicles, the new requirement will not pose any significant challenges for manufacturers, particularly in light of the changes we are making in the test procedure. However, as we also consider vehicles with less headroom and potential future vehicles, we believe there is a need to adopt a headroom reduction requirement to help ensure post-crash survival space.

In the NPRM, we raised a concern that for vehicles with greater than 127 mm (5 inches) of headroom, limiting platen travel to 127 mm (5 inches) may impose a needless burden on these vehicles. However, manufacturers generally supported retaining the platen travel limit, suggesting that the requirement is not burdensome. Moreover, as indicated above, we now have a new analysis showing a statistically significant relationship between intrusion and injury for belted occupants.

Basic Test Procedure for Measuring Head Contact: To help analyze comments raising repeatability concerns

[21] HRMD means the SAE J826 three-dimensional manikin with a headform attached, representing the head position of a seated 50th percentile male, with sliding scale at the back of the head for the purpose of measuring head restraint backset.

[22] ibid

with the Hybrid III dummy and identifying when head contact occurred, the agency conducted a series of tests using alternative approaches. In the first series of tests conducted at NHTSA's Vehicle Research and Test Center (VRTC), the agency used a head positioning fixture developed by GM (GM–HPF).[23] The GM–HPF is a headform secured to an adjustable vertical support that is rigidly attached to the floor pan at the seat anchorages. The GM–HPF rigidly holds a headform in the location of a normally-seated 50th percentile male head and measures the load on the headform from contact with the interior roof as it is crushed.

The headform consists of a skull, headskin, and 6-axis upper neck load cell from a 50th percentile male Hybrid-III dummy (Part 572, subpart E). This assembly is mounted to the end of a channeled square tube (upper post). A second, similar tube (lower post) is perpendicularly mounted to a rectangular aluminum mounting plate. The upper and lower posts attach to each other and are parallel. The upper post can slide along the lower post. This provides vertical adjustment of the headform once the fixture is mounted in the vehicle. The GM–HPF also includes four metal support straps that attach between the upper/lower post and the mounting plate, in a pyramid configuration. These straps provide rigidity to the fixture and are attached after final positioning of the headform.

In the testing conducted at VRTC,[24] the head position of a normally seated 50th percentile male Hybrid-III dummy was determined by placing the seat at the mid-track position and using the SAE J826 (OSCAR) device to locate the H-point. A 50th percentile male Hybrid-III dummy was then positioned per the FMVSS No. 208 seating procedure and the head location was documented using a 3-dimensional measurement device. The dummy and seat were then removed. The GM–HPF mounting plate was attached to the vehicle floor and the headform was then raised until its vertical position matched that determined from dummy placement.

After gaining experience with the GM–HPF, the agency developed its own, simpler HPF approach for evaluating post crash headroom. In doing so, the agency determined that it is not necessary to use a test device with the complexity of a headform based on the Hybrid III dummy head, given the nature of the performance criterion being measured. Earlier testing had shown that the skin on the Hybrid III dummy's head added a level of testing complexity that was unnecessary to the goal of identifying when roof contact occurs at a point in space. Therefore, the agency developed a simpler HPF using an FMVSS No. 201 headform that is currently used for testing instrument panels and seat backs. (This headform is effectively a 16.5 cm (6.5 inch) diameter metallic hemisphere).

During roof crush test series conducted at General Testing Laboratories,[25] the HPF was developed by mounting the FMVSS No. 201 headform to a cantilevered levering arm which was then attached to a tri-pod. The levering arm was maintained in position by air pressure and designed to collapse after a 222 N (50 pound) load was applied. The purpose of the cantilever design was to allow some downward movement so as not to damage the device after head contact is reached. The HPF was positioned in the vehicle at the 50th percentile male head position using the FMVSS No. 214 seating procedure recently adopted (72 FR 51908) and modified to use the OSCAR with a Head Restraint Measuring Device attached for repeatable placement. The HPF tri-pod apparatus was then rigidly secured to the floor of the vehicle. The FMVSS No. 201 headform was mounted on a 3-axis dummy neck load cell, and all loads and moments were recorded. The roof was then crushed until the unmodified interior roof made contact with the HPF and the resultant load, as measured by the load cell, exceeded 222 N (50 pounds). During our evaluation we defined ''head contact'' as occurring when a 222 N (50 pound) load is applied to the sphere, in the belief that this load level would correspond to structural roof contact rather than interior trim components coming loose. This was consistent with comments from DaimlerChrysler and GM that used a force load approach as a reliable method of identifying head contact and removing the uncertainty of random interior trim contact.

Our test experience with the simpler HPF proved to be repeatable in the tests and easier than using the Hybrid III dummy itself during the test.

We believe specification of the HPF appropriately addresses commenters' concerns regarding variability with regard to locating the dummy's head. With the HPF rigidly fixed to the vehicle, we also believe this addresses the concerns of manufacturers, such as Porsche, which alter the attitude of the vehicle with respect to the load press when conducting roof crush tests.

Because head contact is defined as a load on the headform, the test result is more objective/repeatable, and not sensitive to incidental contact with interior surfaces that may disengage during testing.

We disagree with comments from manufacturers that recommended the removal of the roof's interior trim prior to testing in order to simplify the procedure. The agency's headroom analysis established a correlation between injuries and head contact with a NASS–CDS roof component when the injury source was the A–Pillar, B–Pillar, front or rear header, roof rail or the roof itself. These interior surfaces are considered interior trim. We believe they should be factored in when considering the available headroom in the test. By defining head contact as occurring when a 222 N (50 pound) load is applied to the headform, we are addressing concerns about incidental contact with trim. This definition of head contact also addresses concerns about possible conflicts with the intent of FMVSS No. 201U, with respect to concerns with incidental contact. If the headform experiences a 222 N (50 pound) load, the contact is not incidental and there is a safety issue related to available headroom.

We also disagree with comments from manufacturers recommending that the head contact device be a headform on a stand located at a position specified by the manufacturer and not a crash test dummy or a headform located based on SAE J826 manikin (OSCAR) location. The HPF test procedure (as would a test procedure using a test dummy) measures head contact in the vehicle being tested. However, the approach of using a headform on a stand located at a position specified by the manufacturer would not necessarily represent the actual vehicle build.

We note that the SAE J826 mannequin has long been incorporated in NHTSA's safety standards for purposes of determining the H-point location. Issues concerning the accuracy of measurements using this device and the HRMD were addressed at length in our rulemaking upgrading our head restraints standard. Manufacturers can address concerns about different trim and seating options by factoring in the location where the headform (and also the head of a typical average size male occupant) will be under those different options.

Definition of head contact:

As noted above, the Alliance stated that possible use of a 222 N (50 pound) contact criterion has not been supported

[23] *See* Docket Number NHTSA–2005–22143–195

[24] *See* docket entry NHTSA 2008–0015–003 for the vehicles tested with the GM–HPF.

[25] *See* report *Two-Sided Roof Crush Testing Analysis* placed in the docket with this notice.

by any scientific data. Public Citizen expressed concern that defining head contact with the HPF by means of force-deflection criteria would result in a significant number of front seat occupants suffering head and neck injuries.

We note that the load as defined is not intended to be an injury criterion, for which one would expect supporting scientific data, but is instead simply an objective way of defining head contact and avoiding treating incidental contact with loose trim as head contact. Our testing has shown, on average, once physical contact between the interior roof trim and the headform occurred resulting in the onset of a load on the headform, the platen traveled 6 mm (0.24 inches) prior to the load reaching 220 N (50 pounds). Therefore, we do not expect increased head and neck injuries from this approach. Moreover, retention of the current platen travel requirement will also prevent such increased injuries. We selected the 222 N (50 pound) contact criterion based on comments from GM and DaimlerChrysler and our own testing experience.

Possible Reduced Stringency: IIHS, LSMM and Public Citizen expressed concern that if the platen travel requirement were not retained in addition to adopting the headroom criterion, adoption of the proposed headroom criterion would represent a decrease in stringency for the standard's performance criterion. This is not an issue since we are retaining the platen travel requirement.

Possible more restrictive requirements. We disagree with commenters which recommended that the agency reduce the platen travel requirement to 76.3 mm (3 inches).

On average, the vehicles the agency has tested have reached the maximum SWR in 90 mm (3.5 inches) of platen travel. A requirement for reduced platen travel would represent an increase in stringency and, in many respects, would be similar to a requirement for a higher SWR. We note that the agency has already been considering the possibility of a higher SWR, as well as two-sided test requirement, which would also increase stringency. We have not conducted testing to analyze the appropriateness of applying a 3 inch platen travel requirement to all vehicles. However, we believe the other issues we have considered ensure an appropriate level of stringency.

We also do not agree with commenters recommending the use of the 95th percentile dummy (or equivalent HPF) for measuring head contact. Restricting headroom to a 95th percentile occupant is similar to limiting the platen displacement to 76.3 mm (3 inches) in increasing stringency. As indicated above, we believe the other issues we have considered ensure an appropriate level of stringency. Moreover, we believe that the relationship between vehicle headroom and occupant size is insignificant in most cases. It is likely that taller front seat occupants adjust the seat positions to prevent uncomfortable proximity to the roof such as by lowering the seat cushion bottom, increasing the seat back angle and/or adjusting the seat position further rearward.

Low roofline vehicles: In the NPRM, we discussed possible concerns with vehicles that have relatively little available headroom when the 50th percentile adult male dummy is positioned properly in the seat. Vehicles with these aerodynamically sloped roofs will hereafter be referred as ''low roofline vehicles.'' We stated that we were concerned that, in some limited circumstances, the headroom between the head of a 50th percentile male dummy and the interior headliner is so small that even minimal deformation resulting from the application of the required force would lead to test failure. NHTSA requested comments on whether any additional or substitute requirements would be appropriate for low roofline vehicles in order to make the standard practicable.

Several commenters, including DaimlerChrysler, Ford, Porsche, Mitsubishi Motors R&D of America, Inc. (Mitsubishi) and Hyundai America Technical Center, Inc. (Hyundai), provided comments on low roofline vehicles. The commenters recommended that the requirements be limited to 127 mm (5 inches) of deflection for a load of 2.5 SWR in order to minimize the negative impact on continued availability of this type of vehicle if the agency were to adopt a headroom requirement. DaimlerChrysler stated that the proposed standard was not reasonable, practicable and appropriate for these types of motor vehicles as required by the Motor Vehicle Safety Act. It further stated that the agency had not demonstrated in the NPRM or the PRIA, the feasibility of going beyond 1.5 times the UVW in roof strength without head contact for vehicles with steeply raked windshields and reduced headroom.

DaimlerChrysler suggested its recommendation would be applicable to the Chrysler Crossfire, Dodge Viper, and McLaren Mercedes models and successors, which are generally designed with a steeply raked windshield and a low roofline for reduced frontal area and low drag. It further stated that this modified requirement should also apply to other kinds of vehicles, such as any two-seater that is designed with a more aggressively raked windshield. DaimlerChrysler recommended that vehicles of this type could be identified or defined based on a set of characteristics such as the Static Stability Factor (SSF) (e.g., ≥1.4), NCAP rollover rating (e.g., ≥4 stars), height-to-width ratio (e.g., ≤0.75), windshield rake angle, vehicle height, etc.

Ford stated that low roofline vehicles are not the only vehicles that have problems with limited headform clearance. It stated that vehicles that may be considered as ''high roofline'' can also have limited headform-to-roof clearance due to interior package design. Based on the interior package design of a particular vehicle, regardless of roof line characteristics, the critical dimension (distance between the outboard side of dummy's headform and the roof side rail trim) can be minimal. Mitsubishi commented that headform-to-roof clearance is a concern for not only low roofline vehicles but may be more generically classified as being an issue for limited headroom vehicles.

Porsche expressed concern that low roofline vehicles have less opportunity for enhanced roof structures because the focus on performance and aerodynamics virtually eliminates the option of taller pillar supports.

Hyundai stated it will be challenging for low roofline vehicles and particularly two door coupe vehicles to meet the upgraded standard because of the lack of headroom and the possibility the B-pillar may not be loaded because it is further away from the A-pillar compared to a sedan. It requested that the agency define a low roofline vehicle to explicitly include two-door coupe vehicles in the definition. It also requested that these types of vehicles be allowed to meet the current requirements until it can be demonstrated that practicability with the upgrade is feasible.

Based on its analysis, the agency believes the requirements it is adopting will not create new problems for low roofline vehicles. In our most recent two-sided research program, the agency tested a 2006 Chrysler Crossfire, a vehicle identified as a low roofline vehicle. During the first-side test, the vehicle had a peak SWR of 2.9 at 97 mm (3.85 inches) of platen displacement. Head contact based upon our criteria (222 N load on the headform) occurred at 107 mm (4.21 inches) of platen travel. This showed the maximum SWR was reached prior to head contact. On the

second side, the Crossfire reached a 2.7 SWR prior to head contact at 135 mm (5.31 inches) of platen travel.

The agency tested another low roofline vehicle, the 2007 Scion tC. This vehicle achieved a maximum SWR of 4.6 on the first side at 113.3 mm (4.46 inches) of platen travel. Head contact occurred at 119 mm (4.68 inches) of platen travel. On the second side, the Scion achieved a 4.1 SWR prior to head contact at 95.0 mm (3.74 inches) of platen travel. From these tests we believe it is feasible and practicable for smaller vehicles with less initial headroom to meet the requirements. Since both are two-door vehicles, we disagree with Hyundai's assertion that two-door vehicles pose an unreasonable challenge.

We agree with Ford's observations that some vehicles that may appear to be ''high roofline'' vehicles, but may experience head contact in less platen travel than a ''low roofline'' vehicle. The 2007 Buick Lucerne, a large full size vehicle reached a maximum SWR of 2.3 at a platen displacement of 110 mm (4.33 inches). The vehicle did not reach the proposed SWR of 2.5. In this test, platen travel at head contact was less than the Crossfire. Therefore, the arguments being made for excluding low roofline vehicles may not be unique to low roofline vehicles. Ford's comments also illustrate the difficulty in identifying what is or is not a low roofline vehicle.

DaimlerChrysler suggested SSF or other vehicle parameters could be used to define low roofline vehicles and exclude them from the headroom requirement. However, we believe that this exclusion is not warranted based on our testing. Moreover, we are concerned about the safety impact of unnecessarily excluding vehicles from the upgraded requirements.

6. Leadtime and Phase-In

NHTSA proposed that manufacturers be required to comply with the new requirements three years after the issuance of the final rule. At that time, based upon vehicle testing, we estimated that 68 percent of the current fleet already complied with the proposed roof strength criteria. We anticipated the proposal would not require fleet-wide roof structural changes and believed the manufacturers had engineering and manufacturing resources to meet the new requirements within that timeframe.

In commenting on the NPRM, vehicle manufacturers and their associations argued that additional leadtime was needed, and that a significantly greater portion of the fleet would require redesign than estimated by the agency. The Alliance, Ford and GM stated that approximately 60 percent of their fleets would need to be redesigned, and Hyundai commented that 75 percent of its vehicles would need changes to comply with the requirements.

Toyota, Ford, GM, Hyundai, Nissan and DaimlerChrysler stated that the agency underestimated the necessary modifications to vehicle design and manufacturing challenges that must be overcome to comply with the proposal. Ford, GM, DaimlerChrysler, and Toyota stated that the challenges are especially true for heavier vehicle over 2,722 kg (6,000 pounds) GVWR which have not been required to meet FMVSS No. 216.

GM and Ford stated that they rely on outside suppliers for advanced high strength material and currently there is an insufficient supply base for high strength steel. They also cited significant manufacturing challenges that must be overcome to adapt ultra high strength steel to the mass production environment. They argued that leadtime with a phase-in is necessary to permit growth in the supply base and allow the manufacturers to resolve manufacturability issues for high volume production requirements.

The vehicle manufacturers generally requested a 3-year leadtime followed by a multi-year phase-in. Most supported a minimum 3-year phase-in. GM requested a 4-year phase-in period, and DaimlerChrysler requested a 5-year phase-in only for vehicles over 3,855 kg (8,500 pounds). The AIAM requested compliance credits for an early phase in, while the Alliance, Ford and Mitsubishi requested carryforward credits. The AIAM and Ferrari requested that small volume manufacturers be permitted to comply at the end of the phase-in due to compliance difficulties, long product cycles and cost penalties associated with running structural changes to vehicle programs.

In commenting on the SNPRM, the Alliance reiterated points made in its comment on the NPRM, stating that the final rule needs to provide at least three years initial leadtime followed by a multi-year phase-in with carryforward credits. It stated that additional time is needed if the agency adopted the proposed head contact criterion, a two-side test requirement, or an SWR higher than 2.5. Ford suggested that if the agency adopted a more stringent requirement than the one it focused on in the NPRM, that vehicles meeting a 2.5 SWR/one-sided test requirement earn compliance credits before and during the phase-in.

Agency Decision/Response

After carefully considering the comments and available information, and for the reasons discussed below, we have decided to adopt different implementation schedules for vehicles with a GVWR of 2,722 kilograms (6,000 pounds) or less, i.e., the vehicles currently covered by FMVSS No. 216, and those with a higher GVWR. The implementation schedules we are adopting are as follows:

Passenger cars, multipurpose passenger vehicles, trucks and buses with a GVWR of 2,722 kilograms (6,000 pounds) or less. We are adopting a phase-in of the upgraded roof crush resistance requirements for these vehicles. The phase-in requirement for manufacturers of these vehicles (with certain exceptions) is as follows:

—25 percent of the vehicles manufactured during the period from September 1, 2012 to August 31, 2013;
—50 percent of the vehicles manufactured during the period from September 1, 2013 to August 31, 2014;
—75 percent of the vehicles manufactured during the period from September 1, 2014 to August 31, 2015;
—100 percent of light vehicles manufactured on or after September 1, 2015.

Credits may be earned during the phase-in, i.e., beginning September 1, 2012, and carried forward through August 31, 2015.

Small volume manufacturers are not subject to the phase-in but must meet the requirements beginning on September 1, 2015. Vehicles produced in more than one stage and altered vehicles must meet the upgraded requirements beginning September 1, 2016.

Multipurpose passenger vehicles, trucks and buses with a GVWR greater than 2,722 kilograms (6,000 pounds) and less than or equal to 4,536 kilograms (10,000 pounds). All of these vehicles must meet the requirements beginning September 1, 2016,[26] with the following exceptions. Vehicles produced in more than one stage and altered vehicles must meet the requirements beginning September 1, 2017.

Our rationale for this implementation schedule is as follows.

As discussed in the FRIA, a significantly larger proportion of the vehicle fleet will require changes than estimated at the time of the NPRM. This

[26] If heavier vehicles are designed to meet the new requirements early, their production volumes are not to be included when calculating the light vehicle fleet phase-in percent compliance. The phase-in schedule for the two fleets are separate.

would be true even for a 2.5 SWR/one-sided test requirement, and the proportion is higher for the 3.0 SWR/two-sided requirement. We therefore agree that a combination of approximately three years leadtime plus a multi-year phase-in is appropriate.

In developing the implementation schedule, we have considered costs and benefits. The vast majority of the benefits of the rule come from vehicles with a GVWR of 2,722 kilograms (6,000 pounds) and less. Of the 135 fatalities that will be prevented each year, 133 will come from these lighter vehicles. Moreover, the lighter vehicles are generally redesigned more often than the heavier vehicles. Also, manufacturers are familiar with designing and testing the lighter vehicles to meet the current FMVSS No. 216 requirements.

In order to implement the upgraded requirements in a cost effective manner, we believe it is appropriate to provide approximately three years of leadtime coupled with a 25 percent/50 percent/75 percent/100 percent phase-in for the lighter vehicles, and longer leadtime for the heavier vehicles. The benefits for the heavier vehicles are relatively small, and approximately seven years leadtime will generally permit manufacturers to improve roof strength at the same time they redesign these vehicles for other purposes.

While vehicle manufacturers made varying recommendations for the specific provisions of a phase-in, the phase-in we are adopting for lighter vehicles is within the general range of those recommendations. We recognize that manufacturers argued that longer leadtime should be provided for requirements more stringent than a 2.5 SWR/one-sided test requirement. However, while the 3.0 SWR/two-sided test requirement will increase the number of vehicles requiring redesign and the specific countermeasures that are needed, we believe that approximately three years of leadtime coupled with a 25 percent/50 percent/75 percent/100 percent phase-in provides sufficient time for manufacturers to make these changes. We note that the vehicles likely to present the greatest design challenges under our proposal were the ones with a GVWR above 2,722 kilograms (6,000 pounds), for which we are providing longer leadtime and a lower SWR requirement. Vehicle manufacturers have not provided persuasive evidence that longer leadtime is needed, or that a less stringent requirement should be established for an initial period.

We believe that providing for carry forward credits during the phase-in, but not the earning of advance credits prior to the beginning of the phase-in, balances encouraging early compliance and manufacturer flexibility with also encouraging manufacturers to continue to improve roof strength during the years of the phase-in.

As with a number of other rulemakings, we are establishing special requirements for small volume manufacturers and for vehicles produced in more than one stage and altered vehicles.

Given the leadtime needed for manufacturers to redesign their vehicles to meet the upgraded roof crush requirements, we find good cause for the compliance dates included in this document.

b. Aspects of the Test Procedure

1. Tie-down Procedure

In the NPRM, we proposed to revise the vehicle tie-down procedure in order to improve test repeatability. Specifically, we proposed to specify that the vehicle be secured with four vertical supports welded or fixed to both the vehicle and the test fixture. If the vehicle support locations are not metallic, a suitable epoxy or an adhesive could be used in place of welding. Under the proposal, the vertical supports would be located at the manufacturers' designated jack points. If the jack points were not sufficiently defined, the vertical supports would be located between the front and rear axles on the vehicle body or frame such that the distance between the fore and aft locations was maximized. If the jack points were located on the axles or suspension members, the vertical stands would be located between the front and rear axles on the vehicle body or frame such that the distance between the fore and aft locations was maximized. All non-rigid body mounts would be made rigid to prevent motion of the vehicle body relative to the vehicle frame.

We explained that we believed this method of securing the vehicle would increase test repeatability. Welding the support stands to the vehicle would reduce testing complexity and variability of results associated with the use of chains and jackstands. We also stated that we believed that using the jacking point for vertical support attachment is appropriate because the jacking points are designed to accommodate attachments and withstand certain loads without damaging the vehicle.

Comments

Commenters on the proposed tie-down procedure included the Alliance, DaimlerChrysler, Ford, GM, Toyota, AIAM, Mr. Chu, Hyundai and BMW Group (BMW). A number of commenters agreed with the agency's intention to revise the tie-down procedure for the quasi-static test to improve test repeatability. However, manufacturers raised specific concerns about the proposed procedure. AIAM, Mr. Chu, Hyundai and BMW alternatively recommended retention of the current tie-down procedure. Advocates and SAFE supported the revised tie-down procedure because it has the potential to ensure less vehicle movement during testing.

Ford suggested that the proposed tie-down procedure can cause localized, unrealistic floor pan deformations that can reduce the measured strength of the roof. The Alliance, DaimlerChrysler, Ford, GM and Toyota recommended providing one vehicle support per vehicle pillar. However, they recommended placing the support along the sill, as opposed to the jack points, since they stated that jack points are not designed to withstand the forces generated during a roof crush test. The commenters suggested that this would minimize unwanted body displacement by providing a direct load path during testing which the proposal does not address. For body-on-frame vehicles, DaimlerChrysler also recommended support of the vehicle frame, in addition to the pillar supports, to further prevent sag of the body. In the event that the agency adopts the practice of supporting the body at the pillars, the Alliance, GM, and BMW also requested that a minimum area of support be provided to avoid concentrated loading.

The Alliance, BMW and Ford also had concerns about welding supports to the vehicle body. The commenters stated that welding could decrease the material properties of the body reducing the measured roof strength, and welding might not be practical or possible for non-ferrous or composite materials. BMW alternatively recommended clamping instead of welding, citing concerns about welding certain materials and the possibility of failure of the sills due to the welding. Ford recommended contacting the manufacturer for instructions about welding aluminum sills, if the agency proceeded with the welding protocol.

AIAM, Mr. Chu, Hyundai and Nissan recommended maintaining the existing procedure that supports the entire length of the sill in order to reduce complexities and unwanted body deformation with the tie-down proposal. Nissan suggested supporting the wheelbase at the sill flange pinch welds between the two channels that grab the

pinch weld on the bottom of the sill. The side sill flange would be constrained to prevent transverse body movement when tested. Hyundai recommended that the current procedure be permitted at the manufacturer's option since it believes the revised tie down procedure is burdensome. DaimlerChrysler and Toyota also recommended continuous mounting along the sills suggesting this would prevent unwanted body deformation at the jack point locations.

For vehicles without B-pillars, the Alliance, Ford, and GM recommended that a support be placed at the seam between the doors as if a pillar existed between the doors. The Alliance stated that doors connected without a pillar often have reinforcements to compensate for the structure that would be afforded by a pillar if it were part of the vehicle design, and therefore, the joint between the doors will act as one of the direct load paths from the roof to the rocker. Without a support at the door joint, the Alliance suggested that the roof strength cannot be accurately measured in these types of vehicles.

Agency Response

As part of analyzing the comments on the proposed tie-down procedure for the quasi-static test, the agency conducted analytical simulations using a finite element model on a late model Ford Explorer.[27] First the agency performed an analysis of the proposed procedure where the vehicle was supported at the jack locations. Two additional models were also developed to evaluate supporting the vehicle body under the pillars and continuously along the length of the body sill, as the commenters suggested.

The Ford Explorer was modeled because it is a body-on-frame [28] vehicle, and according to the comments, the proposed procedure would not accurately evaluate the roof strength of that type of vehicle. The first Explorer tie-down model followed the NPRM procedure where the vehicle was supported at its jack point locations. This was along the frame mounted inward of the vehicle body sill in the case of the Explorer. The analysis showed that the NPRM procedure produced compression of the body-to-frame rubber body mounts. We believe this tie-down simulation did not accurately evaluate the strength of the roof because the body was not isolated in the simulation. The loading of the body mounts is also unrealistic in a rollover. The results were consistent with Ford's comment that suggested supporting a vehicle by its frame at the body mount locations could cause floor pan deformation and thereby reduce the measured strength of the roof.

The results of the other simulations (vehicle secured under the pillars and vehicle secured along the rocker/sill) showed higher roof strength than the NPRM procedure. There was nearly a 7 percent increase in roof strength within 127 mm (5 inches) of platen travel when the vehicle's body was supported under the pillars compared to the NPRM procedure. The simulation results using the continuous sill support tie-down showed a 3 percent increase in roof strength compared to the NPRM procedure. Overall, in both simulations, the body sag in the floor pan did not appear to be a concern and produced a more realistic loading of the roof. The load-deformations curves were also similar, whereas the results from the simulation using the NPRM tie-down procedure diverged early in the analysis at approximately 18,000 N or 0.8 SWR.

We note that the full sill tie-down procedure generated a lower peak force when compared to the vehicle supported under the pillars. The simulation for the full sill tie-down procedure did not include any constraints for the Explorer's frame. However, when the vehicle body was supported under each pillar, a number of vertical supports were added to support the mass of the frame. This could explain the slight difference in the maximum strength of the roof. However, we believe the difference is negligible.

After considering the comments and the computer simulations, we decided, for purposes of fleet testing, to revise the tie-down procedure to support the vehicle continuously under the sill. We believe this approach further reduces any variability compared to the Alliance recommendation because the entire wheelbase of the vehicle is supported and not just under each pillar. Also, the peak force difference in the computer models was not a significant issue because both methods addressed the commenters' main concern of inappropriate floor pan deformation. For body-on-frame vehicles, additional supports would be placed under the frame as this constraint was not included in the computer simulation and might account for the difference in peak force. The full sill tie-down procedure is consistent with the existing FMVSS No. 216 requirement supported by AIAM, Mr. Chu, Hyundai, and Nissan.

For the fleet testing,[29] the vehicle's sill at the body flange weld was fully supported along the wheelbase between two box tubes and securely fixed into place with high strength epoxy. For body-on-frame vehicles, additional supports were placed under the frame to reduce body sag created by an unsupported frame, as recommended by DaimlerChrysler. Epoxy was selected in response to the Alliance, BMW and Ford's comments that welding may adversely alter the vehicle's structure prior to testing. We believe the epoxy will not alter the material properties of the vehicle structure or cause complications for sills made of non-ferrous or composite materials. The revised test procedure provided support for each of the vehicle pillars and provided a stable load path when tested, consistent with the recommendations by the Alliance, DaimlerChrysler, Ford, GM and Toyota. Also, by supporting the vehicle along the wheelbase, which includes the door seam for vehicles without a B-pillar (the joint between the doors), a reactionary surface is provided for the applied load when tested, addressing the Alliance, GM and Ford's concerns.

During our evaluation of the tie-down procedure,[30] dial indicators were placed at the sill below the vehicle's pillars on the opposite side of the platen travel to check for vehicle displacement during the test. The tie-down procedure showed on average less than a millimeter (0.04 inches) of body displacement at all measurement locations, parallel to the direction of platen motion for both unibody and body-on-frame vehicles. For comparison, the agency also tested a Buick Lacrosse that was rigidly supported along the entire wheelbase and compared the result to another Lacrosse test where the sill was supported along the wheelbase only at 152.4 mm (6 inch) increments. The Lacrosse was also supported under the pillars, as recommended by the

[27] *See* report, *Finite Element Simulation of FMVSS No. 216 Test Procedures,* placed in the docket with this notice.

[28] A body-on-frame vehicle is constructed by attaching a vehicle body to a rigid frame which supports the drivetrain. At the attachment points, rubber body mounts are used to isolate the body from vibration.

[29] *See* report, *Two-Sided Roof Crush Strength Analysis,* placed in the docket of this notice.

[30] The agency measured the sill displacement at three locations along the wheelbase on the side opposite to the force application on the roof, for 13 vehicles. Ten of the tests were single-sided and three were two-sided. The sill displacement ranged from 0 to 2.3 mm (0.09 inches). The VW Jetta achieved the highest SWR level at 5.7 in this data set and experienced almost no sill movement. In the three two-sided tests in this series, conducted with the Subaru Tribeca and two Buick Lacrosses, the agency did not observe any significant difference in sill displacement on the second side compared to the first.

Alliance. The results showed that the body displacement was lower for the full sill tie-down when compared to the results where the sill was only partially supported.

After considering the comments and in light of the testing and simulations, we are adopting the revised tie-down procedure, where the vehicle is supported at the sill, along the entire wheelbase. This procedure reduces vehicle displacement, more accurately measures the strength of the roof, and is more robust than the procedure recommended by the Alliance and its members. Furthermore, the revised test procedure addresses the comments to the NPRM because it supports the vehicle pillars during testing and reduces the likelihood of vertical and horizontal translation of the body.

We note that, in light of the fact that the test procedure is consistent with the current FMVSS No. 216 test procedure while providing improved clarity, the agency has adopted it for use in current FMVSS No. 216 [31] compliance tests. This procedure has been used for 19 fiscal year 2007 and 2008 OVSC compliance tests.

2. Platen Angle and Size

In the NPRM, we did not propose to change the test device orientation or the size of the test plate. However, we included a discussion of comments related to test device orientation and size that we had received in response to the October 2001 RFC.

Under the current test procedure specified in FMVSS No. 216, the test plate is tilted forward at a 5-degree pitch angle, along its longitudinal axis, and rotated outward at a 25-degree angle, along its lateral axis, so that the plate's outboard side is lower than its inboard side. The test plate size of 762 mm (30 inches) wide by 1,829 mm (72 inches) long is designed to load the roof over the occupant compartment. The edges of the test plate are positioned based on fixed points on the vehicle's roof. The forward edge of the plate is positioned 254 mm (10 inches) forward of the forwardmost point on the roof, including the windshield trim. We note that, as discussed later in this document, there is a secondary test procedure for certain vehicles with raised roofs or altered roofs, which we proposed to eliminate.

Comments

The agency received numerous comments and recommendations to change the platen test angle and size. A number of the comments were from safety advocacy groups. Some commenters recommending a 2-sided test requirement recommended that we use different criteria for the two tests.

Consumers Union cited comments it had made on the agency's 2001 RFC and the agency's discussion in the NPRM. That commenter noted that it had recommended that the agency modify the test plate load and size. It stated that it continues to believe that the current plate load and size does not reflect real-world rollover conditions. Consumers Union stated that it believes that more of the roof crush force is absorbed by the A-pillar than accounted for by the current or proposed procedure. It recommended that the agency conduct additional studies concerning this issue.

IIHS commented that testing roof crush strength at multiple load angles would add to the meaningfulness of the quasi-static test requirement that NHTSA currently specifies. However, it also stated that in the absence of a range of plate angles, any distinct test angle choice should be supported by evidence that such an angle is representative of a significant percentage of real-world rollovers.

Various commenters recommended that the agency change the platen pitch in ways they believe would better reflect the more aggressive loading angles that are frequently sustained in real-world rollover crashes, particularly for SUVs and pickups. The general recommendation was to increase the pitch angle of the platen to 10 degrees because commenters believed the proposed 5 degree pitch is not realistic.

CAS stated that the pitch angle must be increased to at least 10 degrees to emulate actual rollovers where damage to front fenders is testimony to the fact that in a rollover, the pitch angles are this high. Advocates suggested that vehicles be evaluated at different platen angles, up to and including 10 degrees pitch × 45 degrees roll.

Mr. Chu suggested a series of procedures he believed would best address the plate angle issue. His 6-step procedure would test each front corner of the roof three times, with the roll angle of the plate maintained at 25 degrees, and the pitch angle from 5 to 10 degrees.

Consumers Union and Mr. Friedman encouraged the agency to consider the use of a smaller platen in order to load the A-Pillar and not extensively load the B-pillar. Mr. Friedman submitted two-sided test data published in a recent technical publication using a smaller platen 301 mm (11.8 inches) wide by 610 mm (24 inches) long and at different pitch and roll angles.[32] The commenter stated that the smaller plate more aggressively loads the A-pillar. It showed the roof achieved a lower SWR on the second side by as much as 40–70 percent compared to the current FMVSS No. 216 procedure.

Agency Response

After carefully considering the comments, we have decided to maintain the current platen size and the pitch and roll angle. We note that many of the issues raised by the commenters were ones that were also raised in comments on the 2001 RFC.

Prior to issuing the NPRM, the agency conducted a test series to evaluate alternative platen angles using the FMVSS No 216 platen.[33] A finite element study was first conducted to evaluate a range of platen configurations and to select appropriate conditions for testing. NHTSA tested four vehicle pairs using 5 degree × 25 degree and 10 degree × 45 degree platen angles. The peak SWR from these tests did not demonstrate a consistent pattern between the two test conditions. For two vehicle models, the 10 degree × 45 degree tests generated a higher peak SWR, whereas, the 10 degree × 45 degree tests generated a lower peak SWR in the others. Therefore, the test results were inconclusive.

To help evaluate the comments submitted in the NPRM docket, the agency extended the previous finite element studies to evaluate alternative platen angles in conjunction with a smaller platen.[34] The finite element model of a 1997 Dodge Caravan was used to evaluate two-sided simulations with a 5 degree × 25 degree orientation on the first side and a 10 degree × 45 degree orientation on the second side. The reduction in peak SWR for using a 10 degree × 45 degree platen angle on a second side test was 18.7 percent. The 18 percent reduction in peak SWR, while significant, is much less than the 40 to 70 percent shown in the test results submitted to the docket. The results were also in line with our two-sided vehicle test results using the 5 degree × 25 degree platen orientation for both sides. On average there was an 8.7 percent reduction of strength on the second side compared to the first. Furthermore, we found an average

[31] TP–216–05 Laboratory Test Procedure for FMVSS No. 216, November 16, 2006.

[32] Friedman D., *et al.,* ''Result From Two Sided Quasi-Static (M216) and Repeatable Dynamic Rollover Test (JRS) Relative to FVMSS 216 Tests,'' 20th ESV Conference, Lyon, France, 2007.

[33] *See* Docket NHTSA 2005–22143–57: Load Plate Angle Determination and Initial Fleet Evaluation.

[34] *See, Finite Element Simulation of FMVSS No. 216 Test Procedures,* placed in the docket with this notice.

difference of approximately 7.1 percent lower peak force for the second side in vehicles under 2,722 kilograms (6,000 pounds) GVWR and 14.9 percent lower peak force for the second side in vehicles over 2,722 kilograms (6,000 pounds) GVWR.

To evaluate how a smaller platen affects roof strength measurements, the agency also conducted simulations with a smaller 305 × 610 mm (12 × 24 inch) platen using a 10 degree × 45 degree platen angle on a Dodge Caravan model. The results showed an approximate six percent decrease in peak force compared to our baseline results with a larger platen using the same configuration. However, the simulations showed the potential for platen edge-to-roof contact. Since the platen-to-roof contact is intended to be a surrogate for vehicles rolling on the ground, localized loading from the platen edge can cause unrealistic loading conditions. Therefore, the results demonstrated how a smaller platen localized the stress on the A-pillar, reducing the measured strength during the evaluation, but the crush deformation does not appear to represent real-world crash results.

Many of the commenters assumed that a higher pitch angle leads to a more demanding test procedure and also assumed it is more reflective of real world rollovers, particularly for pickups and SUVs. However, only limited anecdotal evidence (based on interpretation of crash photos) was provided to support these conclusions. Due to the extremely complex and chaotic nature of rollover crashes, it is impossible for any one test to fully replicate all of the loading forces that occur in all real-world crashes. However, we believe the platen size and pitch/roll angles proposed and currently incorporated in the standard produce roof crush damage patterns that are representative of the crash damage patterns observed in real-world crashes.[35] The use of the smaller platen would result in edge contact and unrealistic buckling of the roof. We did not propose to alter these parameters in the NPRM or SNPRM.

We are also not persuaded by commenters that recommended varying the pitch and roll angle in a two-sided test. As discussed above, the agency conducted analytical simulations varying the platen angles. Based on the similarity of the post test damage pattern in that research, there was not sufficient evidence to justify changing the load plate configuration from our current protocol. We are further not persuaded by CFIR, Mr. Chu, and LSSM comments to require testing on both sides with a smaller platen size. Analytical simulations[36] conducted by the agency using a Dodge Caravan showed that a smaller platen is sensitive to positioning and can result in edge contact. As a result, a smaller test plate can produce unrealistic contact with the roof and highly localized loading, inconsistent with real world rollover crashes. CFIR's finding of a 40–70 percent reduction in roof strength for the second side tests it conducted may be attributed to its smaller platen adding unrealistic stress on the roof.

3. Testing Without Windshields and/or Other Glazing in Place

We did not propose to change the current FMVSS No. 216 procedure and test the vehicle without the windshield or side windows in place. In the NPRM, we stated:

> The agency believes that windshields provide some structural support to the roof even after the windshield breaks because the force-deflection plots in some of the recent test vehicles (e.g., Ford Explorer, Ford Mustang, Toyota Camry, Honda CRV) show little or no drop off in force level after the windshield integrity was compromised. Further examination of real-world crashes indicates that the windshield rarely separates from the vehicle, and therefore, does provide some crush resistance. Because NHTSA believes that the vehicle should be tested with all structural components that would be present in a real-world rollover crash, we decline to propose testing without the windshield or other glazing. 70 FR 49238.

A number of commenters, including ones from safety advocacy groups, questioned the contribution of the windshield to the overall strength of the roof and generally recommended the windshield be removed prior to the test. Advocates, Boyle, et al., CFIR, Consumers Union, DVExperts, IIHS, Public Citizens, Penn Engineering, and Perrone commented that windshields often break in a rollover, and stated that the agency should not specify a test procedure with windshields in place. Consumers Union expressed concern about aftermarket windshield installation and the unquantifiable strength of the windshield in a crash. The Engineering Institute (EI) and Mr. Hauschild recommended that if the agency maintains the 2.5 SWR requirement then the windshield should be removed. Mr. Slavik stated he conducted tests which confirm that on some vehicles, damage to the windshield significantly reduces the force and energy required to produce an incremental amount of intrusion.

Technical Services recommended that the side window glass should be required to be preserved during testing to improve vehicle rollover performance. Xprts and Mr. Friedman also recommended that the side windows should not be permitted to fail during the test. Both commenters referenced Volvo's internal criteria and suggested that tempered glass windows can remain intact.

ARCCA, Consumer Union, Specialty Equipment Market Association (SEMA) and Hyundai raised concerns with regard to vehicles equipped with sunroofs. ARCCA and Consumers Union suggested vehicles equipped with sunroofs meet the roof crush requirements. Hyundai noted that vehicles equipped with sunroofs have reduced headroom compared with those without sunroofs. SEMA requested the agency ensure aftermarket sunroofs be permitted because they are installed inside the roof's perimeter cage.

Agency Response

After considering the comments, we decline to change the current test procedure in which the windshield and side windows remain in place during FMVSS No. 216 tests. We also disagree with the recommendation that the agency require side windows to be preserved during test. The agency was not presented with new information showing windshield breakage in a rollover significantly contributed to a reduction in roof strength.

We have examined the post crash windshield status for 1997–2006 NASS investigated rollover crashes with greater than one quarter turn. The majority of the windshields were coded as either ''in place and cracked'' or ''in place and holed.'' Less than 10 percent of weighted incidents indicate the windshield is ''out of place.''

While Mr. Slavik stated he conducted testing, the agency was not provided data to evaluate. He asserted that there is anecdotal acknowledgement by some manufacturers that the windshield provides upwards of 30 percent of the measured roof strength. We note that that the agency's testing showed that windshield breakage has not been a factor in the maximum strength of the roof for some vehicles.[37] The peak load continued to increase after windshield breakage in the testing of the 2003 Ford Focus, 2003 Chevrolet Cavalier, and 2002 Nissan Xterra. In the case of the

[35] *See* Docket NHTSA 2005–22143–56: Roof Crush Analysis Using 1997–2001 NASS Case Review, 2004.

[36] *See,* Finite *Element Simulation of FMVSS No. 216 Test Procedures,* placed in the docket with this notice.

[37] *See NHTSA–2005–22143–0049:* Roof Crush Research: Phase 3—Expanded Fleet Evaluation.

Cavalier, the windshield did not contribute to a decrease in strength until 170 mm (6.7 inches) of platen travel.

The windshield is a structural element for some vehicles, and we continue to believe that vehicles should be tested with all structural components that would be present in a real-world rollover crash. We declined to propose testing without the windshield or other glazing for that reason, and we are not persuaded that there is sufficient justification to revise our position.

The agency also wanted to ascertain the influence of sunroofs on roof strength. The Scion tC, Cadillac SRX and Ford Edge were tested with large panoramic sunroofs. The glass panel sunroof in the Scion tC shattered during the two-sided test, yet the glass panel in the SRX did not fail during the single-sided only test. After review of the load-deformation curves for both vehicles, the test results showed the effect of the sunroof was insignificant to the overall strength of the roof. In the case of the Scion tC, at the point when the sunroof glass broke during the first side test, there was no change in the platen load. In the case of the Ford Edge, the rear glass panel of the sun roof failed in the second-sided test; however, the front glass panel over the front row occupants remained intact. This occurred well after 125 mm of platen travel. As a result, we believe it is practicable for vehicles with sunroofs (including large panoramic roofs) to meet the requirements and we do not foresee this upgrade inhibiting aftermarket sunroofs mounted within the roof structure.

In response to Consumers Union, the possibility exists that aftermarket windshield installations may not perform to OEM standards. However, we do not believe this possibility justifies changing roof strength requirements for all new vehicles.

Xprts and Mr. Friedman recommended a requirement that the side windows not break during the roof strength test. The agency investigated the contribution of side windows to the strength of the roof structure. Our testing showed that side window breakage is directly correlated to platen displacement with limited effect on the strength of the roof. In reviewing the load-deformation curves at the point where the side glass breaks, there is no measurable drop in load of the roof and it generally occurs well after the peak strength of the roof has been reached.[38] For completeness, the agency also assessed the impact of rear window breakage. The rear windows broke well after peak strength was reached and generally past 127 mm (5 inches) of platen travel. The breakage of the rear window glass resulted in a slight drop in the strength of the roof particularly in pick-up trucks where the vertical glass is loaded by the test device and can add some strength. Overall, the impact of the side and rear glass had little impact on the strength of the roof. We also note that such a requirement is outside the scope of notice of the proposal.

4. Deletion of Secondary Plate Positioning Procedure

In the NPRM, we proposed to apply the primary plate procedure for all vehicles, removing the secondary plate procedure that applies to some raised and altered roof vehicles. We explained that the secondary plate positioning procedure produces rear edge plate loading onto the roof of some raised and altered roof vehicles that may cause excessive deformation uncharacteristic of real-world rollover crashes. Because an optimum plate position cannot be established for all roof shapes, the testing of some raised and altered roof vehicles will result in loading the roof rearward of the front seat area. We stated that we believe this is preferable to edge contact because edge contact produces localized concentrated forces upon the roof typically resulting in excessive shear deformation of a small region. We also stated that we believe that removing the secondary plate position would make the test more objective and practicable.

Advocates was the only commenter on this issue and opposed eliminating the secondary plate positioning. It stated that reverting back to the primary plate position for aerodynamic roof vehicles would induce unrealistic loads in that the proportion of force applied to the roof is excessively concentrated over the B-pillars. It stated that as a consequence, test conditions and roof response to plate loading can be substantially different than the loading that actually occurs in real-world rollovers of these vehicles where the A-pillars receive a proportionately greater force. Advocates suggested this is crucial because some vehicles with severely sloped A-pillars are candidates for A-pillar collapse in rollover crashes and the percentage of new vehicles with severely raked A-pillars and aerodynamically sloped roofs has increased each year since their use began in the early to mid-1990s.

Agency Response

After considering Advocates' comment, we have decided to remove the secondary plate procedure. We do not agree that the FMVSS No. 216 platen size and positioning produces unrealistic loading of aerodynamic roofs. This issue was considered in the 1999 final rule (64 FR 22567) where the agency adopted a revised platen positioning procedure to reduce the likelihood of unrealistic loading on vehicles with rounded roofs. The agency's recent testing of modern vehicles has shown the current plate positioning procedure does distribute the load between the A- and B-pillars. Generally, the plate's initial point of contact with the roof is slightly behind the A-pillar including the Volvo XC90 which had a large amount of curvature to the roof in the test area compared to most vehicles tested.

However, we continue to believe that edge contact induced by the secondary plate procedure results in unrealistic loading specifically when the roof is raised or altered. In some circumstances, the plate will essentially punch through the sheetmetal instead of loading the roof structure. We also do not believe vehicles with steeply raked A-pillars are common architectures for raised and altered roof vehicles. Vans with more upright A-pillars are generally modified to have their roofs raised or altered. We are not aware of such changes to traditional passenger cars with steeply raked A-pillars.

5. Removal of Roof Components

FMVSS No. 216 currently specifies removal of roof racks prior to platen positioning or load application. We did not propose to change this provision.

Xprts recommended that the roof be tested as the vehicle is to be sold, with roof racks or other equipment in place. That commenters stated that removal of roof racks prior to conducting the roof crush test eliminates a typical roof failure mode. It states that roof rack mountings initiate buckling of the roof, increasing the risk of occupant injury from roof panel buckling.

After considering this comment, we decline to change the current test procedure. No data were provided by Xprts to support its contention that roof racks result in a typical roof failure mode and thereby increase the risk of occupant injury from roof panel buckling. We reviewed several NASS–CDS cases[39] of utility vehicles with roof racks that had undergone rollover crashes. Our review did not support the contention that the presence of a roof rack initiated buckling of the roof and increased the risk of occupant injury. There was also no general trend

[38] *Ibid.*

[39] Photographs collected from NASS–CDS Case Query Page. NASS–CDS cases examined: 100121, 102005185, 146004985, 161005827, 656500082, 471300143, and 129005218.

concerning injury severity and presence of a roof rack in the reviewed cases.

We further reviewed our fatal hardcopy case files [40] and could not identify a single case where the roof rack appeared to aggravate the deformation of the roof structure.

6. Tolerances

In response to comments from the Alliance and Chrysler LLC, we are adding several tolerances in the regulatory text to help improve test repeatability. We note that platen angles are measured from the horizontal and not from the vehicle's frame of reference. Measuring platen angles with respect to the ground is more objective than using the test vehicle's frame of reference because the latter would introduce manufacturing variability. We note that we are not including a specification concerning platen overshoot on the first side test since we will not conduct compliance tests beyond the specified SWR.

We decline to add a calibration procedure for the test device or to make changes relating to load application rate or to add platen material specifications. The basic FMVSS No. 216 test procedure has been used for many years, and the commenters did not provide persuasive evidence that changes are needed in these areas. As to platen materials, we believe the current specification for a rigid unyielding block is sufficient.

c. Requirements for Multi-Stage and Altered Vehicles

For vehicles manufactured in two or more stages,[41] other than vehicles incorporating chassis-cabs,[42] we proposed to give manufacturers the option of certifying to either the existing roof crush requirements of FMVSS No. 220, *School Bus Rollover Protection,* or the new roof crush requirements of FMVSS No. 216. FMVSS No. 220 uses a horizontal plate, instead of the angled plate of Standard No. 216.

As explained in the NPRM, multi-stage vehicles are aimed at a variety of niche markets, most of which are too small to be serviced economically by single stage manufacturers. Some multi-stage vehicles are built from chassis-cabs that, by definition, have a completed occupant compartment. A chassis-cab's roof is an integral part of its body structure surrounding the seats for the occupants. Other vehicles are built using incomplete vehicles that do not have a completed occupant compartment. These include a van cutaway, which consists of the frame, drive train, steering, suspension, brakes, axles, and the front body section of a van that has no body structure behind the two front seats. Another example is a stripped chassis. A final stage manufacturer would typically complete the occupant compartments of these incomplete vehicles by adding body components to produce a truck (e.g., work truck) or multipurpose passenger vehicle (e.g., motor home).

In developing our proposal, we considered whether the proposed standard would be appropriate for the type of motor vehicle for which it would be prescribed. We stated that we believed it was appropriate to consider incomplete vehicles, other than those incorporating chassis-cabs, as a vehicle type subject to different regulatory requirements. We anticipated that final stage manufacturers using chassis cabs to produce multi-stage vehicles would be in position to take advantage of ''pass-through certification'' of chassis-cabs, and therefore did not believe the option of alternative compliance with FMVSS No. 220 was appropriate.

We noted that while we believed that the requirements in FMVSS No. 220 have been effective for school buses, we were concerned that they may not be as effective for other vehicle types. As noted above, the FMVSS No. 216 test procedure results in roof deformations that are consistent with the observed crush patterns in the real world for light vehicles. Because of this, we explained that our preference would be to use the FMVSS No. 216 test procedure for light vehicles. We believed, however, that this approach would fail to consider the practicability problems and special issues for multi-stage manufacturers.

We stated that in these circumstances, we believed that the requirements of FMVSS No. 220 appeared to offer a reasonable avenue to balance the desire to respond to the needs of multi-stage manufacturers and the need to increase safety in rollover crashes. Several states already require ''para-transit'' vans and other buses, which are typically manufactured in multiple stages, to comply with the roof crush requirements of FMVSS No. 220. These states include Pennsylvania, Minnesota, Wisconsin, Tennessee, Michigan, Utah, Alabama, and California. We tentatively concluded that these state requirements show the burden on multi-stage manufacturers for evaluating roof strength in accordance with FMVSS No. 220 is not unreasonable, and applying FMVSS No. 220 to these vehicles would ensure that there are some requirements for roof crush protection where none currently exist.

Comments

We received comments concerning requirements for multi-stage and altered vehicles from Advocates, NTEA, NMEDA and RVIA.

Advocates stated that it opposes permitting FMVSS No. 220 as an alternative for multi-stage vehicles. It claimed that FMVSS No. 220 is a ''weak'' standard whose effects on roof strength in actual rollover crashes are mostly unknown.

NTEA recommended that all multi-stage vehicles be excluded from roof crush resistance requirements. It stated that manufacturers of non-chassis-cab vehicles will not be able to conduct the tests or perform engineering analysis to ensure conformance to FMVSS No. 220. NTEA also disagreed with the assumption that the presence of state requirements for FMVSS No. 220 compliance demonstrates that final stage manufacturers can actually comply. It stated that the ability of school bus and para-transit bus manufacturers to comply with FMVSS No. 220 does not reflect the ability of typical final stage manufacturers to comply with FMVSS No. 220.

NTEA also stated it is impractical for the agency to assume manufacturers of multi-stage vehicles built on chassis-cabs will be able to use pass-through certification for compliance. That organization stated that these type of vehicles are generally unique and built to customer specifications. It also raised a concern that some manufacturers of chassis-cabs may not provide the necessary specifications for the final stage manufacturer to rely on pass-through certification as it applies to roof strength. It argued that the final stage manufacturer would therefore be responsible for conducting costly analysis and testing to verify compliance with FMVSS No. 216.

NMEDA expressed concern that the FMVSS No. 220 option would only be available for multi-stage vehicles. It asked that the FMVSS No. 220 option be extended to raised or altered roof vehicles. To encompass the modifiers in the proposed upgrade to FMVSS No. 216, NMEDA asked that a vehicle roof that is altered after first retail sale be considered in compliance if it meets the requirements of FMVSS No. 216 or

[40] *See* Docket Number NHTSA 2005–22143–56: Roof Crush Analysis Using 1997–2001 NASS Case Review.

[41] Vehicles manufactured in two or more stages are assembled by several independent entities with the ''final stage'' manufacturer in most cases assuming the ultimate responsibility for certifying the completed vehicle.

[42] Under 49 CFR § 567.3, chassis-cab means an incomplete vehicle, with a completed occupant compartment, that requires only the addition of cargo-carrying, work-performing, or load-bearing components to perform its intended functions.

FMVSS No. 220. NMEDA also stated that raising a roof increases the available headroom and that the roof therefore can crush more before there is any contact with an occupants head. NMEDA requested the agency account for the additional headroom beyond the original vehicle's headroom in establishing any requirement.

RVIA supported our proposal to permit FMVSS No. 220 as an option for small motor homes as this would allow manufacturers to address the unique issues concerning such specialized vehicles built in two or more stages.

Agency Response

After carefully considering the comments and as explained below, we are providing a FMVSS No. 220 option for multi-stage vehicles, except those built on chassis-cab incomplete vehicles, and for vehicles which are changed in certain ways to raise the height of the roof. For example, a van may be altered by replacing its roof with a taller structure (referred to as a raised roof) to better accommodate a person in a wheelchair. We are also excluding a narrow category of multi-stage vehicles from FMVSS No. 216 altogether, multi-stage trucks built on incomplete vehicles other than chassis cabs.

In discussing the issues raised by commenters, we begin by addressing the comment of Advocates. That organization opposed permitting FMVSS No. 220 as an alternative for multi-stage vehicles because it believes that FMVSS No. 220 is not sufficiently stringent and that its effects on actual rollover crashes are mostly unknown.

As we discussed in the NPRM, we believe the requirements in FMVSS No. 220 have been effective for school buses, but we are concerned that they may not be as effective for other vehicle types. We explained that our preference would be to use the FMVSS No. 216 test procedure for light vehicles, but that this approach would fail to consider the practicability problems and special issues for multi-stage manufacturers.

Advocates did not provide analysis or data addressing the special circumstances faced by multi-stage manufacturers, or explain why it believes these manufacturers can certify compliance of their vehicles to FMVSS No. 216. Therefore, that commenter has not provided a basis for us to take a different position than we took in the NPRM.

We next turn to the issues raised by NTEA. As a general matter, we believe that it is neither necessary nor would it be appropriate to exclude all multi-stage vehicles from roof crush resistance requirements. The purpose of FMVSS No. 216 is to improve occupant safety in the event of a rollover. If a multi-stage vehicle is involved in a rollover, the vehicle's roof strength will be an important factor in providing occupant protection. Therefore, while we seek to address the special needs and circumstances of multi-stage manufacturers, we decline to provide any blanket exclusion for all multi-stage vehicles. We will address the issues raised by that commenter separately for multi-stage vehicles built on chassis-cab incomplete vehicles, multi-stage trucks with a GVWR greater than 2,722 kilograms (6,000 pounds) not built on a chassis cab and not built on an incomplete vehicle with a full exterior van body, and other multi-stage vehicles not built on chassis cabs.

Multi-stage vehicles built on chassis-cab incomplete vehicles.

A chassis-cab is an incomplete vehicle, with a completed occupant compartment, that requires only the addition of cargo-carrying, work-performing, or load-bearing components to perform its intended functions. As such, chassis-cabs have intact roof designs. Chassis-cabs are based on vehicles that are sold as complete vehicles, e.g., medium and full size pickup trucks, so their roof structure will be designed to meet the upgraded requirements of FMVSS No. 216.

After considering the comments of NTEA, we believe that final stage manufacturers can rely on the incomplete vehicle documents (IVD) for pass-through certification of compliance with FMVSS No. 216 for vehicles built using chassis cabs. To do this, final stage manufacturers will need to remain within specifications contained in the IVD. Since the stringency of FMVSS No. 216 is dependent on a vehicle's unloaded vehicle weight, the final stage manufacturer would need to remain within the specification for unloaded vehicle weight. If they did not, the roof would not likely have the strength to comply with FMVSS No. 216. Also, final stage manufacturers will need to avoid changes to the vehicle that would affect roof strength.

We note that some changes made by final stage manufacturers could affect the ability to conduct an FMVSS No. 216 test, e.g., for a truck, the addition of a cargo box structure higher than the occupant compartment, which could interfere with the placement of the FMVSS No. 216 test device. To address this concern, we are including a specification in the final rule that such structures are removed prior to testing. (They are still counted as part of a vehicle's unloaded weight.)

Multi-stage trucks with a GVWR greater than 2,722 kilograms (6,000 pounds) not built on a chassis cab and not built on an incomplete vehicle with a full exterior van body.

We have decided to exclude from FMVSS No. 216 a very limited group of multi-stage trucks with a GVWR greater than 2,722 kilograms (6,000 pounds), ones not built on a chassis cab and ones not built on an incomplete vehicle with a full exterior van body. We note that some incomplete vehicles with a full exterior van body might not be included in the definition of chassis-cab but would still have an intact roof design.

For the reasons discussed in the previous section, final stage manufacturers can rely on the IVD for pass-through certification of compliance with FMVSS No. 216 for vehicles built using chassis cabs. For multi-stage trucks built on an incomplete vehicle with a full exterior van body, the manufacturer can rely on either the IVD for pass-through certification of compliance with FMVSS No. 216, or use the FMVSS No. 220 option. Since the incomplete vehicle will have an intact roof design and will be similar to ones sold as non-multi-stage vehicles, the roof will have been designed to comply with FMVSS No. 216. Therefore, it is likely that the final stage manufacturer can pass through FMVSS No. 216 certification. Since the vehicle at issue will be based on an incomplete vehicle with a full exterior van body, the FMVSS No. 220 procedure is likely to also be an appropriate one for the final stage vehicle.

We are concerned, however, that for other multi-stage trucks, e.g., van cutaways, there may be practicability problems for final stage manufacturers. Because the incomplete vehicle will not have an intact roof and because the strength of the roof may be dependent on the structure to be added by the final stage manufacturer, the incomplete vehicle manufacturer may not provide IVD or similar information that would permit pass-through certification. Moreover, the design of the completed truck may be such that it is not possible to test the vehicle to FMVSS No. 216 (due to interference with the FMVSS test device) or inappropriate for testing with FMVSS No. 220. As noted earlier, the FMVSS No. 220 test was designed for school buses and uses a horizontal plate over the driver and passenger compartment instead of the angled plate of Standard No. 216. This test may not be appropriate for a truck with a cargo box that is higher than the occupant compartment.

Given these practicability issues, we have decided to exclude this limited

group of multi-stage trucks from the requirements of FMVSS No. 216.

Other multi-stage vehicles not built on chassis cabs.

For other multi-stage vehicles not built on chassis cabs, we continue to believe, for the reasons discussed in the NPRM, that permitting FMVSS No. 220 as an option is a reasonable way to balance the desire to respond to the needs of multi-stage manufacturers and the need to increase safety in rollover crashes. As we noted, several states already require ''para-transit'' vans and other buses, which are typically manufactured in multiple stages, to comply with the roof crush requirements of FMVSS No. 220. We also note that RVIA supported our proposal.

Multi-stage vehicles and complete vehicles with a GVWR greater than 2,722 kilograms (6,000 pounds) which have been changed by raising their original roof.

In response to the comments of NMEDA, we agree that the FMVSS No. 220 option should be available to multi-stage and complete vehicles with a GVWR greater than 2,722 kilograms (6,000 pounds) which have been changed by raising their original roof.

In considering this issue, we note that in 1999 the agency published a final rule (64 FR 22567) that was in part in response to an RVIA petition to allow vans, motor homes and other multipurpose vehicles with raised roofs the option to certify to FMVSS No. 220. The RVIA had argued first that since raised roof vehicles would have met FMVSS No. 216 requirements prior to modification of their roofs, the A-Pillar strength has already been demonstrated. Second, RVIA had claimed that the modifications usually do not affect the roof strength near the A-pillar. RVIA believed that the FMVSS No 220 test procedure could be used to test the strength of the entire modified vehicle roof without repeating the FMVSS No. 216 certification test. In the final rule, we stated that we disagreed with RVIA's analysis that concluded FMVSS No. 220 is comparable to FMVSS No. 216 and is preferable for testing vehicles with raised or modified roofs. We stated that that the agency stood by its tentative conclusions stated in the NPRM that the FMVSS No. 220 test is less stringent than FMVSS No. 216 for testing the appropriate roof area.

In considering the issues raise by NMEDA, we note that the discussion we included in the 1999 final rule was in the context of the version of FMVSS No. 216 that existed at that time. The standard was applicable to vehicles with a GVWR of 2,722 kilograms (6,000 pounds) or less. Here we are discussing vehicles with a GVWR greater than 2,722 kilograms (6000 pounds).

We believe that practicability issues arise for vehicles with a GVWR greater than 2,722 kilograms (6,000 pounds) whose roofs are raised. Moreover, we believe that the FMVSS No. 220 option is appropriate for the ''para-transit'' vans and buses. The FMVSS No. 220 option will help ensure that these occupants are afforded a level of protection that is currently not required. We are not providing this option to vehicles with raised roofs and a GVWR of less than or equal to 2,722 kilograms (6,000 pounds).

We believe that the practicability issues for vehicle alterers which raise roofs on the vehicles at issue are comparable to those of final stage manufacturers. An alterer may raise a roof on a vehicle that was originally certified to FMVSS No. 216. We believe that permitting alterers which raise roofs on these vehicles the option of certifying to FMVSS No. 220 balances potential practicability issues with the need to increase safety in rollovers.

The FMVSS No. 220 130 mm (5.1 inches) limit of platen travel established at the point of contact with the raised roof is consistent with FMVSS No. 216 requirements. As discussed elsewhere in this document, we are maintaining the current platen travel requirement as well as adding a headroom requirement in FMVSS No. 216. Therefore, even if a roof is raised and the manufacturer or alterer selects the FMVSS No. 220 option, we believe the platen travel requirement should be the same, even if there is additional headroom.

In arguing for an alternative requirement in this area, NMEDA raised a concern about higher center of gravity. NMEDA surveyed its members to obtain, amongst a number of things, an estimate of the height of raised roofs. It found that some raised roofs can be as high as 762 mm (30 inches). It was concerned about the resulting center of gravity's effect on rollover propensity of these vehicles.

We note that in raising the roof of a vehicle, a final stage manufacturer or alterer will likely increase the center of gravity of the vehicle, independent of any roof crush resistance requirements. We believe that it is important that manufacturers carefully analyze the impacts of their changes, and choose appropriate vehicles for such modifications. We also believe that if final stage manufacturers or alterers raise the roof of a vehicle, it is still necessary that the vehicle have appropriate roof strength to provide protection in potential rollovers.

As to NMEDA's specific recommendation, we believe that organization has not demonstrated a need for a different requirement in this area. According to that organization, the typical height of a raised roof is 356–406 mm (14–16 inches). Its members have designed raised roofs that meet FMVSS No. 220, and FMVSS No. 216 as amended will permit this option. In addition, vans which are typically altered or modified in this manner will have an electronic stability control system as standard equipment. Also, different vehicles can be used for higher raised roofs, i.e., those with dual rear wheels. We note that the GVWR of those vehicles is greater than 4,536 kg (10,000 pounds) and FMVSS No. 216 would not apply.

d. Other Issues

1. Convertibles and Open Bodied Vehicles

Convertibles are excluded from the requirements of FMVSS No. 216. In the NPRM, we sought to clarify the definition and scope of exclusion for convertibles.

We explained that FMVSS No. 216 does not define the term ''convertible.'' We noted, however, that S3 of 49 CFR 571.201 defines convertibles as vehicles whose A-pillars are not joined with the B-pillars (or rearmost pillars) by a fixed, rigid structural member. In a previous rulemaking, NHTSA stated that ''open-body type vehicles'' [43] are a subset of convertibles and are therefore excluded from the requirements of FMVSS No. 216.[44]

We stated in the NPRM that we had reassessed our position with respect to ''open-body type vehicles.'' Specifically, we believed that we were incorrect in stating that ''open-body type vehicles'' are a subset of convertibles because some open-body type vehicles do not fall under the definition of convertibles in S3 of FMVSS No. 201. We cited the example of a Jeep Wrangler, which we believed to have a rigid structural member that connects the A-pillars to the B-pillars.

We stated in the NPRM that we believe that ''open-body type vehicles are capable of offering roof crush protection over the front seat area.'' Accordingly, we proposed to limit the exclusion of convertibles from the requirements of FMVSS No. 216 to only those vehicles whose A-pillars are not

[43] An open-body type vehicle is a vehicle having no occupant compartment top or an occupant compartment top that can be installed or removed by the user at his convenience. *See* Part 49 CFR 571.3.

[44] *See* 56 FR 15510 (April 17, 1991).

joined with the B-pillars, thus providing consistency with the definition of a convertible in S3 of FMVSS No. 201. We proposed to add the definition of convertibles contained in S3 of 49 CFR § 571.201 to the definition section in FMVSS No. 216.

Comments

The agency received comments on this issue from Advocates, the Alliance, AIAM, BMW, DaimlerChrysler, Ferrari and Porsche. Vehicle manufacturers supported continuing to exclude convertibles from the requirements; however they raised some concerns with regard to the proposed definition. The Alliance commented that there is no evidence that it is practicable for convertibles or open body vehicles to comply.

DaimlerChrysler disagreed with the agency's position that the Wrangler is not a convertible. It claimed that the Wrangler does not have an A-pillar, since the structure is not rigid and is hinged to fold down. Further, that company stated that the padded tube connecting the windshield frame and the sport bar is not rigid because it is attached with easily-removable screws.

Several commenters addressed the proposed definition of convertible. Ferrari suggested that the definition of convertible include ''above the window opening light lowermost point.'' AIAM recommended two changes: to add ''not permanently joined'' and to make it clear that the referenced connection is ''above the lowest point of the side window opening.'' This would lead to the following complete definition: ''A convertible is a vehicle whose A-pillars are not permanently joined with the B-pillars (or rearmost pillars) by a fixed, rigid structural member above the lowest point of the window opening.'' DaimlerChrysler suggested changing the convertible definition to ''vehicles with folding tops or removable hardtops with A-pillars not joined to the B-pillars (or rearmost pillars) or joined with removable parts to the B-pillars (or rearmost pillars).''

Advocates disagreed with excluding convertibles from FMVSS No. 216 and stated further that the agency should establish rollover requirements for convertibles that limit ejections and head and neck injuries.

Agency Response

After considering the comments, we are adopting the proposed definition of convertible for the final rule and we are continuing to exclude convertibles within that definition from the FMVSS No. 216 requirements. This includes retractable hard top convertibles. We believe that to establish a roof crush requirement on vehicles that do not have a permanent roof structure would not be practical from a countermeasure perspective. A convertible roof would have to be strong enough to pass the quasi-static test, yet flexible enough to fold into the vehicle. Since we are not aware of any such designs, we do not agree with Advocates on this point. We also note that new rollover and ejection requirements for convertibles are outside the scope of this rulemaking.

On the issue of open-body vehicles, we agree with DaimlerChrysler that the agency misidentified the Wrangler as an open-body vehicle in the NPRM when it should have been considered a convertible (since the A-pillar is not rigid and fixed to the B-pillar or other rearmost pillar). At the time, we were unaware that the windshield and support bars were designed to be disassembled.

Our position on open-body vehicles has not changed. Under the new definition, open-body vehicles will be subject to FMVSS No. 216, since they are capable of offering roof crush protection over the front seat area. We note, however, that given DaimlerChrysler's comment about the Jeep Wrangler, we are not aware of other vehicles currently available for sale that are considered open-body vehicles.

We disagree with the Alliance's assertion that it is not practicable for open-body vehicles to meet the requirements of FMVSS No. 216. We believe that if a vehicle otherwise similar to the Wrangler had roof supports that are fixed (as in a roll cage), it should be capable of providing protection to the occupants as required by today's final rule.

We are also not making the changes to the proposed definition of convertible suggested by some commenters. The definition proposed was previously adopted in FMVSS No. 201 (62 FR 16725), and the agency believes the applicability is the same and is unaware of any concerns. Furthermore, we do not believe further specificity is warranted given our revised position on the Wrangler. We believe our discussion in the NPRM concerning the Wrangler may have caused confusion. We also do not agree that there is a need to specify that convertibles have folding hardtops or removable hardtops. These roof systems are not intended as significant structural elements but are designed primarily to provide protection from inclement weather, improve theft protection and are generally offered as a luxury item. These types of roof systems are also designed of lighter weight materials, such as aluminum or composites, for ease of folding and storage within the vehicle or removal by the consumer. and we believe consumers readily recognize they will afford the occupants limited protection in a rollover.

2. Vehicles Without B-Pillars

In the NPRM, we did not specifically discuss vehicles that are designed without B-pillars. At the time we were unaware of any technical concerns the manufacturers might have with these vehicle, to meet the proposed requirements.

Ford identified a number of design challenges for vehicles without B-pillars. That company's concerns were focused on pickup trucks without B-pillars that have a GVWR of 3,856 kilograms (8,500 pounds) or more. These vehicles have a front-forward opening and a rear-rearward opening side door configuration that latch together without a fixed, structural B-pillar. Ford expressed concern that there is no direct load path to resist the platen during testing and as a result, there are significant design and manufacturing issues that must be addressed while avoiding a major incremental weight penalty. Ford did not make any specific recommendations.

Agency Response

We agree with Ford's analysis that certain vehicles without B-pillars may raise additional technical challenges compared to other vehicles, particularly for heavier vehicles. However, based upon our fleet testing, we believe that a structure can be designed at the joint between the doors that acts as a surrogate B-pillar to resist roof displacement during testing. We note that the Alliance's comments on how the proposed tie-down procedure adversely affects vehicles without B-pillars reinforce this view. The revised tie-down procedure for the final rule will aid vehicles without B-pillars in complying since support will be placed along the complete body sill.

NHTSA tested two vehicles without B-pillars, the 2004 Chevrolet Silverado HD and 2005 Nissan Frontier. This testing confirmed that the load can be successfully transferred to the joint between adjacent doors where a B-pillar would be in a conventional vehicle design. The Silverado did not meet the 2.5 SWR proposed in the NPRM, but it did exceed 1.5. The Frontier achieved a peak SWR of almost 4.0 within the allocated platen displacement.

While we appreciate the challenges manufacturers will incur to meet the new requirements, we believe the upgrade is feasible for vehicles without B-pillars. We note that one of the

reasons we are providing a phase-in is to permit manufacturers additional time to make the design changes needed to enable some of the more challenging vehicles to comply with the requirements of the final rule.

3. Heavier Vehicles With a High Height to Width Aspect Ratio

The Alliance and Mercedes–Benz USA requested that vehicles with a GVWR above 3,856 kilograms (8,500 pounds) GVWR and a height to width aspect ratio greater than 1.2 be permitted to certify to FMVSS No. 220 as an option or, at a minimum, use the larger platen specified for FMVSS No. 220. They argued that the FMVSS No. 216 platen results in unrealistic roof deformation for these particular vehicles.

Agency Response

While we have considered this comment, we believe that the commenters have not provided persuasive evidence that a special requirement is needed for these vehicles. While we did observe edge contact in our testing of the Sprinter, it was not of a nature that prevents compliant designs. We note that the 1.5 SWR we are adopting for vehicles within this weight range reduces possible concerns in this area.

4. Active Roofs

Autoliv North America (Autoliv) stated that the quasi-static test procedure does not have a provision for active roof structure systems. Active roof structures are being developed to provide added stiffness during an actual rollover event. The effectiveness of such a system may be transient, deployed during a rollover initiation and lasting only as long as required to reduce intrusion. The quasi-static test specifies a deformation rate of not more than 13 millimeters per second with the total time for crush not to exceed 120 seconds. According to Autoliv, the duration of this test may exceed the time in which certain active roof structures can be effective.

Agency Response

We are not aware of the near term implementation or effectiveness of active roof structure technology. In developing performance requirements, we seek to develop ones that are appropriate for, and do not unnecessarily discourage, new technologies. However, our ability to do this is dependent on the amount of information we have. We do not have sufficient information at this time to indicate the quasi-static test will prevent implementation of active roof systems.

5. Whether an Additional SNPRM Is Needed

Several commenters argued that the agency's January 2008 SNPRM did not provide sufficient information about the alternatives we were considering and that an additional SNPRM should be published.

Public Citizen claimed that the January 2008 SNPRM failed to provide enough information for meaningful public comment. It stated that the agency did not spell out the explicit safety benefits of mandating a two-sided test, or how using the one-sided test would meet the statutory requirement relating to roof strength for driver and passenger sides. Public Citizen argued that a new SNPRM is needed.

Advocates claimed that the January 2008 SNPRM offered several regulatory alternatives without support from a cost-benefits analysis. That commenter stated that this denied the public an opportunity to evaluate the agency's comparative estimates of costs and benefits before submitting comments. Advocates argued that the SNPRM did not fulfill agency's obligation to present the public with the regulatory alternatives it is considering.

The AIAM stated that it believes there would not be a fair opportunity for public comment on a two-sided test requirement without an opportunity of review of revised cost-benefit analysis.

Agency Response

We reject the commenters' arguments that the agency did not provide a meaningful opportunity for comment. In conjunction with the August 2005 NPRM, the agency's PRIA included an assessment of the 2.5 and 3.0 SWR alternatives. As discussed above, in our January 2008 SNPRM, we asked for public comment on a number of issues that might affect the content of the final rule, including possible variations in the proposed requirements. We also announced the release of the results of various vehicle tests conducted since the proposal. In the SNPRM, we noted that we had been carefully analyzing the numerous comments we had received on the NPRM, as well as the various additional vehicle tests, including both single-side tests and two-sided tests, conducted since the NPRM. We invited comments on how the agency should factor the new information into its decision. We noted that while the NPRM focused on a specified force equivalent to 2.5 times the unloaded vehicle weight, the agency could adopt a higher or lower value for the final rule. We explained, with respect to two-sided vehicle testing, that we believed there was now sufficient available information for the agency to consider a two-sided requirement as an alternative to the single-sided procedure described in the NPRM. We stated that we planned to evaluate both the single-sided and two-sided testing alternatives for the final rule and requested comments that would help us reach a decision on that issue.

While the agency did not provide complete new cost-benefits analyses to accompany the SNPRM, we included a detailed discussion in the SNPRM of how estimated impacts of the final rule would be changed by a number of relevant factors. See 73 FR 5488–5490. These factors included the pass/fail rate of the vehicle fleet, the impact of the ESC standard on potential benefits, revised cost and weight estimates, two-sided testing implications, and other factors.

Thus, in the NPRM and SNPRM, we provided detailed information concerning the alternatives we were considering and the relevant issues. We also note that both Public Citizen and Advocates supported a two-sided test requirement, the alternative we are adopting in today's rule.

6. Rear Seat Occupants

As a general comment to the NPRM, the Advocates raised a concern that the quasi-static platen test is not applicable to rear seat occupants including small children seated in the rear.

Agency Response

We note that the large size of the FMVSS No. 216 platen covers the rear seat in most vehicles to help ensure protection for rear seat occupants. We believe that one of the countermeasures that vehicle manufacturers will use to meet the upgraded roof strength requirements is strengthening the B-pillars. In terms of possible benefits to small children, belted occupant injuries sustained due to rollover roof crush are to the head, neck, and face from contact with roof structures. Appropriately restrained children are generally not tall enough to sustain such injuries.

7. New Car Assessment Program (NCAP)

Several commenters suggested that the agency develop a 5-star rating system concerning roof strength for our NCAP program to provide the public with information on roof strength and to encourage manufacturers to improve the roof strength of their vehicles.

Agency Response

The purpose of this rulemaking is to upgrade our roof strength standard. The issue of whether roof strength might be addressed in some way in our NCAP program would be considered separately in the context of that program.

8. Possible Energy Requirement

We did not propose an energy requirement in the NPRM but indicated that we would welcome comments on an energy absorption test that had previously been suggested by SAFE and Syson-Hille and Associates (Syson).

Agency Response

We received several comments. We appreciate the information provided in the comments but note that we are not considering rulemaking in this area.

9. Advanced Restraints

In the NPRM, we presented a summary of our advanced restraints research and requested comments in this area.

Agency Response

While advanced restraints are not part of this rulemaking, the agency is continuing research in this area and appreciates the comments that were provided.

VII. Costs and Benefits

At the time of the NPRM, the agency prepared a PRIA describing the estimated costs and benefits of the proposal. While the agency did not provide complete new cost-benefits analyses to accompany the SNPRM, we included a detailed discussion in the SNPRM of how estimated impacts of the final rule would be changed by a number of relevant factors. *See* 73 FR 5488–5490. These factors included the pass/fail rate of the vehicle fleet, the impact of the ESC standard on potential benefits, revised cost and weight estimates, two-sided testing implications, and other factors.

Many commenters addressed the PRIA and the later discussion of these impacts included in the SNPRM. Among other things, commenters addressed the target population, the pass/fail rate of the current fleet, cost and weight impacts, and estimates of benefits.

The agency addresses the comments concerning its analysis of costs and benefits in detail in the FRIA. In this document, we summarize the agency's estimates of costs and benefits and discuss the comments concerning target population and roof crush as a cause of injury.

a. Conclusions of the FRIA

The conclusions of the FRIA can be summarized as follows:

Countermeasures

The agency believes that manufacturers will meet this standard by strengthening reinforcements in roof pillars, by increasing the gauge of steel used in roofs, and/or by using higher strength materials. The agency believes that pressure to improve fuel economy in vehicles, driven by more stringent Corporate Average Fuel Economy (CAFE) standards as well as by market forces, together with safety considerations, will provide a strong incentive for manufacturers to achieve increased roof strength through use of light weight materials and stronger roof designs initiated during the redesign cycle. The agency believes that the phase-in schedule provided in this rule will allow manufacturers to establish such designs in an efficient manner. The agency estimates that about 82 percent of all current passenger car and light truck models with GVWRs less than 2,722 kilograms (6,000 pounds) will need changes to meet the 3.0 SWR requirement, and that 40 percent of vehicles over 2,722 kilograms (6,000 pounds) GVWR will need changes to meet the 1.5 SWR requirement.

Benefits

The agency estimates that the changes in FMVSS No. 216 will prevent 135 fatalities and 1,065 nonfatal injuries annually.

Costs

The design changes made to comply with higher test load requirements will add both cost and weight to the vehicle. This will increase the initial purchase price and will increase lifetime fuel usage costs.

Taking account of both the costs of design changes and lifetime fuel usage costs, the agency estimates that compliance with the upgraded roof strength standard will increase lifetime consumer costs by $69–$114 per affected vehicle. Redesign costs are expected to increase affected vehicle prices by an average of about $54. Added weight is estimated to increase the lifetime cost of fuel usage by $15 to $62 for an average affected vehicle. The range in fuel costs reflects different discount rate assumptions of 7% and 3%, as well as a range of assumptions regarding the ability of manufacturers to incorporate advanced weight saving technology into their redesigned fleet. Total consumer costs are expected to range from $875 million to $1.4 billion annually.

Cost Effectiveness and Net Benefits

Cost effectiveness is a measure of the economic investment that is required to prevent a fatality. The cost effectiveness of this rule was estimated under both 3% and 7% discount rate assumptions for each alternative. Nonfatal injuries were translated into fatality equivalents based on comprehensive valuations that included both economic impacts and valuations of lost quality of life. To reflect the present value of benefits that would be experienced over the vehicle's useful life, the resulting equivalent fatalities were discounted over the vehicle's life based on annual exposure to crash involvement as measured by annual miles traveled. The 135 fatalities and 1,065 nonfatal injuries that will be prevented translate into 190 equivalent fatalities, which are valued at 156 equivalent fatalities under a 3% discount rate, and 125 equivalent fatalities under a 7% discount rate. When compared to total costs, the results indicate that the new standard will cost from $6.1 million to $9.8 million per equivalent life saved.

Net benefits represent the difference between total costs and the total monetary value of benefits. DOT's guidance specifies a value of $5.8 million as the value of a statistical life (VSL), with a range of uncertainty covering $3.2 million to $8.4 million. The monetary value of benefits was estimated by assigning a value of $6.1 million to each equivalent fatality prevented. This value includes the $5.8 million VSL plus approximately $300,000 of economic savings to represent the comprehensive societal benefit from preventing a fatality. This means that the standard would be considered to result in net benefits only if the cost per equivalent life saved was below $6.1 million.

Net benefits represent the difference between total costs and the total monetary value of benefits. The monetary value of benefits was estimated by assigning a value of $6.1 million to each equivalent fatality prevented. This value consists of a value per statistical life saved (VSL) of $5.8 million plus $300,000 in economic costs prevented. For the 3.0/1.5 load requirements of the final rule, the net impact would range from a net benefit of $6 million to a net loss of $458 million. Using an alternate comprehensive value of $8.7 million (which consists of a VSL of $8.4 million plus $300,000 in economic savings), the standard could result in a net benefit of $388 million to a net loss of $151 million. Using an alternate comprehensive value of $3.5 million (which consists of a VSL of $3.2 million plus $300,000 in economic savings), the standard could result in a net loss ranging from $376 million to $824

million. These impacts are disproportionately influenced by the relatively large contributions to costs and small contributions to benefits from vehicles over 6,000 lbs. GVWR. Nearly all alternatives covering vehicles from 6,001 to 10,000 lbs. GVWR yield net losses rather than net savings to society.

The following table summarizes the cost and benefits of this final rule.

TABLE 2—COST AND BENEFIT SUMMARY

Total Cost	$875 to $1,391 million.
Cost per Affected Vehicle	$69 to $114.
Benefits	135 fatalities, 1,065 injuries, 190 equivalent fatalities.
Cost per Equivalent Life Saved	$6.1million to $9.8 million.
Net Benefits	$6 million to −$458.

b. Comments

Target Population

The agency received numerous comments concerning the target population. CAS and Advocates argued that improving roof strength would impact ejection and that mitigated ejections should therefore be included in the agency's benefit calculations. Advocates also argued that rear seat occupants should be covered by the revised standard. SAFE argued that roof crush increases the likelihood of glass fracture and vehicle structure deformation, thereby increasing the possibility of ejection. It also argued that roof crush reduces the effectiveness of restraint systems, decreases the effectiveness of rollover air curtains, and decreases the ability of occupants to be extricated from the vehicle. The Xprts disagreed with several of NHTSA's target population restrictions. It stated that ejected occupants, rear seat occupants, and children under 12 should be included. It also argued that roof crush can cause thoracic and spinal injuries, and that upper extremity injuries from ejection through side windows should also be included. Many of these arguments were repeated in a separate submission by CFIR signed by one of the Xprts authors. Consumers Union and Public Citizen also argued that stronger roofs would reduce ejections and better maintain the performance of other safety features such as safety belts, air bags, and door locks. Public Citizen also argued that unbelted occupants would benefit from stronger roofs.

Agency response. We begin our response by noting that Table 1, set forth earlier in this document, shows a breakdown of the target population that could potentially benefit from roof crush improvements.

To examine the inclusion of different categories of injuries in the target population, the agency has conducted several analyses of ejections in rollovers. The first study was a statistical analysis examining the relationship between intrusion and ejection. In this study,[45] Strashny examined 36 different Probit models examining belted cases, unbelted cases, complete ejections, all ejections (including both complete and partial ejection), continuous models, dichotomous models, adjusted models based on both quarter turns and roof exposures, as well as unadjusted models. In all, there were 18 models for complete ejections and 18 for all ejections. Strashny found that there was no significant relationship between the level of intrusion and the probability of complete ejection in any of the 18 full ejection models. For all ejections, which include partial ejections, he found some level of significance for 8 of the 18 models, indicating that a minority of the models found a possibility that some partial ejections might be influenced by stronger roofs. However, 12 of the models found no statistically significant relationship between intrusion and all ejections. We note that partial ejections that meet the other inclusion criteria are a part of the target population for this rulemaking.

The agency then conducted a detailed examination of all fatal complete ejection cases that were excluded from the target population. A panel of three NHTSA safety engineers independently examined each case to determine whether (a) for ejections through open doors, there was deformation in the door latch area where the root cause could be directly attributed to roof crush, and (b) for ejections through windows, if the broken glass through which the occupant was ejected was directly related to deformation of the roof rather than dynamic crash impulse loads or side window/door to ground contact. The panel concluded that there were no cases that met either of these criteria. Therefore, based on these findings and Strashny's finding of no statistically significant correlation between intrusion and ejection probability, all cases of total ejection were excluded from the target population unless their MAIS level injury occurred inside the vehicle prior to ejection.

For occupants who were unbelted but not fully ejected, we could not establish a relationship between roof crush injuries and the magnitude of roof crush. Strashny analyzed the relationship between intrusion and injuries to unbelted occupants and found no significant correlation. This is not unexpected because unbelted occupants essentially become flying objects inside vehicles as they roll over, and head injuries can occur at multiple interior locations. Therefore, only belted occupants are included in the target population.

Regarding the other categories of injuries noted in the comments, partially ejected occupants were already included in the target population, and the agency has decided to include rear seat occupants in the target population. We note that B pillar strength upgrades were included in all of our finite element countermeasure analyses, and this support also provides protection for rear occupants. Moreover, vehicle schematics submitted by both industry and contractors indicate that some design solutions contemplated for increased roof strength include not only stronger A- and B-pillars but also a stronger B- to C-pillar load path to resist platen movement. Such solutions may benefit rear seat occupants as well as front seat occupants. The agency has also decided to include belted children in the target population.

Roof Crush as a Cause of Injury

A number of commenters including GM, Ford, Nissan, and SAFE stated that the statistical correlation Strashny found between roof intrusion and injury does not establish a causal relationship between roof deformation and injury. SAFE stated that the studies by both Rains and Strashny merely suggest that there is a relationship. SAFE stated that "* * * when you compare rollover accidents that have significant roof/pillar deformation with other rollover

[45] Strashny, Alexander, "The Role of Vertical Roof Intrusion in Predicting Occupant Ejection," National Center for Statistics and Analysis, 2009.

accidents that have very little or no roof/pillar deformation, you are not comparing similar accidents with respect to roof-to-ground impact severity. Just the fact that two vehicles are in a rollover with greater than 2 quarter turns does not mean they are in the same or even similar impact severities.'' SAFE also noted an earlier study (matched pair comparison project) in which production and roll bar-equipped vehicles were tested where the comprehensive forces measured on test dummies were similar regardless of the vehicle roof crush. Ford stated that ''The amount of roof deformation is only an indication of the severity of the impact between the roof and the ground * * *.'' GM stated that ''Observations of injury occurrence at the end of a rollover collision reveal nothing regarding the relationship of roof deformation, roof strength, or roof strength-to-weight ratio injury causation.'' Nissan stated that deformation and injury severity are both independently associated with roof impact severity.

Agency Response

The agency agrees that as a general principle, a statistical correlation does not in itself prove that a causal relationship exists. However, the Strashny study was designed with a strict focus to only include injury scenarios where the intruding roof was the injury source. The study compared cases where there was intrusion to cases where there was no intrusion and found that as intrusion increases, the probability of, and severity of injury also increases. The study controlled for crash severity using quarter turns, which is the best available metric for rollover severity. Contrary to SAFE's contention, the study does not compare crashes over 2 quarter turns as a group. Rather, it compares only crashes of similar severity as defined by each iterative quarter turn exposure. Thus, a vehicle that experienced 3 quarter turns would only be compared to other vehicles that experienced 3 quarter turns. SAFE's and Ford's arguments appear to imply that any difference in roof intrusion must be due to a difference in impact severity rather than roof strength or design, whereas the Strashny study, by controlling for quarter turns, attempts to minimize differences due to impact severity. Further, the study included only belted cases which minimized the impact of ''diving'' as an injury cause.

There are logical reasons to believe that a collapsing roof that strikes an occupant's head at the nearly instantaneous impact velocity experienced when structures deform might cause serious injury. These types of injuries were documented by Rechnitzer and Lane in a detailed investigation of 43 rollover crashes.[46] The agency believes that the statistically significant relationship between roof intrusion and belted occupant injury found in the Strashny study indicates not just a suggestion, but a probability that increasing roof strength reduces injuries.

Regarding the SAFE matched pair comparison project, the agency notes that the dummy necks used in the tests were not biofidelic. They are rigid structures that do not allow for the normal bending that occurs in the human spine. The agency believes that lateral bending plays an important role in determining the degree of injury sustained by humans in rollovers, and does not view these results as an adequate assessment of injury in humans during rollover crashes.

VIII. Rulemaking Analyses and Notices

a. Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The agency has considered the impact of this rulemaking action under Executive Order 12866 and the Department of Transportation's regulatory policies and procedures. This rulemaking is economically significant and was reviewed by the Office of Management and Budget under E.O. 12866, ''Regulatory Planning and Review.'' The rulemaking action has also been determined to be significant under the Department's regulatory policies and procedures. The FRIA fully discusses the estimated costs and benefits of this rulemaking action. The costs and benefits are summarized in section VII of this preamble, *supra.*

b. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980, as amended, requires agencies to evaluate the potential effects of their proposed and final rules on small businesses, small organizations and small governmental jurisdictions. I hereby certify that this rule will not have a significant economic impact on a substantial number of small entities. Small organizations and small governmental units will not be significantly affected since the potential cost impacts associated with this action will not significantly affect the price of new motor vehicles.

The rule directly affects motor vehicle manufacturers, second stage or final manufacturers, and alterers. The majority of motor vehicle manufacturers would not qualify as a small business. There are six manufacturers of passenger cars that are small businesses.[47] These manufacturers, along with manufacturers that do not qualify as a small business, are already required to comply with the current requirements of FMVSS No. 216 for vehicles with a GVWR of 2,722 kilograms (6,000 pounds) or less. Improving performance as necessary to meet the upgraded requirements, and for the requirements for heavier light vehicles, can be achieved by means including strengthening reinforcements in roof pillars, by increasing the gauge of steel used in roofs and by using higher strength materials.

All of these small manufacturers could be affected by the upgraded requirements. However, the economic impact upon these entities will not be significant for the following reasons.

(1) Potential cost increases are very small compared to the price of the vehicles being manufactured and can be passed on to the consumer.

(2) Some of the vehicles manufactured by these small businesses are convertibles not subject to this requirement.

(3) The rule provides several years leadtime, and small volume manufacturers are given the option of waiting until the end of the phase-in (until September 1, 2015) to meet the upgraded requirements for lighter vehicles. All manufacturers are given until September 1, 2016 to meet the requirements for the heavier light vehicles.

Most of the intermediate and final stage manufacturers of vehicles built in two or more stages and alterers have 1,000 or fewer employees. Some of these companies already are required to comply with the current requirements of FMVSS No. 216 for vehicles with a GVWR of 2,722 kilograms (6,000 pounds) or less. We have included several provisions in the final rule to address the special needs of multi-stage manufacturers and alterers. While the number of these small businesses potentially affected by this rule is substantial, the economic impact upon these entities will not be significant for the following reasons:

(1) We are providing a FMVSS No. 220 option for multi-stage vehicles, except those built on chassis-cab incomplete vehicles, and for vehicles

[46] Rechnutzer, George and Lane, John, ''Rollover Crash Study, Vehicle Design and Occupant Injuries'', Monash University, 1994.

[47] Fisker, Mosler, Panoz, Saleen, Standard Taxi, Tesla.

which are changed in certain ways to raise the height of the roof. This aspect of our rule affords significant economic relief to small businesses, some of which are already required by States to certify to the requirements of FMVSS No. 220.

(2) Small businesses using chassis cabs will be in position to take advantage of ''pass-through certification,'' and therefore are not expected to incur any additional expenditures.

(3) We are excluding a narrow category of multi-stage vehicles from FMVSS No. 216 altogether, multi-stage trucks built on incomplete vehicles other than chassis cabs.

(4) Some of the vehicles manufactured by these small businesses are convertibles.

(5) Final stage manufacturers and alterers can wait until one year after the end of the phase-in to meet the new requirements.

Accordingly, there will not be a significant economic impact on small businesses, small organizations, or small governmental units by these amendments. For these reasons, the agency has not prepared a regulatory flexibility analysis.

c. Executive Order 13132 (Federalism)

NHTSA has examined today's final rule pursuant to Executive Order 13132 (64 FR 43255, August 10, 1999) and concluded that no additional consultation with States, local governments or their representatives is mandated beyond the rulemaking process. The agency has concluded that the rule does not have federalism implications because the rule does not have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

Further, after careful consideration of the public comments and further analysis of the issues, NHTSA concludes that no consultation is needed to discuss the preemptive effect of today's rule. NHTSA's safety standards can have preemptive effect in at least two ways. First, the National Traffic and Motor Vehicle Safety Act contains an express preemption provision: ''When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter.'' 49 U.S.C. 30103(b)(1). It is this statutory command that unavoidably preempts non-identical State legislative and administrative law, not today's rulemaking, so consultation would be unnecessary.

Second, the Supreme Court has recognized the possibility of implied preemption: State requirements imposed on motor vehicle manufacturers, including sanctions imposed by State tort law, can stand as an obstacle to the accomplishment and execution of a NHTSA safety standard. When such a conflict is discerned, the Supremacy Clause of the Constitution makes the State requirements unenforceable. *See Geier* v. *American Honda Motor Co.,* 529 U.S. 861 (2000). For the reasons explained below, the agency has reconsidered the tentative position presented in the NPRM and does not currently foresee any potential State tort requirements that might conflict with today's final rule.

In the NPRM, NHTSA considered the objectives of the proposed roof crush resistance upgrade in the context of the agency's overall rollover plan and addressed whether there might be specific conflicts between the standard and anticipated State tort law. The agency opined on the possibility that certain State tort law actions might conflict with an improved Federal roof crush resistance standard and that those conflicts could result in those actions being determined by a court to be impliedly preempted. It presented the following tentative conclusions:

- Overall, safety would best be promoted by the careful balance it had struck in the proposal among a variety of considerations and objectives regarding rollover safety.
- The proposal to upgrade roof crush resistance was a part of a comprehensive plan for reducing the serious risk of rollover crashes and the risk of death and serious injury in those crashes. The objective of the proposal was to increase the requirement for roof crush resistance only to the extent that it can be done without creating too much risk of negatively affecting vehicle dynamics and rollover propensity. Excessively increasing current roof crush resistance requirements could lead vehicle manufacturers to add weight to vehicle roof and pillars, thereby raising the vehicle center of gravity (CG) and increasing rollover propensity.
- Some methods of improving roof crush resistance are costlier than others and the resources diverted to increasing roof strength using one of the costlier methods could delay or even prevent vehicle manufacturers from equipping their vehicles with advanced vehicle technologies for reducing rollovers.
- Either a broad State performance requirement for levels of roof crush resistance greater than those proposed or a narrower requirement mandating that increased roof strength be achieved by a particular specified means, could frustrate the agency's objectives by upsetting the balance between efforts to increase roof strength and reduce rollover propensity.
- Based on this conflict analysis, if the proposal were adopted as a final rule, all conflicting State common law requirements, including rules of tort law, would be subject to being found to be impliedly preempted.

1. Public Comments About NHTSA's Tentative Views on Conflict and Preemption

Vehicle manufacturers and one legal advocacy organization strongly supported the view that an upgraded roof crush standard would conflict with and therefore impliedly preempt State rules of tort law imposing more stringent requirements than the one ultimately adopted by NHTSA.

Consumer advocacy groups, members of Congress and State officials, trial lawyers, consultants and members of academia, and private individuals strongly opposed our view that there could be conflict. The opposing letters from State officials included one signed by 27 State Attorneys General and the National Conference of State Legislatures.

A summary of the primary arguments of the commenters on each side follows:

A. Primary Arguments for the Existence of Conflict

- There is a limit to the increases in roof crush resistance or stiffening that can practicably be achieved across the fleet without introducing unacceptable risk of undesirable effects, such as increases in the height of the center of gravity of the vehicle or diverting resources away from other promising advanced vehicle technologies for reducing rollovers.
- Small additions of weight and small changes in center of gravity height will, based on NHTSA's analysis presented in Appendix A of the PRIA, have large consequences on the level of rollover risk and risk of associated fatalities and injuries. Moreover, the weight impacts of meeting requirements at different SWR levels are greater than estimated by the agency in the PRIA.
- There is a conflict between the agency's comprehensive rollover policy and some state common law rules related to roof strength. Any state

common law rule that would purport to impose a duty to design vehicles' roofs to meet a more stringent strength requirement has the potential, as a practical matter, to result in a reduction in vehicle stability (as measured by average SSF), at least for some vehicle models in the fleet. Such a result would undercut NHTSA's overall rollover mitigation policy that has been developed to balance the competing goals of preventing rollover crashes in the first place and of reducing the risk of injury when such crashes nevertheless occur.

- The creation of a patchwork of different State roof crush resistance requirements across the country would not contribute toward achievement of an appropriate balancing of roof strength and rollover propensity.
- Being required to devote resources to increasing roof strength using one of the costlier methods could delay or even prevent manufacturers from installing advanced vehicle technologies for reducing rollovers.
- The agency should also be concerned about another potential safety conflict, in the area of vehicle compatibility, as the addition of weight increases the chances of vehicle mass mismatch in a collision.

B. Primary Arguments Against the Existence of Conflict

- NHTSA's claims that a more stringent standard could result in increased vehicle weight and decreased stability are not supported by the record.
- Manufacturers can strengthen roofs by a variety of means without significantly increasing weight, and advanced steels and other lightweight materials can be used to strengthen roofs without a weight increase.
- NHTSA's data show that increases in roof structural strength will not have a physically measurable influence on CG height. Production of vehicles that exceed the NHTSA standard would enhance the safety objectives of that standard.
- NHTSA did not provide any examples of vehicles with elevated rollover risk due to weight added to the roof. An examination of the vehicle fleet, including the Volvo XC90 and vehicles with high SWRs tested after publication of the NPRM, shows that the agency's concerns are unfounded.
- The agency's statement that resources used to increase roof strength could divert resources away from other promising advanced vehicle technologies for reducing rollovers is unsupported and speculative. Manufacturers can do both.
- Given the agency's New Car Assessment Program, manufacturers would improve roof strength using design changes that avoid a lower star rating.
- The tort system would provide the best incentive for manufacturers to make design decisions that will not increase rollover propensity.
- The premise behind NHTSA's analysis is incorrect because plaintiffs alleging a design defect must prove that the alternative design would not have created more injuries in other accidents.
- The *Geier* case does not support preemption as the situation it addressed involved two key factors that are not present here: Consumer resistance to air bags and the need to foster innovation in passive restraint technology. Preemption in this case is inconsistent with the statutory savings clause.
- The agency's statement is overbroad in being applied to all vehicles covered by the standard, without regard to their individual design characteristics or their manufacturers' ability to exceed the standard without negatively affecting vehicle dynamics and rollover propensity.

2. Preemption, Geier and the National Traffic and Motor Vehicle Safety Act

In *Geier,* 529 U.S. 861 (2000), the Supreme Court specifically addressed the possible preemptive effect of the National Traffic and Motor Vehicle Safety Act, taken together with Federal motor vehicle safety standards issued under that Act, on common law tort claims. The issue before the court was whether the Safety Act, together with FMVSS No. 208, preempted a lawsuit claiming a 1987 car was defective for lacking a driver air bag. When the car was manufactured, FMVSS No. 208 had required manufacturers to equip some but not all of their vehicles with passive restraints.

The conclusions of *Geier* can be summarized as follows:

- The Safety Act's provision expressly preempting state ''standards'' does not preempt common law tort claims. The issue of whether the term ''standards'' includes tort law actions is resolved by another provision in the Safety Act—the ''savings'' clause. That provision states that ''(c)ompliance with'' a Federal safety standard ''does not exempt any person from any liability under common law.''
- The savings clause preserves those tort actions that seek to establish greater safety than the minimum safety achieved by a Federal regulation intended to provide a floor.
- The savings clause does not bar the working of conflict preemption principles. Nor does the preemption provision, the saving provision, or both read together, create some kind of ''special burden'' beyond that inherent in ordinary preemption principles that would specially disfavor pre-emption. The two provisions, read together, reflect a neutral policy, not a specially favorable or unfavorable policy, toward the application of ordinary conflict preemption principles.
- The preemption provision itself reflects a desire to subject the industry to a single, uniform set of Federal safety standards. On the other hand, the savings clause reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries not only create, but also enforce, safety standards, while simultaneously providing necessary compensation to victims. Nothing in any natural reading of the two provisions favors one set of policies over the other where a jury-imposed safety standard actually conflicts with a Federal safety standard.
- A court should not find preemption too readily in the absence of clear evidence of a conflict.
- The common-law ''no airbag'' action before the Court was preempted because it actually conflicted with FMVSS No. 208. That standard sought a gradually developing mix of alternative passive restraint devices for safety-related reasons. The rule of state tort law sought by the petitioner would have required manufacturers of all similar cars to install air bags rather than other passive restraint systems, thereby presenting an obstacle to the variety and mix of devices that the Federal regulation sought.

3. Agency Testing and Discussion

In the NPRM, we noted the well-established physical relationship between center of gravity (CG) and rollover propensity. It is reflected in our NCAP ratings program. All other things being equal, increasing the CG of a vehicle increases its rollover propensity.

We also posited a second relationship, one between CG and SWR. We identified a hypothetical fleet impact in which the weight and center of gravity effects of complying with a 2.5 SWR requirement could result in additional rollovers and added fatalities. This analysis was presented in Appendix A of the PRIA. As discussed in that document, there were various uncertainties and caveats associated with the analysis. The agency believed that manufacturers would take steps to avoid negative effects on rollover propensity.

We note that NHTSA has updated that analysis for the FRIA, addressing 2.5, 3.0 and 3.5 SWR alternatives. As discussed in the FRIA, the agency believes that, for the alternatives analyzed, manufacturers could and would take steps sufficient to avoid negative effects on rollover propensity if sufficient leadtime is provided for them to do so.

As noted earlier, NHTSA has done testing of vehicles measuring roof crush resistance performance, much of it completed after publication of the NPRM. Twelve of the vehicles tested by NHTSA after the NPRM had (one-sided) SWRs of 3.9 or higher. As part of our fleet testing, NHTSA has also tested three paired vehicles [48] for which manufacturers significantly increased SWR as part of redesigning the vehicle. In each case, SWR was increased without increasing rollover propensity as measured by SSF. In two of the cases, CG stayed about the same (it did not increase); in the other, CG did increase but other changes (track width) offset the negative effect of higher CG.

4. Agency Views About Conflict Preemption

As discussed above, the Supreme Court has recognized the possibility of implied preemption: State requirements imposed on motor vehicle manufacturers, including sanctions imposed by State tort law, can stand as obstacles to the accomplishment and execution of a NHTSA safety standard. When such a conflict is discerned, the Supremacy Clause of the Constitution makes the State requirements unenforceable.

Since implied preemption turns upon the existence of an actual conflict, we, as the agency charged with effectively carrying out the Act and possessing substantial technical expertise regarding the subject matter and purposes of the Federal motor vehicle safety standards and the Vehicle Safety Act, address whether conflicts exist in our rulemaking notices. In most rulemakings, we do not foresee the possibility of there being any state requirements that would create conflicts.

Following the principles set forth in *Geier,* we are providing our views concerning the issue of whether conflicts may exist in connection with the requirements being adopted in this final rule. We believe that this is appropriately responsive to statements by several Supreme Court justices encouraging agencies to consider and discuss the possible preemptive effects of their rulemakings.[49]

After considering the public comments on the proposal and considering today's final rule, NHTSA has reconsidered the tentative position presented in the NPRM and do not currently foresee any potential State tort requirements that might conflict with today's final rule. Without any conflict, there could not be any implied preemption.

In the NPRM, we stated that it was our tentative judgment that safety would be best promoted by the balance we had struck in the proposal among a variety of considerations and objectives regarding rollover safety. We explained that it was the objective of the proposal to increase the requirement for roof crush resistance only to the extent that it could be done without creating too much risk of negatively affecting vehicle dynamics and rollover propensity. We expressed concern that excessively increasing current roof crush resistance requirements could lead vehicle manufacturers to add weight to vehicle roof and pillars, thereby raising the vehicle center of gravity (CG) and increasing rollover propensity. As part of our tentative position, we indicated in the NPRM that a broad State performance requirement for more stringent levels of roof crush resistance could frustrate the agency's objectives by upsetting the balance between efforts to increase roof strength and reduce rollover propensity.

Based on the record for this final rule, we cannot identify a level of stringency of roof crush resistance above which tort laws would conflict. For example, we cannot say that any particular levels of roof crush resistance above those required by today's rule would likely result in unacceptable levels of rollover resistance. Similarly, we cannot identify any level of roof crush resistance above which it would be expected that net safety benefits would diminish.

As discussed earlier, there are ways of improving roof strength that avoid or minimize adding weight high in the vehicle (e.g., use of advanced lightweight materials), and there are other design characteristics that can be used to offset or eliminate any potential change in rollover stability due to increased CG (e.g., increased track width). Moreover, during our fleet testing, we observed three paired vehicles for which manufacturers significantly increased SWR as part of redesigning the vehicle, without increasing rollover propensity as measured by SSF. Finally, while there would be increasing technical challenges for vehicle manufacturers to meet successively higher SWR levels above the alternatives we analyzed, those challenges would vary considerably depending on the nature of the vehicle, e.g., weight, size, geometry, etc., making it essentially impossible for NHTSA to define a level of roof crush stringency likely to cause a conflict with our rollover resistance objectives.

As to another concern we identified in the NPRM, the possibility that some kinds of State tort laws requiring improved roof crush resistance might cause a diversion of resources away from manufacturer efforts to use advanced technologies to reduce rollovers, we have concluded that it is not possible to identify how such resources would otherwise have been used. Specifically, there is not a basis to conclude that such resources would otherwise have been used for improving rollover resistance or improving safety. Therefore, we believe that such tort laws do not create a conflict on these grounds.

Finally, as noted earlier, vehicle manufacturers suggested that we consider a potential policy conflict in the area of vehicle compatibility. They stated that the addition of weight would increase the chances of vehicle mass mismatch in a collision. However, mass mismatch is only one key aspect of vehicle-to-vehicle crash compatibility, particularly in frontal crashes. Vehicle stiffness and geometric alignment are also important factors in vehicle compatibility. While it is hypothetically possible that some kinds of tort laws on roof strength could contribute toward greater differential in weight between some vehicles, e.g., if they resulted in manufacturers adding significant weight to heavier vehicles, we believe it is not possible to define any level of stringency of roof crush resistance above which tort laws would create a conflict with our vehicle compatibility objectives. We note that in redesigning vehicles in ways that improve roof strength and also minimize impacts on vehicle mass, manufacturers have many design options to avoid or minimize adding weight (e.g., use of advanced light materials in various parts of the vehicle, including ones other than those related to the roof). There may also be ways of offsetting any possible incremental change in fleet compatibility due to increased weight mismatch that might occur with vehicle geometric and/or stiffness design

[48] 2002 and 2007 Toyota Camry; 2003 and 2007 Toyota Tacoma; 2004 and 2008 Honda Accord.

[49] See, e.g., *Hillsborough County* v. *Automated Medical Laboratories, Inc.,* 471 U.S. 707, 718 (1985); *Medtronic, Inc.,* v. *Lohr,* 518 U.S. 470, 506 (1996) (Justice Breyer, in concurrence); and *Geier* v. *American Honda Motor Co.,* 529 U.S. 861, 908 (2000) (Justice Stevens, in dissent).

modifications. We note that the vehicle manufacturers did not provide technical analysis addressing the latter issue.

Therefore, although under the principles enunciated in *Geier* it is possible that a rule of State tort law could conflict with a NHTSA safety standard if it created an obstacle to the accomplishment and execution of that standard, we do not currently foresee the likelihood of any such tort requirements and do not have a basis for concluding that any particular levels of stringency would create such a conflict.

d. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA) requires Federal agencies to prepare a written assessment of the costs, benefits and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually (adjusted annually for inflation, with base year of 1995). These effects are discussed earlier in this preamble and in the FRIA. UMRA also requires an agency issuing a final rule subject to the Act to select the ''least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule.''

The preamble and the FRIA identify and consider a number of alternatives, concerning factors such as single- or two-sided test requirements, different SWR levels, and phase-in schedule. Alternatives considered by and rejected by us would not fully achieve the objectives of the alternative preferred by NHTSA (a reasonable balance between the benefits and costs). The agency believes that it has selected the most cost-effective alternative that achieves the objectives of the rulemaking.

e. National Environmental Policy Act

NHTSA has analyzed this final rule for the purposes of the National Environmental Policy Act. The agency has determined that implementation of this action will not have any significant impact on the quality of the human environment.

f. Executive Order 12778 (Civil Justice Reform)

With respect to the review of the promulgation of a new regulation, section 3(b) of Executive Order 12988, ''Civil Justice Reform'' (61 FR 4729, February 7, 1996) requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect; (2) clearly specifies the effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct, while promoting simplification and burden reduction; (4) clearly specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. This document is consistent with that requirement.

Pursuant to this Order, NHTSA notes as follows. The preemptive effect of this rule is discussed above. NHTSA notes further that there is no requirement that individuals submit a petition for reconsideration or pursue other administrative proceeding before they may file suit in court.

g. Plain Language

Executive Order 12866 requires each agency to write all rules in plain language. Application of the principles of plain language includes consideration of the following questions:

- Have we organized the material to suit the public's needs?
- Are the requirements in the rule clearly stated?
- Does the rule contain technical language or jargon that isn't clear?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand?
- Would more (but shorter) sections be better?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rule easier to understand?

If you have any responses to these questions, please write to us with your views.

h. Paperwork Reduction Act (PRA)

Under the PRA of 1995, a person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid OMB control number. The final rule contains a collection of information because of the proposed phase-in reporting requirements. There is no burden to the general public.

The collection of information requires manufacturers of passenger cars and multipurpose passenger vehicles, trucks and buses with a GVWR of 2,722 kilograms (6,000 pounds) or less to annually submit a report, and maintain records related to the report, concerning the number of such vehicles that meet the upgraded roof strength requirements. The phase-in will cover three years. The purpose of the reporting and recordkeeping requirements is to assist the agency in determining whether a manufacturer of vehicles has complied with the requirements during the phase-in period.

We will submit a request for OMB clearance of the collection of information required under today's final rule in time to obtain clearance prior to the beginning of the phase-in at the beginning of September 2012.

These requirements and our estimates of the burden to vehicle manufacturers are as follows:

NHTSA estimates that there are 21 manufacturers of passenger cars, multipurpose passenger vehicles, trucks, and buses with a GVWR of 2,722 kilograms (6,000 pounds) or less;

NHTSA estimates that the total annual reporting and recordkeeping burden resulting from the collection of information is 1,260 hours;

NHTSA estimates that the total annual cost burden, in U.S. dollars, will be $0. No additional resources will be expended by vehicle manufacturers to gather annual production information because they already compile this data for their own use.

A **Federal Register** document must provide a 60-day comment period concerning the collection of information. The Office of Management and Budget (OMB) promulgated regulations describing what must be included in such a document. Under OMB's regulations (5 CFR 320.8(d)), agencies must ask for public comment on the following:

(1) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) How to enhance the quality, utility, and clarity of the information to be collected; and,

(4) How to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

i. National Technology Transfer and Advancement Act

Under the National Technology Transfer and Advancement Act of 1995 (NTTAA) (Pub. L. 104–113),

All Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards

bodies, using such technical standards as a means to carry out policy objectives or activities determined by the agencies and departments.

Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies, such as the International Organization for Standardization (ISO) and the Society of Automotive Engineers (SAE). The NTTAA directs us to provide Congress, through OMB, explanations when we decide not to use available and applicable voluntary consensus standards.

We are incorporating the voluntary consensus standard SAE Standard J826 ''Devices for Use in Defining and Measuring Vehicle Seating Accommodation,'' SAE J826 (rev. July 1995) into the requirements of FMVSS No. 216a as part of this rulemaking. As discussed in the NPRM, we evaluated the SAE inverted drop testing procedure, but decided against proposing it.

List of Subjects

49 CFR Part 571

Imports, Incorporation by reference, Motor vehicle safety, Reporting and recordkeeping requirements, Tires.

49 CFR Part 585

Motor vehicle safety, Reporting and recordkeeping requirements.

■ In consideration of the foregoing, NHTSA amends 49 CFR Chapter V as set forth below.

PART 571—FEDERAL MOTOR VEHICLE SAFETY STANDARDS

■ 1. The authority citation for part 571 of title 49 continues to read as follows:

Authority: 49 U.S.C. 322, 30111, 30115, 30117, and 30166; delegation of authority at 49 CFR 1.50.

■ 2. Section 571.216 is amended by revising the section heading and S3 to read as follows:

§ 571.216 Standard No. 216; Roof crush resistance; Applicable unless a vehicle is certified to § 571.216a.

* * * * *

S3. *Application.*

(a) This standard applies to passenger cars, and to multipurpose passenger vehicles, trucks and buses with a GVWR of 2,722 kilograms (6,000 pounds) or less. However, it does not apply to—

(a) School buses;

(b) Vehicles that conform to the rollover test requirements (S5.3) of Standard No. 208 (§ 571.208) by means that require no action by vehicle occupants;

(c) Convertibles, except for optional compliance with the standard as an alternative to the rollover test requirements in S5.3 of Standard No. 208; or

(d) Vehicles certified to comply with § 571.216a.

* * * * *

■ 3. Section 571.216a is added to read as follows:

§ 571.216a Standard No. 216a; Roof crush resistance; Upgraded standard.

S1. *Scope.* This standard establishes strength requirements for the passenger compartment roof.

S2. *Purpose.* The purpose of this standard is to reduce deaths and injuries due to the crushing of the roof into the occupant compartment in rollover crashes.

S3. *Application, incorporation by reference, and selection of compliance options.*

S3.1 *Application.*

(a) This standard applies to passenger cars, and to multipurpose passenger vehicles, trucks and buses with a GVWR of 4,536 kilograms (10,000 pounds) or less, according to the implementation schedule specified in S8 and S9 of this section. However, it does not apply to—

(1) School buses;

(2) Vehicles that conform to the rollover test requirements (S5.3) of Standard No. 208 (§ 571.208) by means that require no action by vehicle occupants;

(3) Convertibles, except for optional compliance with the standard as an alternative to the rollover test requirement (S5.3) of Standard No. 208; or

(4) Trucks built in two or more stages with a GVWR greater than 2,722 kilograms (6,000 pounds) not built using a chassis cab.

(b) At the option of the manufacturer, vehicles within either of the following categories may comply with the roof crush requirements (S4) of Standard No. 220 (§ 571.220) instead of the requirements of this standard:

(1) Vehicles built in two or more stages, other than vehicles built using a chassis cab;

(2) Vehicles with a GVWR greater than 2,722 kilograms (6,000 pounds) that have an altered roof as defined by S4 of this section.

(c) Manufacturers may comply with the standard in this § 571.216a as an alternative to § 571.216.

S3.2 *Incorporation by reference.* Society of Automotive Engineers (SAE) Standard J826 ''Devices for Use in Defining and Measuring Vehicle Seating Accommodation,'' SAE J826 (rev. July 1995) is incorporated by reference in S7.2 of this section. The Director of the Federal Register has approved the incorporation by reference of this material in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. A copy of SAE J826 (rev. Jul 95) may be obtained from SAE at the Society of Automotive Engineers, Inc., 400 Commonwealth Drive, Warrendale, PA 15096. *Phone:* 1–724–776–4841; *Web: http://www.sae.org.* A copy of SAE J826 (July 1995) may be inspected at NHTSA's Technical Information Services, 1200 New Jersey Avenue, Washington, DC 20590, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

S3.3 *Selection of compliance option.* Where manufacturer options are specified, the manufacturer shall select the option by the time it certifies the vehicle and may not thereafter select a different option for the vehicle. Each manufacturer shall, upon the request from the National Highway Traffic Safety Administration, provide information regarding which of the compliance options it selected for a particular vehicle or make/model.

S4. *Definitions.*

Altered roof means the replacement roof on a motor vehicle whose original roof has been removed, in part or in total, and replaced by a roof that is higher than the original roof. The replacement roof on a motor vehicle whose original roof has been replaced, in whole or in part, by a roof that consists of glazing materials, such as those in T-tops and sunroofs, and is located at the level of the original roof, is not considered to be an altered roof.

Convertible means a vehicle whose A-pillars are not joined with the B-pillars (or rearmost pillars) by a fixed, rigid structural member.

S5. *Requirements.*

S5.1 When the test device described in S6 is used to apply a force to a vehicle's roof in accordance with S7, first to one side of the roof and then to the other side of the roof:

(a) The lower surface of the test device must not move more than 127 millimeters, and

(b) No load greater than 222 Newtons (50 pounds) may be applied to the head form specified in S5.2 of 49 CFR 571.201 located at the head position of a 50th percentile adult male in accordance with S7.2 of this section.

S5.2 The maximum applied force to the vehicle's roof in Newtons is:

(a) For vehicles with a GVWR of 2,722 kilograms (6,000 pounds) or less, any value up to and including 3.0 times the unloaded vehicle weight of the vehicle, measured in kilograms and multiplied by 9.8, and

(b) For vehicles with a GVWR greater than 2,722 kilograms (6,000 pounds), any value up to and including 1.5 times the unloaded vehicle weight of the vehicle, measured in kilograms and multiplied by 9.8.

S6. *Test device.* The test device is a rigid unyielding block whose lower surface is a flat rectangle measuring 762 millimeters by 1,829 millimeters.

S7. *Test procedure.* Each vehicle must be capable of meeting the requirements of S5 when tested in accordance with the procedure in S7.1 through S7.6.

S7.1 Support the vehicle off its suspension and rigidly secure the sills and the chassis frame (when applicable) of the vehicle on a rigid horizontal surface(s) at a longitudinal attitude of 0 degrees ± 0.5 degrees. Measure the longitudinal vehicle attitude along both the driver and passenger sill. Determine the lateral vehicle attitude by measuring the vertical distance between a level surface and a standard reference point on the bottom of the driver and passenger side sills. The difference between the vertical distance measured on the driver side and the passenger side sills is not more than ± 10 mm. Close all windows, close and lock all doors, and close and secure any moveable roof panel, moveable shade, or removable roof structure in place over the occupant compartment. Remove roof racks or other non-structural components. For a vehicle built on a chassis-cab incomplete vehicle that has some portion of the added body structure above the height of the incomplete vehicle, remove the entire added body structure prior to testing (the vehicle's unloaded vehicle weight as specified in S5 includes the weight of the added body structure).

S7.2 Adjust the seats in accordance with S8.3 of 49 CFR 571.214. Position the top center of the head form specified in S5.2 of 49 CFR 571.201 at the location of the top center of the Head Restraint Measurement Device (HRMD) specified in 49 CFR 571.202a, in the front outboard designated seating position on the side of the vehicle being tested as follows:

(a) Position the three dimensional manikin specified in Society of Automotive Engineers (SAE) Surface Vehicle Standard J826, revised July 1995, ''Devices for Use in Defining and Measuring Vehicle Seating Accommodation,'' (incorporated by reference, see paragraph S3.2), in accordance to the seating procedure specified in that document, except that the length of the lower leg and thigh segments of the H-point machine are adjusted to 414 and 401 millimeters, respectively, instead of the 50th percentile values specified in Table 1 of SAE J826 (July 1995).

(b) Remove four torso weights from the three-dimensional manikin specified in SAE J826 (July 1995) (two from the left side and two from the right side), replace with two HRMD torso weights (one on each side), and attach and level the HRMD head form.

(c) Mark the location of the top center of the HRMD in three dimensional space to locate the top center of the head form specified in S5.2 of 49 CFR 571.201.

S7.3 Orient the test device as shown in Figure 1 of this section, so that—

(a) Its longitudinal axis is at a forward angle (in side view) of 5 degrees (± 0.5 degrees) below the horizontal, and is parallel to the vertical plane through the vehicle's longitudinal centerline;

(b) Its transverse axis is at an outboard angle, in the front view projection, of 25 degrees below the horizontal (± 0.5 degrees).

S7.4 Maintaining the orientation specified in S7.3 of this section—

(a) Lower the test device until it initially makes contact with the roof of the vehicle.

(b) Position the test device so that—

(1) The longitudinal centerline on its lower surface is within 10 mm of the initial point of contact, or on the center of the initial contact area, with the roof; and

(2) The midpoint of the forward edge of the lower surface of the test device is within 10 mm of the transverse vertical plane 254 mm forward of the forwardmost point on the exterior surface of the roof, including windshield trim, that lies in the longitudinal vertical plane passing through the vehicle's longitudinal centerline.

S7.5 Apply force so that the test device moves in a downward direction perpendicular to the lower surface of the test device at a rate of not more than 13 millimeters per second until reaching the force level specified in S5. Guide the test device so that throughout the test it moves, without rotation, in a straight line with its lower surface oriented as specified in S7.3(a) and S7.3(b). Complete the test within 120 seconds.

S7.6 Repeat the test on the other side of the vehicle.

S8. *Phase-in schedule for vehicles with a GVWR of 2,722 kilograms (6,000 pounds) or less.*

S8.1 *Vehicles manufactured on or after September 1, 2012, and before September 1, 2013.* For vehicles manufactured on or after September 1, 2012, and before September 1, 2013, the number of vehicles complying with this standard must not be less than 25 percent of:

(a) The manufacturer's average annual production of vehicles manufactured on or after September 1, 2009, and before September 1, 2012; or

(b) The manufacturer's production on or after September 1, 2012, and before September 1, 2013.

S8.2 *Vehicles manufactured on or after September 1, 2013, and before September 1, 2014.* For vehicles manufactured on or after September 1, 2013, and before September 1, 2014, the number of vehicles complying with this standard must not be less than 50 percent of:

(a) The manufacturer's average annual production of vehicles manufactured on or after September 1, 2010, and before September 1, 2013; or

(b) The manufacturer's production on or after September 1, 2013, and before September 1, 2014.

S8.3 *Vehicles manufactured on or after September 1, 2014, and before September 1, 2015.* For vehicles manufactured on or after September 1, 2014, and before September 1, 2015, the number of vehicles complying with this standard must not be less than 75 percent of:

(a) The manufacturer's average annual production of vehicles manufactured on or after September 1, 2011, and before September 1, 2014; or

(b) The manufacturer's production on or after September 1, 2014, and before September 1, 2015.

S8.4 *Vehicles manufactured on or after September 1, 2015.* Except as provided in S8.8, each vehicle manufactured on or after September 1, 2015 must comply with this standard.

S8.5 *Calculation of complying vehicles.*

(a) For purpose of complying with S8.1, a manufacturer may count a vehicle if it is certified as complying with this standard and is manufactured on or after September 1, 2012, but before September 1, 2013.

(b) For purposes of complying with S8.2, a manufacturer may count a vehicle if it:

(1) Is certified as complying with this standard and is manufactured on or after September 1, 2012, but before September 1, 2014; and

(2) Is not counted toward compliance with S8.1.

(c) For purposes of complying with S8.3, a manufacturer may count a vehicle if it:

(1) Is certified as complying with this standard and is manufactured on or after September 1, 2012, but before September 1, 2015; and

(2) Is not counted toward compliance with S8.1 or S8.2.

S8.6 *Vehicles produced by more than one manufacturer.*

S8.6.1 For the purpose of calculating average annual production of vehicles for each manufacturer and the number of vehicles manufactured by each manufacturer under S8.1 through S8.3, a vehicle produced by more than one manufacturer must be attributed to a single manufacturer as follows, subject to S8.6.2:

(a) A vehicle that is imported must be attributed to the importer.

(b) A vehicle manufactured in the United States by more than one manufacturer, one of which also markets the vehicle, must be attributed to the manufacturer that markets the vehicle.

S8.6.2 A vehicle produced by more than one manufacturer must be attributed to any one of the vehicle's manufacturers specified by an express written contract, reported to the National Highway Traffic Safety Administration under 49 CFR Part 585, between the manufacturer so specified and the manufacturer to which the vehicle would otherwise be attributed under S8.6.1.

S8.7 *Small volume manufacturers.*

Vehicles manufactured during any of the three years of the September 1, 2012 through August 31, 2015 phase-in by a manufacturer that produces fewer than 5,000 vehicles for sale in the United States during that year are not subject to the requirements of S8.1, S8.2, and S8.3.

S8.8 *Final-stage manufacturers and alterers.*

Vehicles that are manufactured in two or more stages or that are altered (within the meaning of 49 CFR 567.7) after having previously been certified in accordance with Part 567 of this chapter are not subject to the requirements of S8.1 through S8.3. Instead, all vehicles produced by these manufacturers on or after September 1, 2016 must comply with this standard.

S9 *Vehicles with a GVWR above 2,722 kilograms (6,000 pounds).*

(a) Except as provided in S9(b), each vehicle manufactured on or after September 1, 2016 must comply with this standard.

(b) Vehicles that are manufactured in two or more stages or that are altered (within the meaning of 49 CFR 567.7) after having previously been certified in accordance with Part 567 of this chapter are not subject to the requirements of S8.1 through S8.3. Instead, all vehicles produced by these manufacturers on or after September 1, 2017 must comply with this standard.

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Figure 1 to § 571.216

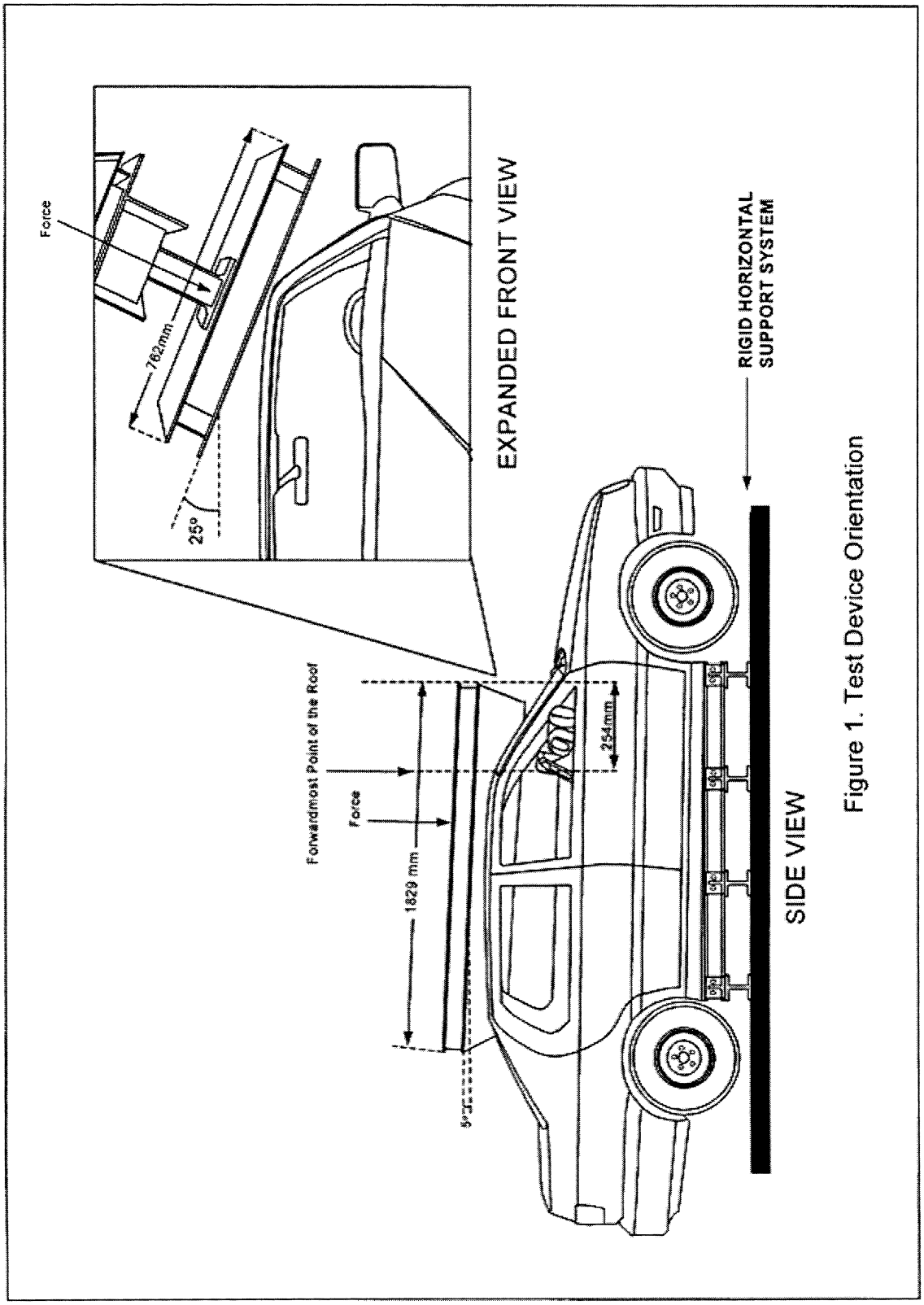

Figure 1. Test Device Orientation

■ 6. The authority citation for Part 585 continues to read as follows:

Authority: 49 U.S.C. 322, 30111, 30115, 30117, and 30166; delegation of authority at 49 CFR 1.50.

PART 585—[AMENDED]

■ 7. Part 585 is amended by adding Subpart L to read as follows:

Subpart L—Roof Crush Resistance Phase-in Reporting Requirements

Sec.
585.111 Scope.
585.112 Purpose.
585.113 Applicability.
585.114 Definitions.
585.115 Response to inquiries.
585.116 Reporting requirements.
585.117 Records.

Subpart L—Roof Crush Resistance Phase-in Reporting Requirements

§ 585.111 Scope.

This subpart establishes requirements for manufacturers of passenger cars, multipurpose passenger vehicles, trucks, and buses with a gross vehicle weight rating of 2,722 kilograms (6,000 pounds) or less to submit a report, and maintain records related to the report, concerning the number of such vehicles that meet the requirements of Standard No. 216a; *Roof crush resistance; Upgraded standard* (49 CFR 571.216a).

§ 585.112 Purpose.

The purpose of these reporting requirements is to assist the National Highway Traffic Safety Administration in determining whether a manufacturer has complied with Standard No. 216a (49 CFR 571.216a).

§ 585.113 Applicability.

This subpart applies to manufacturers of passenger cars, multipurpose passenger vehicles, trucks, and buses with a gross vehicle weight rating of 2,722 kilograms (6,000 pounds) or less. However, this subpart does not apply to manufacturers whose production consists exclusively of vehicles manufactured in two or more stages, and vehicles that are altered after previously having been certified in accordance with part 567 of this chapter. In addition, this subpart does not apply to manufacturers whose production of motor vehicles for the United States market is less than 5,000 vehicles in a production year.

§ 585.114 Definitions.

For the purposes of this subpart:

Production year means the 12-month period between September 1 of one year and August 31 of the following year, inclusive.

§ 585.115 Response to inquiries.

At any time prior to August 31, 2018, each manufacturer must, upon request from the Office of Vehicle Safety Compliance, provide information identifying the vehicles (by make, model, and vehicle identification number) that have been certified as complying with Standard No. 216a (49 CFR 571.216a). The manufacturer's designation of a vehicle as a certified vehicle is irrevocable. Upon request, the manufacturer also must specify whether it intends to utilize carry-forward credits, and the vehicles to which those credits relate.

§ 585.116 Reporting requirements.

(a) *General reporting requirements.* Within 60 days after the end of the production years ending August 31, 2013, August 31, 2014, and August 31, 2015, each manufacturer must submit a report to the National Highway Traffic Safety Administration concerning its compliance with Standard No. 216a (49 CFR 571.216a) for its passenger cars, multipurpose passenger vehicles, trucks, and buses with a gross vehicle weight rating of less than 2,722 kilograms (6,000 pounds) produced in that year. Each report must —

(1) Identify the manufacturer;

(2) State the full name, title, and address of the official responsible for preparing the report;

(3) Identify the production year being reported on;

(4) Contain a statement regarding whether or not the manufacturer complied with the requirements of Standard No. 216a (49 CFR 571.216a) for the period covered by the report and the basis for that statement;

(5) Provide the information specified in paragraph (b) of this section;

(6) Be written in the English language; and

(7) Be submitted to: Administrator, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590.

(b) *Report content*—(1) *Basis for statement of compliance.* Each manufacturer must provide the number of passenger cars, multipurpose passenger vehicles, trucks, and buses with a gross vehicle weight rating of 2,722 kilograms (6,000 pounds) or less, manufactured for sale in the United States for each of the three previous production years, or, at the manufacturer's option, for the current production year. A new manufacturer that has not previously manufactured these vehicles for sale in the United States must report the number of such vehicles manufactured during the current production year.

(2) *Production.* Each manufacturer must report for the production year for which the report is filed: the number of passenger cars, multipurpose passenger vehicles, trucks, and buses with a gross vehicle weight rating of 2,722 kilograms (6,000 pounds) or less that meet Standard No. 216a (49 CFR 571.216a).

(3) *Statement regarding compliance.* Each manufacturer must provide a statement regarding whether or not the manufacturer complied with the requirements of Standard No. 216a (49 CFR 571.216a) as applicable to the period covered by the report, and the basis for that statement. This statement must include an explanation concerning the use of any carry-forward credits.

(4) *Vehicles produced by more than one manufacturer.* Each manufacturer whose reporting of information is affected by one or more of the express written contracts permitted by S8.6.2 of Standard No. 216a (49 CFR 571.216a) must:

(i) Report the existence of each contract, including the names of all parties to the contract, and explain how the contract affects the report being submitted.

(ii) Report the actual number of vehicles covered by each contract.

§ 585.117 Records.

Each manufacturer must maintain records of the Vehicle Identification Number for each vehicle for which information is reported under § 585.116(b)(2) until December 31, 2018.

Issued on: April 30, 2009.

Ronald L. Medford,

Acting Deputy Administrator.

Appendix A—Analysis of Comments Concerning Dynamic Testing

NHTSA did not propose a dynamic test procedure in the NPRM or the SNPRM. However, in the NPRM, we discussed comments received in response to our October 2001 RFC concerning whether we should include some type of dynamic test as part of the roof crush resistance standard. We discussed several types of dynamic tests, including the inverted drop test, the FMVSS No. 208 dolly test, the Controlled Rollover Impact System (CRIS) test, and the Jordan Rollover System (JRS) test. We identified a number of concerns about using these tests in FMVSS No. 216. We noted our belief that the current quasi-static test procedure is repeatable and capable of simulating real-world rollover deformation patterns. We also stated that we were unaware of any dynamic test procedures that provide a sufficiently repeatable test environment.

Several consumer advocacy organizations and a number of other commenters argued that the agency should propose a dynamic test procedure in lieu of the proposed quasi-static test. Ms. Lawlor and Mr. Clough suggested a dynamic rollover test is more reflective of real-world rollovers. Boyle et al. suggested that a dynamic test would provide the most accurate data for regulation. Mr. Turner recommended that such a test would better measure the comprehensive interaction among safety systems in a rollover crash. Mr. Friedman and the Center for Injury Research (CFIR) recommended the use of the JRS or a modified FMVSS No. 208 dolly rollover test. Mr. Friedman further stated that when given the chance, engineers design the structure to

deal with the dynamic impact realities required to protect occupants and not to meet what he characterized as a vaguely related criteria like SWR.

DVExperts asserted that a static test, such as FMVSS No. 216 or any variation on this, is not an effective rollover performance test, just as a load test would be considered defective for frontal or side impacts. Public Citizen recommended a dynamic test because it can be improved to better simulate a rollover. It believes a static test is inappropriate for a roof crush test.

Advocates stated that a dynamic test would show how to model occupant injury mechanisms and their prevention to provide substantially enhanced roof crush resistance. Both Advocates and Public Citizen recommended the development of a biofidelic rollover anthropomorphic test device (ATD) to measure forces accurately in a dynamic test. Syson stated that although some aspects of real rollover crashes are not representative in dynamic tests, useful engineering information can be obtained from the results. Syson also expressed concern with including a dummy in dynamic testing because biofidelic problems may help obscure the consequences of roof failure or safety belt performance.

As indicated above, some of the commenters recommending a dynamic test cited potential benefits related to aspects of performance other than roof crush resistance, e.g., measuring the performance of seat belts, doors, ejection. We note that the suitability of a particular dynamic test must be assessed separately for each aspect of performance that would be addressed. In this rulemaking, we are addressing roof crush resistance, and our discussion and analysis of the comments focus on that issue. Our discussion and analysis below in some instances cite potential problems related to measuring other aspects of performance which might be measured during a test that evaluates roof crush resistance. However, we emphasize that our discussion/analysis does not in any way represent an assessment by the agency as to whether any of the tests would be suitable for addressing aspects of performance other than roof crush resistance.

FMVSS No. 208 Dolly Rollover Test

Section 5.3 of FMVSS No. 208 contains a dynamic test commonly known as the ''dolly rollover test.'' This test was part of early provisions in FMVSS No. 208 which permitted manufacturers the option of providing automatic crash protection in lateral and rollover crashes instead of seat belts. We believe that no manufacturer ever selected the option for purposes of complying with FMVSS No. 208. Selection of the option was ultimately precluded by the Intermodal Surface Transportation Efficiency Act of 1991, which required the installation of lap/shoulder belts. FMVSS No. 216 has long contained a provision that excludes vehicles that conform to the S5.3 rollover test requirements of FMVSS No. 208 by means that require no action by vehicle occupants. We are unaware of any vehicle that has been certified to S5.3 in lieu of FMVSS No. 216.

As discussed in our August 2005 NPRM, the FMVSS No. 208 dolly test was originally developed only as an occupant containment test and not to evaluate the loads on specified vehicle components. While S5.3 of FMVSS No. 208 specifies that an unbelted Hybrid III 50th percentile adult male dummy must be retained inside the vehicle during the test, it does not specify roof strength performance criteria or injury assessment reference values that must be met. We stated in the NPRM that we believed that this test lacks sufficient repeatability to serve as a structural component compliance requirement.

A number of commenters recommended that the agency propose a dolly rollover test. Advocates, Bidez & Associates (Bidez), SRS, Public Citizen, CFIR and Mr. Friedman cited use of the dolly rollover test in the Volvo XC90 development program. Several commenters stated that the dolly rollover test remains an option for certification in lieu of FMVSS No. 216.

Advocates and Bidez disagreed with the agency's statement that the dolly rollover test is not sufficiently repeatable. Bidez presented data from three dolly rollover tests conducted for Ford at the Autoliv Test Center to support its position. Bidez concluded that the test was repeatable based on the timing similarities of the peak neck forces and moments.

Ford submitted additional comments refuting Bidez's conclusions and claimed the wide range of amplitude and timing for the occupant injury measures were not repeatable.

CFIR also stated that dynamic rollover tests have been widely used to qualify safety devices. It stated they are repeatable in that the initial conditions are highly controlled, and it stated that a vehicle designed to pass can do so repeatedly. CFIR also acknowledged, however, that dolly rollover tests do not reproduce the same initial roof-to-ground contact conditions and small changes can cause large differences in vehicle trajectory and dummy kinematics.

In support of a dynamic test such as the dolly test, Technical Services commented that while dolly rollover tests do not produce occupant kinematics that are representative of highway rollovers, they represent a more difficult test for the vehicle because of the lateral component.

Agency Response

While the FMVSS No. 208 dolly rollover test has long been an option for manufacturers in lieu of the FMVSS No. 216 test, it is an option that they have never used. Thus, there has not been any experience with using that test for purposes of compliance with an FMVSS.

Moreover, as noted above, the test was not developed to evaluate the loads on specified vehicle components. While S5.3 of FMVSS No. 208 specifies that an unbelted Hybrid III 50th percentile adult male dummy be retained inside the vehicle, it does not specify roof strength performance criteria or injury assessment reference values that must be met.

Some commenters stated the dolly test was used in the development of the Volvo XC90 and is therefore an accepted industry practice. We note, however, that there is a significant difference between vehicle development work by manufacturers and objective test procedures needed for a FMVSS.

No commenters provided data demonstrating that the agency's concerns about the dolly test lacking sufficient repeatability to serve as a vehicle structural component compliance requirement for assessing roof strength are unfounded. We note that our research is consistent with the comments from CFIR concerning reproducibility problems with respect to initial roof to ground contact conditions. We believe that reproducibility in that area would be an important issue for measurement of roof intrusion in an FMVSS.

In response to Bidez, we agree that the ''timing'' of peak axial neck force was similar in their submitted test data; however, we also noted that the magnitudes of the neck forces varied considerably (from 260 N to 5,933 N) for the passenger side dummy of a driver side leading test. Further, the moments and forces for the driver side dummy also experienced wide ranges in values despite the similar timing of the event. Given the wide range of reported peak loads and moments, we are not convinced that repeatable timing is more important than repeatable peak values in the injury measurements.

The Bidez test data further showed the variation in the range of post-test headroom for these three dolly rollover tests. In two tests, the driver post test headroom increased 212 mm and 444 mm (8.3 inches and 15.5 inches), but in the third test, it decreased 31 mm (−5.9 inches). The passenger side showed similar results. It should also be noted that the measured headroom difference between the driver's and passenger's side in each test were relatively similar. This suggested that the roof deformed equally on both sides but the amount of deformation differed from test to test. These results suggest that the current dolly rollover test is not repeatable as a roof crush test.

As stated in the NPRM, the agency has conducted prior dolly testing (similar to the FMVSS No. 208 dolly rollover test) and determined that the test conditions were so severe that it was difficult to identify which vehicles had better performing roofs. Based on these, and other dynamic tests, the agency decided that it was best to pursue an upgraded quasi-static test for this rulemaking.

Jordan Rollover System (JRS)

There were a range of comments related to the Jordan Rollover System (JRS) test. The JRS device rotates a vehicle body structure on a rotating apparatus (''spit'') while the road surface platform moves a track underneath the vehicle and contacts the roof structure. Comments on the JRS were submitted by the following groups: Advocates, CFIR, DVExperts, Xprts, and Public Citizen. Some commenters recommended developing a safety standard using the test procedure, while others recommended that the agency undertake a research program and investigate the JRS fully.

Advocates recommended using the JRS procedure. CFIR provided information concerning the JRS test procedure and addressing repeatability of the initial conditions, including data from their JRS

research program. DVExperts claimed the JRS is a repeatable, practical, and scientifically valid dynamic rollover test procedure. Xprts submitted summary results from JRS testing of a Jeep Grand Cherokee. It identified roof intrusion velocities and roof deformation behavior (buckling) as important criteria for determining injury. Public Citizen commented that NHTSA should thoroughly investigate the JRS. Public Citizen and CFIR also commented that the JRS test can be conducted with dummies that demonstrate whether vehicle roof performance meets objective injury and ejection criteria for belted and unbelted occupants.

CFIR also recommended a maximum axial neck load injury measurement (Fz) of 7,000 N [50] (1,574 pounds) using the Hybrid III dummy in the JRS. The recommendation was based on cadaver and dummy drop and impact tests. CFIR also acknowledged that the Hybrid III dummy has poor biofidelity in the rollover mode. As an alternative, it recommended using the roof velocity and intrusion amplitude, as measured by an array of string potentiometers attached to the roof. The criteria were based on its axial neck load research. CFIR claimed to have found a good correlation between neck injury and the speed of head impact.

In response to the SNPRM, CAS and CFIR submitted additional instrumented test data using the JRS [51] equipped with a Hybrid III dummy. The test vehicles were selected from the agency's fleet evaluation. They argued, based upon the data, the JRS is highly controlled and repeatable. They further suggested that the equipment, and the test costs are modest. The test conditions can be widely varied to emulate actual rollover conditions.

Mr. Nash provided an analysis of NASS rollover cases. He concluded that the FMVSS No. 216 platen test would not stress the windshield header and create the type of buckling shown in the NASS cases. Mr. Nash claimed that the dynamic JRS test would identify the header deformation.

Agency Response

While a number of commenters indicated support for the JRS dynamic test procedure, and the developers submitted data for multiple tests, the agency has remaining questions regarding the setup, conduct, and evaluation of the JRS test procedure despite witnessing the JRS testing in February 2007 and multiple other meetings. All commenters relied on the JRS tests conducted and reported by CFIR and Xprts.

After considering the data submitted, we believe there are a large number of unresolved technical issues related to the JRS with respect to whether it would be suitable as a potential test procedure to replicate real-world crash damage patterns for a safety standard evaluating vehicle roof crush structural integrity. These include:

Test Parameters

• *Determination of the drop height (for different vehicles)*—The JRS releases the test vehicle from a predetermined drop height to fall onto a moving roadway. The ideal drop height is not known. If the drop height is not correlated with real world data, some vehicles could be overloaded beyond what would be representative of real world crashes. Other vehicles could be under-exercised based on accident conditions. A specific drop height or drop height methodology would need to be sensitive to the vehicle types and crash conditions in the fleet.

• *Determination of the roll rate and roll angle at vehicle release (for different vehicles)*—The JRS releases the test vehicle at a predetermined roll rate. The roll rate, drop height, and angle at which the vehicle is released are carefully coordinated to obtain an initial contact between the vehicle and the moving roadway at the nearside A-pillar/roof junction. While advocates of the test present anecdotal support for the test conditions, the appropriateness of the specific test conditions is not clear. There may be many vehicles that miss contacting the near side A-pillar/roof junction and have first contact with the far side of the roof. Roll rate has a role in the duration of the load on the roof and could have a significant effect on the roof performance during the test. If the roll rate is too slow, intrusion could be minimal. If the roll rate is too fast, intrusion could be excessive. We believe there is a need to correlate these parameters to real world data, which we do not have.

• *Determination of the roadway speed and road surface*—The JRS drops the vehicle onto an instrumented moving roadway that is covered with sandpaper to represent the vehicle-to-ground interaction. The roadway speed and the vehicle-to-ground friction play a significant role in controlling the transfer of momentum between the rotating vehicle and the moving roadway. Changing the roadway speed may affect how the vehicle interacts with the ground for the far side contact. Research would be necessary to understand this interaction and how the initial contact conditions affect the JRS test kinematics.

• *Repeatability of the drop height, roll rate, release angle, initial contact with the roadway and roadway speed*—Any regulatory test needs to be repeatable and enforceable. The agency does not have any experience with the JRS to know what its operating tolerances are. If it is possible to first determine optimum or representative conditions, it is then necessary to determine the accuracy and repeatability that a test device can provide for those conditions using a wide variety of vehicle sizes and shapes. For example, there are some concerns about whether some vehicle sizes or shapes (such as the Sprinter van) would be suitable for testing with a JRS device.

• *Vehicle performance criteria and instrumentation*—There are no generally accepted criteria to evaluate vehicle performance in rollover crashes. We would need to investigate measurement devices for relevancy with the JRS.

• *Initial lateral acceleration*—The JRS does not take into account the initial lateral acceleration in a real world rollover. This may have implications when testing with a dummy and potentially measuring performance related to some safety countermeasures (e.g., ejection containment side curtain bags and pretensioners). If a dummy's position in the test is not correlated to real-world rollovers, then the assessment of pretensioners and side window air bags in the JRS test is put into question.

Lack of Real-World Data To Feed Into the Test Parameters

• At this time, NHTSA has only limited event data recorder (EDR) data from rollover sensor-equipped vehicles. It is hoped that data from these vehicles can provide a better understanding of the range of initial roll rate and trip angles for real world rollover crashes. As voluntarily-installed EDRs continue to be installed in the fleet, the agency will gather an increasing amount of data on real world rollover crashes. Currently, the agency does not have enough of these data to evaluate how the JRS test might be optimized to real world rollover conditions.

• The ongoing implementation of ESC systems complicates the evaluation of real world rollover crashes. ESC systems are anticipated to be highly effective in reducing single vehicle rollover crashes. These crashes tend to have the highest number of quarter turns. The federally mandated implementation of ESC systems is expected to dramatically alter the distribution of rollover crash conditions.

• Assuming that real world representative test conditions could be established, NHTSA would still need to conduct a fleet study to examine the safety performance in a JRS test, evaluate how well the test results relate to real world safety performance, and determine whether or not there would be any appreciable safety improvement beyond existing FMVSSs.

Test Dummy Issues

• *Lack of test dummy and injury criteria*—At this time, no anthropomorphic test device (ATD) or crash test dummy, has been designed for use in rollover crash tests. Existing ATDs used in rollover crash tests, such as the Hybrid III dummy lack lateral kinematic behavior as well as lateral impact biofidelity. In addition, new injury criteria beyond those currently developed for frontal and side impacts would need to be developed for the types of loading conditions that result in head, neck, and face injuries associated with roof contact.

• *Repeatability of test dummy and initial restraint positioning*—Because the JRS is spinning prior to initiating the vehicle test, there are concerns about how to establish the initial belt position on the ATD in a manner that is consistent with real world conditions. The lateral acceleration prior to rollover initiation (as discussed previously) can cause a belted occupant to introduce slack in the belt. There is also the additional complication of the timing for firing the rollover curtains and/or pretensioners in the JRS pre-spin cycle.

There are also issues concerning the biomechanical basis for the CFIR

[50] Friedman D., Nash C.E., ''Advanced Roof Design for Occupant Protection,'' 17th ESV Conference, Amsterdam, 2002

[51] *See* Docket NHTSA 2008–0015: 2003 Subaru Forester, 2004 Subaru Forest, 2004 Volvo XC90, 2006 Chrysler 300, 2006 Hyundai Sonata.

recommended performance criteria. Specifically, we have concerns about CFIR recommended axial neck load criteria, and the surrogate (intrusion speed and amplitude), having potential to predict neck injury in the real world. We note that in response to CFIR's injury metrics, Nissan submitted an analysis conducted by David C. Viano, Ph.D. from ProBiomechanics evaluating their findings. Viano found no correlation between impact force and head impact velocity based upon the available cadaver data CFIR used in its analysis. We believe this is an important issue, and believe that lateral moments may be equally or more significant than axial force in predicting cervical spine injuries. Absent other information we believe further research would be needed as to whether the recommended neck axial loads and/or roof intrusion velocity are appropriate criteria.

As to the issue raised by Mr. Nash, the agency reviewed the Toyota NASS cases he provided, and the damage patterns to the roof were consistent with other cases the agency has analyzed. Neither the agency nor Mr. Nash identified a catastrophic collapse of the header. The integrity of the roof was maintained in all but one of the crash events cited. NHTSA also reviewed the JRS 2007 Toyota Camry tests and compared the results to the NASS data. The Camry was tested twice on the driver's side of the vehicle. When the driver's side was tested the first time, there was no appreciable damage to the header. The driver's side of the same vehicle was then tested again and showed some minor header damage. This test methodology is inconsistent with a real world rollover as the far side of the vehicle was not damaged in either JRS test and yet the driver's side was tested twice.

While we appreciate the information provided by the commenters, we do not believe that the information is sufficient for consideration of the JRS as a possible test device for a Federal motor vehicle safety standard at this time. The concept and the ability of the fixture to rotate a vehicle and contact the roadway have been demonstrated. However, as indicated above, there are numerous technical issues related to the test and potential parameters as well as a suitable ATD and associated injury criteria or other metric.

Controlled Rollover Impact System (CRIS)

In the NPRM, NHTSA stated its belief that the CRIS device is helpful in understanding occupant kinematics during rollover crashes. However, we also stated that we believe that the device does not provide the level of repeatability needed for a regulatory requirement, because the CRIS test is repeatable only up to the initial contact with the ground. After initial roof impact, the CRIS test allows the vehicle to continue rolling, resulting in an unrepeatable test condition.

Two commenters provided support for the CRIS test procedure. The commenters were CFIR [52] and Technical Services. CFIR provided summary information on the repeatability of the initial conditions, and certain occupant injury measures for the CRIS test procedure. Technical Services recommended that the CRIS test should be considered by the agency for dynamic roof crush testing.

Agency Response

The CRIS test procedure was developed to produce repeatable vehicle and occupant kinematics for the initial vehicle-to-ground contact. No data have been provided indicating that the procedure is repeatable after initial ground contact, and we would not expect it to be given that the CRIS test allows the vehicle to continue rolling. While it is notable that some of the injury criteria appear to be repeatable for the first ground contact, the relevance of the dummy measurements for rollover impacts has not been established. Evaluating performance criteria for the CRIS test would depend upon the development of an ATD with biofidelity in rollover crash tests. We believe a long-term research program would be necessary to develop performance measures, evaluate the repeatability, reproducibility, and any potential real world correlation of this test procedure.

Inverted Vehicle Drop Test

In the NPRM, the agency stated that its research found that the inverted drop test does not replicate real-world rollovers better than the current quasi-static test. We stated further that the inverted drop test does not produce results as repeatable as the quasi-static method.

The agency received three comments on the inverted vehicle drop test. Commenters included SAFE, Syson, and Technical Services. SAFE commented that the inverted drop test is superior to the quasi-static test because: (1) It is a dynamic evaluation; (2) it could evaluate multiple rollover safety systems; (3) it could incorporate restraint system effectiveness; and (4) it is a simple test procedure. Syson stated that the inverted vehicle drop test procedure provides more useful information about roof structure performance. Technical Services questioned the value of an inverted vehicle drop test less than 3 feet in height and the lack of lateral loading, when compared to other dynamic dolly rollover tests.

Agency Response

We discussed issues related to the inverted drop test procedure at some length in the NPRM, including a discussion of agency research. NHTSA has previously conducted a test program to evaluate the relative merits of drop testing compared to the current quasi-static test procedure. The previous evaluation concluded that without a rollover ATD the roof drop test could not provide a complete safety performance test. If the test requirement is limited to measuring roof deformation as a surrogate for occupant injury potential, then the more controlled and repeatable quasi-static test procedure is preferable. The agency's research indicated that the static test can be related to the drop test with a moderate degree of accuracy. Because of an additional number of uncontrolled variables, such as consistent vehicle release, impact location and deformation measurements, drop test results can be expected to vary significantly, even for seemingly comparable test conditions.[53] Adding a lateral component to this test procedure to address concerns identified by Technical Services would add another level of complexity. The comments do not provide data or arguments to refute the positions taken by NHTSA in the NPRM.

Weight Drop Onto the Roof Test (WDORT)

In the NPRM, NHTSA did not discuss the weight drop onto the roof test (WDORT) since commenters on the prior roof crush resistance notice had not addressed this test. One commenter, Mr. Chu, recommended that NHTSA develop a dynamic WDORT and set the dynamic intrusion limit as a percentage of the headroom before impact. Chu stated the WDORT is not sensitive to a vehicle's CG like the inverted vehicle drop test and the test weight can be calibrated and guided within four rails during the drop. Mr. Chu did not provide a detailed test setup, procedure or test data to support his recommendation.

Agency Response

No details or test data were provided for the WDORT concept. Consequently, a considerable research effort would be required to evaluate the appropriateness and practicability of such an approach and whether it would provide any safety benefit beyond the quasi-static procedure.

Appendix B—Two-Sided Test Results

Vehicle	Peak SWR prior to 127 mm of platen travel or head contact (except as noted)		Peak force change (percent)
	1st Side	2nd Side	
2007 Toyota Tundra	3.3	2.2	−17.5
2008 Honda Accord **	3.5	4.0	n/a

[52] Peltez submitted comments from the Center for Injury Research (CFIR) dated March 22, 2004. This was originally submitted to Docket 1999–5572 (submission #12).

[53] Glen C. Rains and Mike Van Voorhis, ''Quasi Static and Dynamic Roof Crush Testing,'' DOT HS 808–873, 1998.

Vehicle	Peak SWR prior to 127 mm of platen travel or head contact (except as noted)		Peak force change (percent)
	1st Side	2nd Side	
2007 Ford Edge	3.3	3.2	−3.6
2007 Chevrolet Colorado	2.2	1.7	−21.4
2007 Toyota Tacoma	3.3	3.7	12.4
2007 Chevrolet Express***	2.3	1.7	−27.3
2007 Jeep Grand Cherokee	2.2	1.6	−27.1
2007 Pontiac G6	2.3	1.7	−23.8
2005 Lincoln LS*	2.6	2.0	−21.3
2007 Saturn Outlook	2.7	2.2	−20.8
2003 Ford Crown Victoria*	2.0	1.7	−19.5
2007 Ford F–150	2.3	1.9	−19.0
2007 Chevrolet Tahoe	2.1	1.7	−16.4
2007 Toyota Yaris	4.0	3.4	−15.8
2005 Buick LaCrosse	2.6	2.2	−13.5
2007 Toyota Tacoma	4.4	3.9	−12.2
2007 Buick Lucerne	2.3	2.1	−10.8
2003 Chevrolet Impala*	2.9	2.5	−9.9
2004 Lincoln LS*	2.5	2.2	−8.7
2006 Subaru Tribeca	3.9	3.5	−8.3
2007 Scion tC	4.6	4.3	−6.7
2006 Chrysler Crossfire	2.9	2.7	−5.6
2007 Dodge Caravan	3.0	2.9	−5.3
2007 Honda CRV	2.6	2.5	−4.9
2005 Buick LaCrosse	2.4	2.3	−3.4
2004 Nissan Quest*	2.8	2.7	−3.0
2001 GMC Sierra*	1.9	1.9	−1.3
2007 Chrysler 300	2.5	2.5	1.6
2004 Chrysler Pacifica*	2.2	2.4	7.0
2007 Toyota Camry	4.3	4.7	9.0
2004 Land Rover Freelander*	1.7	2.0	19.2

* Crush of first side stopped at windshield cracking.
** First side test stopped at predetermined SWR.
*** Between the first and second side tests, the front door on the tested side was opened. Because of damage to the vehicle during the first side test, the door would not properly close. The door was clamped until the latch engaged, locking the door in place. This may have compromised the structural integrity of the roof and reduced the measured peak load on the second side.

Appendix C—Single-Sided Test Results

Vehicle	Unloaded vehicle weight (kg)	Peak strength within 127 mm of platen travel		Peak strength prior to head contact		Platen travel at head contact (mm)
		N	SWR	N	SWR	
2006 VW Jetta	1,443	72,613	5.1	72,613	5.1	158
2007 Scion tC	1,326	59,749	4.6	59,749	4.6	113
2006 Volvo XC90	2,020	90,188	4.6	N/A	N/A	N/A
2006 Honda Civic	1,251	55,207	4.5	55,207	4.5	177
2007 Toyota Tacoma	1,489	64,441	4.4	64,441	4.4	123
2006 Mazda 5	1,535	66,621	4.4	66,621	4.4	155
2007 Toyota Camry	1,468	62,097	4.3	62,097	4.3	N/A
2007 Toyota Yaris	1,038	41,073	4	41,073	4	115
2006 Ford 500	1,657	63,181	3.9	63,181	3.9	150
2007 Nissan Frontier	1,615	62,828	3.9	62,828	3.9	167
2006 Subaru Tribeca	1,907	72,306	3.9	72,306	3.9	112
2006 Mitsubishi Eclipse	1,485	51,711	3.6	51,711	3.6	127
2008 Honda Accord**	1,476	50,959	3.5	50,959	3.5	N/A
2006 Hummer H3	2,128	70,264	3.4	70,264	3.4	185
2007 Toyota Tacoma	1,752	56,555	3.3	56,555	3.3	N/A
2007 Toyota Tundra	2,345	76,216	3.3	76,216	3.3	N/A
2007 Ford Edge	1,919	61,910	3.3	61,910	3.3	N/A
2006 Hyundai Sonata	1,505	46,662	3.2	46,662	3.2	131
2007 Dodge Caravan	1,759	52,436	3	52,436	3	N/A
2006 Chrysler Crossfire	1,357	38,179	2.9	38,179	2.9	107
2004 Honda Accord	1,413	38,281	2.8	38,281	2.8	140
2007 Saturn Outlook*	2,133	57,222	2.7	57,222	2.7	N/A
2006 Ford Mustang	1,527	40,101	2.7	41,822	2.8	132
2005 Buick Lacrosse	1,590	40,345	2.6	40,345	2.6	126
2006 Sprinter Van*	1,946	49,073	2.6	N/A	N/A	N/A

Vehicle	Unloaded vehicle weight (kg)	Peak strength within 127 mm of platen travel		Peak strength prior to head contact		Platen travel at head contact (mm)
		N	SWR	N	SWR	
2004 Cadillac SRX	1,961	50,346	2.6	50,346	2.6	138
2007 Honda CRV	1,529	38,637	2.6	38,637	2.6	N/A
2007 Chrysler 300	1,684	41,257	2.5	41,257	2.5	N/A
2005 Buick Lacrosse	1,588	37,196	2.4	37,196	2.4	123
2006 Honda Ridgeline	2,036	47,334	2.4	47,334	2.4	172
2007 Ford F–150*	2,413	54,829	2.3	54,829	2.3	N/A
2007 Buick Lucerne	1,690	38,268	2.3	38,268	2.3	N/A
2004 Chevrolet 2500 HD*	2,450	55,934	2.3	56,294	2.3	171
2007 Pontiac G6	1,497	33,393	2.3	33,393	2.3	124
2007 Chevrolet Express*	2,471	55,038	2.3	55,038	2.3	N/A
2007 Jeep Grand Cherokee	1,941	41,582	2.2	41,582	2.2	117
2007 Chevrolet Colorado	1,560	33,299	2.2	33,299	2.2	N/A
2007 Chevrolet Tahoe*	2,462	49,878	2.1	49,878	2.1	N/A
2006 Dodge Ram*	2,287	37,596	1.7	42,578	1.9	158
2003 Ford F–250*	2,658	44,776	1.7	44,776	1.7	205

*GVWR greater than 6,000 pounds.
**Test stopped at 3.5 SWR.

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Federal Register

Tuesday,
May 12, 2009

Part V

Federal Trade Commission

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Notice

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Submission for OMB Review; Comment Request

AGENCY: Federal Trade Commission (''Commission'' or ''FTC'').

ACTION: Notice.

SUMMARY: The FTC plans to conduct a study to examine consumer perception of environmental marketing claims. The study is part of the Commission's regulatory review of the Guides for the Use of Environmental Marketing Claims (''Green Guides'' or ''Guides''). This is the second of two notices required under the Paperwork Reduction Act (''PRA'') in which the FTC seeks public comments on its proposed consumer research before requesting Office of Management and Budget (''OMB'') review of, and clearance for, the collection of information discussed herein.

DATES: Comments must be received on or before June 11, 2009.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to ''Green Marketing Consumer Perception Study, Project No. P954501'' to facilitate the organization of comments. Please note that your comment—including your name and your state—will be placed on the public record of this proceeding, including on the publicly accessible FTC Website, at (*http://www.ftc.gov/os/publiccomments.shtm*).

Because comments will be made public, they should not include any sensitive personal information, such as an individual's Social Security Number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any ''[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential. . . .'' as provided in Section 6(f) of the Federal Trade Commission Act (''FTC Act''), 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c).[1]

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following weblink: (*https://secure.commentworks.com/ftc-GreenGuidesReview*) (and following the instructions on the web-based form). To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the weblink: (*https://secure.commentworks.com/ftc-GreenGuidesReview*). If this Notice appears at (*http://www.regulations.gov/search/index.jsp*), you may also file an electronic comment through that website. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC website at *http://www.ftc.gov/* to read the Notice and the news release describing it.

A comment filed in paper form should include the reference ''Green Marketing Consumer Perception Study, Project No. P954501'' reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex J), 600 Pennsylvania Avenue, NW, Washington, DC 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

Comments on any proposed filing, recordkeeping, or disclosure requirements that are subject to paperwork burden review under the Paperwork Reduction Act should additionally be submitted to: Office of Information and Regulatory Affairs, Office of Management and Budget (''OMB''), Attention: Desk Officer for Federal Trade Commission. Comments should be submitted via facsimile to (202) 395-5167 because U.S. postal mail at the OMB is subject to delays due to heightened security precautions.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC Website, to the extent practicable, at (*http://www.ftc.gov/os/publiccomments.shtm*). As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at (*http://www.ftc.gov/ftc/privacy.shtm*).

FOR FURTHER INFORMATION CONTACT: Laura Koss, Attorney, 202-326-2890, or Michael J. Davis, Attorney, 202-326-2458, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission.

SUPPLEMENTARY INFORMATION:

I. Background

The Commission issued the Green Guides, 16 CFR Part 260, to help marketers avoid making environmental claims that are unfair or deceptive under Section 5 of the FTC Act, 15 U.S.C. 45.[2] Guides are administrative interpretations of the law. They do not have the force and effect of law and are not independently enforceable. The Guides are the Commission's interpretation of Section 5 of the FTC Act as it applies to environmental marketing claims. The Commission, therefore, can take action under the FTC Act if a business makes environmental marketing claims inconsistent with the Guides. In any such enforcement action, the Commission must prove that the act or practice at issue is unfair or deceptive.

The Green Guides outline general principles that apply to all environmental marketing claims and provide guidance regarding specific categories of environmental claims. These categories include: general environmental benefit claims such as ''environmentally friendly''; degradable claims; compostable claims; recyclable claims; recycled content claims; source reduction claims; refillable claims; and ozone safe/ozone friendly claims. For each of these claims, the Green Guides explain how reasonable consumers are likely to interpret them. The Guides also

[1] The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

[2] The Commission issued the Green Guides in 1992 (57 FR 36363) and subsequently revised them in 1996 (61 FR 53311) and 1998 (63 FR 24240).

describe the basic elements necessary to substantiate claims and present options for qualifying specific claims to avoid deception.[3] The illustrative qualifications provide ''safe harbors'' for marketers who want certainty about how to make environmental claims, but do not represent the only permissible approaches to qualifying a claim.

II. Regulatory Review of the Green Guides

The Commission reviews all of its rules and guides periodically to examine their efficacy, costs, and benefits, and to determine whether to retain, modify, or rescind them. On November 26, 2007, the FTC commenced its review of the Green Guides and sought public comment.[4] As part of this comprehensive review, the FTC also announced a series of public workshops to explore emerging environmental marketing issues and, through subsequent notices, opened public comment periods in connection with each workshop.[5] The Commission sought comment on a number of issues, including the continuing need for and economic impact of the Guides, the effect of the Guides on the accuracy of environmental claims, and whether the Guides should include certain environmental claims—such as carbon neutrality, sustainability, and renewability—not currently addressed in the Guides.

The Commission also sought specific consumer survey evidence and consumer perception data addressing environmental claims. Few commenters submitted consumer survey evidence or consumer perception data. The Commission, therefore, is considering conducting its own study related to consumer perception of environmental marketing claims. This study would aid the Commission in determining what revisions, if any, it should make to the Guides to ensure that the Guides are appropriately responsive to any changes in consumer perception of environmental claims.

III. Paperwork Reduction Act Notice

Under the PRA, 44 U.S.C. 3501-3521, federal agencies must obtain approval from OMB for each collection of information they conduct or sponsor. ''Collection of information'' means agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. 44 U.S.C. 3502(3); 5 CFR 1320.3(c). As required by section 3506(c)(2) of the PRA, the FTC published a notice seeking public comment on the proposed collections of information. *See* 73 FR 60702 (Oct. 14, 2008). In response, the Commission received one comment, which was submitted by General Electric Company (''GE'').[6] Section V below sets forth FTC staff's analysis of the GE comment.

Pursuant to the OMB regulations, 5 CFR Part 1320, that implement the PRA, the Commission is providing this second opportunity for public comment. All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before June 11, 2009.

IV. FTC's Proposed Study of Consumer Perception

A. Methodologies

1. Environmental Marketing Claims

This proposed study will focus on consumer understanding of certain environmental marketing claims that are prevalent in today's marketplace. Specifically, the proposed study will examine: general environmental benefit claims (*e.g.*, eco-friendly, green); sustainable; renewable (*e.g.*, made with renewable energy, made with renewable materials); and carbon neutral and carbon offset claims. In recommending any changes to the Green Guides, FTC staff will consider the consumer research results in conjunction with the broad range of policy and legal issues raised by commenters and workshop participants.

The primary focus of the proposed study is to compare participant responses regarding the meaning of different environmental marketing claims, including unqualified general environmental claims, such as ''Green'' and ''Eco-friendly,'' and general environmental benefit claims combined with a specific representation—*e.g.*, ''Green - Made with Renewable Materials'' (a ''qualified-general claim''). Specifically, using a treatment-effect methodology, the study will examine whether consumers viewing general environmental benefit claims believe that a product has specific environmental benefits, such as being recyclable, biodegradable, compostable, or made from recycled materials.

The proposed study also will examine whether consumers viewing a qualified-general environmental benefit claim, such as ''Green - Made with Renewable Materials,'' believe that such a claim implies that the product provides environmental benefits beyond the specific attribute mentioned. Thus, for example, would consumers viewing a ''Green - Made with Renewable Materials'' claim for a product believe that product is also compostable, recyclable, or non-toxic? In addition to asking consumers about the unqualified and qualified general environmental benefit claims, the study will ask consumers how they perceive the specific environmental attributes that the study uses as qualifications (*e.g.*, ''Made with Recycled Materials,'' ''Made with Renewable Materials,'' ''Made with Energy'') alone.

The study will examine whether consumers believe that environmental claims suggest anything about the environmental impact of a product through stages of its life cycle (*e.g.*, production, transportation, use, and disposal). For consumers who do think about a product's life cycle, the study will explore whether consumers think of more than one stage in the life cycle; and if they do, which specific life cycle stages they have in mind.

The study will inquire about consumer interpretations of all of these claims in the context of multiple products to determine whether consumers' interpretations are affected by the product about which the claim is made.

Also, the study will collect information about how consumers perceive claims about the purchase of renewable energy and how they understand claims about carbon neutrality and carbon offsets. That information will help the Commission determine whether additional guidance is needed about the use of these terms in marketing and what that guidance should be.

2. Study Sample

As noted in Section IV.B below, the FTC proposes to collect information from up to 3,700 consumers in order to gather data on consumer perception of environmental marketing claims. All information will be collected on a voluntary basis. While having a sample that can be used to project to the entire U.S. adult population is not crucial to this study given its focus on comparing responses of participants who are randomly exposed to different products and claims, it will be useful to have as representative a sample as possible. Having considered the costs and

[3] The Guides do not, however, establish standards for environmental performance or prescribe testing protocols.

[4] 72 FR 66091.

[5] *See* 72 FR 66094, Carbon Offsets and Renewable Energy Certificates (held on January 8, 2008); 73 FR 11371, Green Packaging Claims (held on April 30, 2008); and 73 FR 32662, Green Building and Textiles (held on July 8, 2008).

[6] General Electric Company Comment in FTC Project No. P954501 (Dec. 15, 2008), pp. 1-4, available at (*http://www.ftc.gov/os/comments/greenguidespra/00001.pdf*).

benefits of various data collection methods, FTC staff has concluded that the most efficient way to collect data to meet the research objectives within a feasible budget is to use an Internet panel with nationwide coverage.

Thus, the FTC has contracted with Harris Interactive, Inc. (''Harris Interactive''), a consumer research firm that has substantial experience assessing consumer communications via the Internet and other alternative protocols, to design an Internet study that, while not strictly representative of the nation as a whole, nonetheless reflects the views of a broad population. The Harris Interactive Internet panel consists of more than four million individuals drawn from throughout the country, derived from a series of convenience sampling procedures, rather than true probability sampling. Harris Interactive has studied the relationship between samples from its Internet panel and samples collected using more traditional probability sampling techniques, such as telephone surveys. Based on these studies, Harris Interactive has developed procedures to ensure that differences between the results of Harris' Internet panel studies and those based on true probability samples of the nation are minimized. In particular, Harris Interactive has used a variety of methods, including demographic weighting, propensity scoring, and quota sampling to obtain accurate estimates of national views from its Internet panel. Through study administration, FTC staff will work with Harris Interactive to ensure that the sample is as representative of the nation as possible.

B. PRA Burden Analysis

Staff is revising certain prior assumptions,[7] based on a more precise target population for completing the questionnaire and further consultation with Harris Interactive regarding the anticipated response rate. Harris Interactive anticipates that 6.3% of those invited to participate in the survey will respond and will fit within the desired distribution of demographic characteristics. Accordingly, Harris might contact as many as 59,000 persons to achieve the contracted aim of surveying 3,700 respondents.

As before,[8] staff estimates that respondents to the Internet questionnaire will require, on average, approximately 25 minutes to complete it. Staff will pretest the questionnaire with approximately 100 respondents to ensure that all questions are easily understood. Allowing for an extra three minutes for questions unique to the pretest, the pretest will total approximately 47 hours cumulatively (100 respondents x 28 minutes each).

The burden estimate now addresses both those who will complete the questionnaire and those who will not. Those completing it will require 1,542 hours (3,700 persons x 25 minutes each). Those who do not complete the survey will spend no more than one minute; thus, 922 hours (59,000 total contacts - 3,700 persons completing the study) x one minute each). Cumulatively, then, complete and partial surveying of 59,000 persons will total about 2,464 hours.

Overall burden for the pretest and questionnaire would thus be 2,511 hours. The cost per respondent should be negligible. Participation is voluntary and will not require start-up, capital, or labor expenditures by respondents.

V. Analysis of Comment Received

As noted above, the Commission received one comment, by GE, in response to its notice seeking public comment on the proposed collections of information. *See* 73 FR 60702 (Oct. 14, 2008). GE's comment makes several suggestions about study methodology.

In particular, GE discusses Internet-based research, noting that access to the study is limited to participants with access to a computer and that such participants tend to be persons who have self-selected by expressing an interest in consumer research. As discussed above, having considered the costs and benefits of various data collection methods, FTC staff has concluded that the most efficient way to collect data to meet the research objectives within a feasible budget is to use Harris Interactive's existing Internet panel. Harris' convenience sampling procedures will obtain accurate projections of national sentiment based on samples drawn from its Internet panel. As noted above, because the primary focus of the study is to compare responses across treatment groups, *i.e.*, across different environmental marketing claims presented to participants, rather than to project responses to the population as a whole, using a broad sample of individuals at least 18 years of age, rather than a national probability sample will provide useful information.

With respect to GE's concern about identifying the ''proper universe of consumers,'' FTC staff has included in the questionnaire a brief section of questions that address participants' level of interest in environmental issues. For example, one question asks: ''In the past six months, have you chosen to purchase one product rather than another because the product is better for the environment?'' Through analyses of answers to such questions, staff can compare the study responses of participants who have a high degree of interest in environmental issues and who take these issues into account when making purchasing decisions with responses of participants who are not as concerned with environmental issues.

GE also asserts that the FTC should ensure a ''proper sample size.'' The FTC staff determined the sample size of 3,700 consumers based on several considerations, including the funds available for the study, the cost of different sample size configurations, the number of environmental claims to be examined, and a power analysis. In this study, 150 participants will see each of the various environmental marketing claims to be compared. Staff believes that this will be adequate to allow comparisons across treatment cells.

GE further recommends that the research be double-blind, so that ''neither participants nor administrators know its purpose or who it is for'' and that the study employ an adequate control. To avoid biasing how respondents answer the questions, study participants will not be told that the FTC has commissioned the research in order to avoid biasing how respondents answer the questions. Furthermore, while completing the survey, participants will not have access to personnel at Harris Interactive who know the purpose of the study. For most participants, there will be no contact between the participant and any Harris personnel. Harris does, however, provide a telephone number or email for people who have technical problems while completing the survey. The personnel who respond to such inquiries, however, are only able to resolve technical problems, like an inability to connect to the web site. They do not know the purpose of the study and, if asked, for example, about the meaning of a question, are instructed to tell the person inquiring that he or she should answer to the best of their ability based on what appears on the screen. It is not necessary to have ''blind'' administrators. Because the proposed study is automated and online, participants and study administrators can have only technical interaction. Therefore, there is no concern that a study administrator might convey information about desired results to participants. The study employs an adequate control, testing a ''New and Improved'' claim that says

[7] *See* 73 FR at 60704.

[8] *See id.*

nothing about environmental characteristics.

GE asserts that the questionnaire should ask consumers about marketing terms in conditions that are as real-world as possible, suggesting that participants be shown actual advertisements and suggesting that the study include a control. GE also expresses concern, however, ''that no matter how a specific term is tested, the relevance of the data may be limited to the particular scenario presented.'' Thus, GE urges the FTC to consider how to conduct research on ''specific terms in a manner that will both be relevant and will have broader applicability.''

While the proposed study does not test actual advertisements, the environmental marketing claims are based upon actual claims FTC staff has observed in the marketplace. In addition, the study protocol tests each claim with three different products—kitchen flooring, a laundry basket, and wrapping paper. While costs prohibit conducting a study with more products, examining three products will provide useful information about the extent to which product variation affects participants' interpretation of the claims being studied.

GE urges the FTC to include non-leading questions and stimuli, specifically recommending that the study include open-ended questions. FTC staff agrees with these recommendations and it has designed questions that are as non-suggestive and non-leading as possible. Many parts of the questionnaire include a combination of open- and closed-ended questions, which ask about the same concept. Moreover, the questionnaire uses phrasing that minimizes the risk that participants will give answers that they think *should be* correct. For example, some participants will randomly be shown the claim ''Sustainable'' in connection with wrapping paper. The questionnaire then asks: ''Which of the following most accurately describes what this statement suggests or implies *to you* about any negative environmental impact that may come from this wrapping paper?'' (emphasis added). The response choices to this question then take the form: ''The statement suggests or implies that there is no negative environmental impact from this wrapping paper;'' ''The statement suggests or implies that this wrapping paper causes less negative environmental impact than other wrapping paper. . .,'' etc. The FTC staff also plans to conduct a pretest, which will help identify any remaining problems in this area.

Finally, GE notes that Internet study participants may consult outside reference materials or other persons in responding to the questionnaire. While there is a possibility that participants could consult such sources, FTC staff believes that this not a significant problem. Based on its extensive Internet study experience, Harris Interactive assures that participants in such studies generally are most interested in completing the study in a relatively short period of time; thus, they are unlikely to choose to spend the additional time needed to do any such research. In addition, the questionnaire expressly informs each participant that the study designer is interested in what the individual thinks, rather than any supposedly ''right'' answer. For example, some participants will randomly be shown the claim ''Eco-friendly'' in connection with kitchen flooring. The questionnaire then asks: ''What, if anything, *does this statement suggest or imply to you* about the kitchen flooring?'' (emphasis added). Moreover, the final phase of the questionnaire contains a standard question for all participants asking whether they consulted outside sources. Again, based upon its extensive experience with Internet-protocol studies, Harris Interactive reports that participants tend to answer such questions honestly. Finally, Harris noted that if a participant consults outside sources while completing the questionnaire, it will take that participant longer to complete the study. Thus, when reviewing study results, Harris Interactive will examine participant response times, identifying those that are abnormally long, and assess whether they reflect participants' outside consultation.

David C. Shonka

Acting General Counsel

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Part VI

Department of Commerce

National Telecommunications and Information Administration

Low-Power Television and Translator Upgrade Program: Notice of Availability of Funds; Notice

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Docket No. 090416676–9677–01

Low-Power Television and Translator Upgrade Program: Notice of Availability of Funds

AGENCY: National Telecommunications and Information Administration, U.S. Department of Commerce.

ACTION: Notice of Availability of Funds and Program Guidelines.

SUMMARY: The National Telecommunications and Information Administration (NTIA) publishes this notice to provide the guidelines for the Low-Power Television and Translator Upgrade Program (Upgrade Program) and to announce the availability of approximately $44 million for awards under this program. Upgrade Program funds will be used by eligible low-power television and translator stations to upgrade from analog broadcasting to digital broadcasting. Completed applications for the Priority Round must be received at NTIA no later than 5 p.m., Eastern Daylight Time on July 13, 2009. After August 10, 2009, applications must be received at NTIA by the first business day of each subsequent month as long as funds are available. NTIA will provide updated information on a periodic basis at its website http://www.ntia.doc.gov/lptv regarding program awards and funds remaining for grants.

DATES: Paper applications and applications submitted electronically through Grants.gov for the Priority Round must be received at NTIA no later than 5 p.m., Eastern Daylight Time, on July 13, 2009 (Priority Round Closing Date). Applicants must ensure that the carrier they use guarantees delivery of the application by the Priority Round Closing Date. Applicants should note that all material sent via the U.S. Postal Service (including ''Overnight'' or ''Express Mail'') is subject to delivery delays of up to two weeks due to mail security procedures at the Department of Commerce. If an application is received after the Priority Round Closing Date due to (1) carrier error, when the carrier accepted the package with a guarantee for delivery by the Priority Round Closing Date and Time, or (2) significant weather delays or natural disasters, NTIA will, upon receipt of proper documentation, consider the application as having been received by the deadline.

After August 10, 2009, applications for the next grant round must be received at NTIA by 5 p.m., Eastern Time, the first business day of each subsequent month as long as funds are available (Closing Dates). Applications received after any of the subsequent monthly Closing Dates will be held until the next grant round.

Applications submitted by facsimile will not be accepted. Applications submitted electronically via the Grants.gov website must be received and logged by Grants.gov by 5 p.m. Eastern Daylight Time on the Priority Round Closing Date or the subsequent monthly Closing Dates. Applicants planning to submit an application electronically via the Grants.gov website should take into consideration computer-related difficulties that may arise during the submission of an electronic filing. NTIA will not be responsible for any computer problems that delay the submission of last-minute electronic filings.

ADDRESSES: To submit completed applications or send any other correspondence, write to the Upgrade Program at the following address: NTIA/Upgrade Program, Room H–4812, U.S. Department of Commerce, 1401 Constitution Avenue, N.W., Washington, DC 20230. Application materials may be obtained electronically via the Internet at http://www.ntia.doc.gov/lptv or http://www.Grants.gov.

FOR FURTHER INFORMATION CONTACT: William Cooperman, Upgrade Program Director, Broadcasting Division, NTIA Office of Telecommunications and Information Applications, telephone: (202) 482–5802; fax: (202) 482–2156; email: wcooperman@ntia.doc.gov. Information about the Upgrade Program also can be obtained electronically via the Internet at http://www.ntia.doc.gov/lptv.

SUPPLEMENTARY INFORMATION:

I. Funding Opportunity Description

A. Background on the Low-Power Television and Translator Upgrade Program

The Digital Television Transition and Public Safety Act of 2005 (the Act), as amended, permits low-power television facilities to continue analog broadcasts after the June 12, 2009, deadline for conversion of full-power television stations to digital. The Act also authorizes NTIA to operate two programs to assist low-power television facilities during the nation's transition from analog to digital television broadcasting.[1]

Conversion Program. NTIA's first program, the Low-Power Television and Translator Digital-to-Analog Conversion Program (Conversion Program), permits NTIA to provide grants so a low-power television station can convert the incoming digital signal of its corresponding full-power television station to analog format for transmission on the low-power television station's analog channel.[2] By statute, the deadline for submission of applications to the Conversion Program is June 12, 2009.[3]

Upgrade Program. The Low-Power Television and Translator Upgrade Program is the second NTIA program to assist low-power television stations and is authorized by Section 3009 of the Act, as amended.[4] The Upgrade Program will provide reimbursement for equipment to upgrade low-power stations in eligible rural communities from analog to digital. Section 3009, as amended, is provided below, in its entirety:

SEC. 3009. LOW-POWER TELEVISION AND TRANSLATOR UPGRADE PROGRAM.

(a) ESTABLISHMENT.—The Assistant Secretary shall make payments of not to exceed $65,000,000, in the aggregate, during fiscal years 2009 through 2012, from the Digital Television Transition and Public Safety Fund established under section 309(j)(8)(E) of the Communications Act of 1934 (47 U.S.C. 309(j)(8)(E)) to implement and administer a program through which each licensee of an eligible low-power television station may receive reimbursement for equipment to upgrade low-power television stations from analog to digital in eligible rural communities, as that term is defined in section 610(b)(2) of the Rural

[1] The Digital Television Transition and Public Safety Act of 2005 (the Act) is Title III of the Deficit Reduction Act of 2005, Pub. L. No. 109–171, 120 Stat. 4, 21 (Feb. 8, 2006). Section 3002(b) of the Act originally provided the digital conversion deadline to be February 17, 2009. Section 2(a) of the subsequently enacted DTV Delay Act, Pub. L. No. 111–4, 123 Stat. 112 (Feb. 11, 2009), changed that deadline to June 12, 2009.

[2] *Id.*, the Act, at § 3008, 120 Stat. at 25.

[3] Section 2(b) of the DTV Delay Act changed the application deadline for the Conversion Program from February 17, 2009, to June 12, 2009. *See also* Low-Power Television and Translator Digital-to-Analog Conversion Program, Initial Announcement — Notice of Availability of Funds, 72 Fed. Reg. 61,109 (Oct. 29, 2007); Low-Power Television and Translator Digital-to-Analog Conversion Program, Amendment to Notice of Availability of Funds, 73 Fed. Reg. 50,782 (Aug. 28, 2008); Low-Power Television and Translator Digital-to-Analog Conversion Program: Extension of Closing Date, Notice of Amended Solicitation of Applications, 74 Fed. Reg. 7663 (Feb. 19, 2009).

[4] *See* the Act, *supra* note 1 at § 3009, 120 Stat. at 26. Section 2(b) of the DTV Transition Assistance Act, Pub. L. No. 110–295, 122 Stat. 2872 (July 30, 2008), amended Section 3009 to clarify the period during which NTIA could make awards for the Upgrade Program.

Electrification Act of 1937 (7 U.S.C. 950bb(b)(2)). Such reimbursements shall be issued to eligible stations on or after February 18, 2009. Priority reimbursements shall be given to eligible low-power television stations in which the license is held by a non-profit corporation and eligible low-power television stations that serve rural areas of fewer than 10,000 viewers.

(b) ELIGIBLE STATIONS.—For purposes of this section, the term ''eligible low-power television station'' means a low-power television broadcast station, Class A television station, television translator station, or television booster station—

(1) that is itself broadcasting exclusively in analog format; and

(2) that has not converted from analog to digital operations prior to the date of enactment of the Digital Television Transition and Public Safety Act of 2005.[5]

In addition, the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. Law No. 110–329, authorized NTIA to use funds from the Upgrade Program for additional administrative expenses of the Digital-to-Analog Converter Box Program.[6] Pursuant to this authority, NTIA transferred $16,230,000 to the Converter Box Program. As a result, approximately $44 million is available for Upgrade Program grants.

B. October 2008 Public Meetings

On October 9, 2008, NTIA issued an Advanced Notice of Proposed Rulemaking and Notice of Public Meetings regarding the Upgrade Program (Upgrade Program Notice).[7] The Upgrade Program Notice announced two meetings regarding the implementation of the program and solicited written comments on certain aspects of the program's implementation. The first meeting was held on October 24, 2008, in Washington, DC, and the second meeting was held on October 28, 2008, in Las Vegas, Nevada.[8] After reviewing and considering the comments received, NTIA decided not to proceed with regulations to implement the program and withdrew the Advanced Notice of Proposed Rulemaking.[9] Instead, this Notice of Availability of Funds reviews the comments received and provides detailed information concerning the implementation of the Upgrade Program.

NTIA discussed the following topics at the public meetings: Community Eligibility; Station Eligibility; Reimbursement; Priority Reimbursement; Eligible Equipment and Costs; and Application Selection Procedures. These issues are discussed further in the following sections of this document.

1. Community Eligibility

Under the Act, both the station and the community it serves must be eligible in order for a station to receive Upgrade Program funds. Section 3009(a) of the Act states that Upgrade Program funds are to ''upgrade low-power television stations from analog to digital *in eligible rural communities, as that term is defined in section 610(b)(2) of the Rural Electrification Act of 1937 (7 U.S.C. 950bb(b)(2)).*''[10] The referenced section defines ''rural communities'' as ''any area of the United States that is not contained in an incorporated city or town with a population in excess of 20,000 inhabitants.''

In the Upgrade Program Notice, NTIA identified the following issues that were discussed at the public meetings regarding NTIA's possible interpretation of this definition:

(1) Whether NTIA should determine an eligible rural community based on the population within the station's (a) community of license, or (b) FCC 50/50 protected contour,[11] or (c) Grade A coverage, or (d) Grade B coverage, or (e) protected coverage contour per Section 74.707 of the FCC Rules.

(2) Whether NTIA should determine an eligible rural community based on some other definition or formula (e.g., the number, or percentage, of people served by the station living in rural areas outside Urban Areas or Urban Clusters of more than 20,000).[12]

Community of License. NTIA received several comments regarding the issue of community eligibility. The most common response was the suggestion to utilize the U.S. Census Bureau data for the station's community of license. As stated by the Belo Corporation, ''NTIA should choose the simplest and least expensive method: the population of a station's community of license based on census data. This number is easy to determine, requires little work from stations, and would be easy for NTIA to verify.''[13] In his comments, Michael Couzens, however, stated that the community of license ''has no legal or practical significance. No requirements are attendant on specifying any particular community, and the specification can be changed by minor amendment. So the use of that community for eligibility would be arbitrary.''[14]

NTIA believes that, while it is a possibly convenient solution, the use of population within a community of license is impractical as a means of determining whether a station truly serves a rural area. As noted by Couzens, the FCC treats changes of a community of license of a low-power television station as a minor modification and, therefore, the community of license can be changed easily. Further, NTIA notes that the population of a station's community of license has no relationship to the population in the surrounding coverage area. It is possible that a station can be licensed to a small community within a large metropolitan area. The existence of a community of license with a small population does not mean that the station serves a rural community.[15]

[5] Section 610(b)(2) of the Rural Electrification Act of 1937, 7 U.S.C. § 950bb(b)(2), provides that ''[t]he term 'eligible rural community' means any area of the United States that is not contained in an incorporated city or town with a population in excess of 20,000 inhabitants.''

[6] Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110–329, § 121, 122 Stat. 3574, 3577 (Sept. 30, 2008).

[7] Low-Power Television and Translator Upgrade Program, 73 Fed. Reg. 59,586 (Oct. 9, 2008) (Advanced Notice of Proposed Rulemaking).

[8] The PowerPoint presentation presented at the meetings, as well as a recording of an audiocast of the October 24 meeting, was posted on the Upgrade Program's website. Written comments received in response to Upgrade Program Notice, the NTIA PowerPoint presentation from the October meetings, and the audiocast of the October 24 meeting are available on NTIA's website at http://www.ntia.doc.gov/lptv/upgrade.html and http://www.ntia.doc.gov/lptv/lptv_overview.html.

[9] *See* Advanced Notice of Proposed Rulemaking, *supra* note 7; Low-Power Television and Translator Upgrade Program, 74 Fed. Reg. 17,938 (April 20, 2009) (Advanced Notice of Proposed Rulemaking, Withdrawal).

[10] *See* the Act, *supra* note 1 at § 3009, 120 Stat. at 26 (emphasis added).

[11] 73 Fed. Reg. at 59,587. The FCC 50/50 protected contour referred to herein is defined as follows: a low-power television or translator station's FCC license protects that station from interference from another station within a geographic area. The FCC calculates the protected coverage contour of a station based on the station's authorized broadcast power, its broadcast frequency, and the area within which 50 percent of the potential receiver locations can receive the station 50 percent of the time. The signal strength levels for protected contours of television translators are contained in 47 C.F.R. § 74.707 and listed in note 16 *infra*.

[12] 73 Fed. Reg. at 59,587. Urban Areas and Urban Clusters are areas defined by the U.S. Census Bureau, *see* http://www.census.gov/geo/www/ua/ua_2k.html. *See supra* note 5.

[13] Belo Corporation Comments (Belo) at 2 (Nov. 14, 2008); *see also*, Association of Public Television Stations Comments (APTS) at 2 (Nov. 14, 2008), Darwin Hillberry Comments (Hillberry) at 1 (Nov. 14, 2008), Vegas PBS Comments (Vegas PBS) at 1 (Oct. 30, 2008), Oregon Association of Broadcasters Comments (OAB) at 3 (Nov. 14, 2008), KRHP Comments (KRHP) at 2 (June 9, 2008).

[14] Michael Couzens Comments (Couzens) at 3 (Nov. 17, 2008).

[15] For example, WNXY-LP is licensed to Roslyn, New York, a community located on Long Island,

Continued

FCC Coverage Contours. Several commenters suggested that NTIA utilize the population within an FCC-predicted coverage contour as a means of determining whether the community served meets the eligibility requirement. Commenters were divided, however, over whether NTIA should use the Grade B contour or its low-power FCC 50/50 protected contour.[16] No one supported the use of the FCC's Grade A contour.

The FCC provides maps of the service area for each currently operating low-power television station at its Internet site http://www.fcc.gov/mb/video/tvq.html. The FCC maps show the geographic areas covered by a station and display urbanized areas in yellow, but do not provide the population within the coverage contour. APTS and Walla Walla noted that the FCC's coverage contours may be inaccurate because they ''assume flat terrain and thus frequently overestimate the reach of stations.''[17] APTS, Belo, and OAB commented that having stations determine the population via contour maps may impose a cost burden on stations.[18]

The service areas of each station shown on FCC maps are the FCC 50/50 protected contours for low-power stations. The National Translator Association (NTA) noted that the population in the FCC protected contour is being used by NTIA for determining eligibility for the Conversion Program and that its use should be continued for the Upgrade Program.[19] As established by the FCC, low-power television stations, translator stations, and Class A stations are protected from interference within the coverage contours set forth in the FCC Rules. While the station's signals may extend beyond this contour, only those people living within the contour are protected from interference from other stations.

NTIA agrees that the population within the FCC 50/50 protected contour is the most appropriate metric upon which to determine community eligibility because it is well-defined and understood. As NTA correctly noted, NTIA used the population within the FCC 50/50 protected contour as a metric in the Conversion Program and believes that it is the appropriate basis for determining population for the Upgrade Program as well.[20] NTIA chose not to use the Grade B contour since it relates to full-power television stations and does not apply to low-power stations.[21]

Longley-Rice Calculations. NTIA is mindful of the comments raised regarding the accuracy of the FCC coverage maps to reflect differences in coverage due to terrain variations. To determine the population within eligible communities, NTIA will, therefore, use the Longley-Rice model to determine the population within the FCC 50/50 protected contour for low-power television stations. This model is a widely-accepted method for predicting coverage over irregular terrain and will allow for a more accurate population count.[22]

NTIA recognizes that it would be burdensome for many stations to determine the population within a coverage contour, whichever contour standard NTIA adopts. In order to assist low-power stations in their participation in the Upgrade Program, NTIA has calculated the population of every translator, low-power, and Class A station licensed by the FCC as of December 2008.[23] These calculations use the Longley-Rice model to provide an estimate of the population within the FCC 50/50 protected contour that each station serves. NTIA will provide a population figure to each applicant as part of the Upgrade Program's application process.[24]

NTIA will use its population calculations as one of several methods of determining community eligibility. NTIA has found that the vast majority of stations serve a population of fewer than 20,000 within the FCC 50/50 protected contour using the Longley-Rice model (50/50 L/R). These stations will, therefore, quickly qualify for the Upgrade Program. NTIA cautions, however, that a station contour displayed on the FCC map that is within a large urban area (usually shown in yellow on the FCC map) cannot be considered rural, even if it has fewer than 20,000 people within the NTIA-calculated contour.

Alternate Rural Determination. In a small number of cases, fewer than 10 percent of the stations, NTIA was unable to calculate a population within the station's service area. In these instances, applicants may provide a coverage contour printed from the FCC's website (http://www.fcc.gov/mb/video/tvq.html) showing no urban areas containing a population greater than 20,000, or provide information from the Economic Research Service (ERS), U.S. Department of Agriculture, which lists those counties in the United States that have an urban population of fewer than 20,000.[25] Both sites are easy to access and the information can be obtained in a few computer clicks. The NTIA application form will provide information on obtaining information from both the FCC and ERS sites. Maps for stations no longer operating in analog will be available as part of the Upgrade Program application. The three procedures provided above will enable the vast majority of stations to easily determine whether their service areas meet the requirements of the Upgrade Program. Thus, based on the statutory requirements, NTIA will consider stations that provide service to areas that do not include urban areas greater than 20,000 to be 100 percent rural and will award these stations ten points

and is listed in the 2000 U.S. Census as having a population of 2,570. NTIA's conservative estimate of the number of people served by the station, however, is over 6 million. (NTIA calculated this population using the procedure discussed in note 24 *infra*).

[16] The FCC defines Grade A coverage as a level of service for *full-power* analog television stations with a signal strength of 68 dBu for channels 2–6, 71 dBu for channels 7–13, and 74 dBu for channels 14–69; and Grade B coverage as a level of service for *full-power* analog television stations with a signal strength of 47 dBu for channels 2–6, 56 dBu for channels 7–13, and 64 dBu for channels 14–69. *See* 47 C.F.R. § 73.683. The comparable 50/50 protected contours for *low-power* analog television stations are 62 dBu, 68 dBu, and 74 dBu, respectively. 47 C.F.R. § 74.707. These same dBu levels apply to Class A stations. *See* 47 C.F.R. § 73.6010.

[17] APTS at 2; *see also* Walla Walla University Comments (Walla Walla) at 1 (Nov. 14, 2008).

[18] APTS at 3; OAB at 3; Belo at 2.

[19] NTA Comments (NTA 1) at 1 (Sept. 29, 2008); *see also* Cohen, Dippell, and Everist Comments (Cohen, Dippell, and Everist) at 1 (Nov. 14, 2008) (agreeing that the FCC 50/50 protected coverage contours as set forth in 47 C.F.R. §§ 73.6010, 74.707 should be used if the community of license is not viable).

[20] *See* 72 Fed. Reg. at 61,112.

[21] *See supra* note 16.

[22] *See* 47 C.F.R. §§ 73.6010, 74.707. The Longley-Rice signal propagation model was developed at NTIA's Institute of Telecommunications Sciences and is an industry-accepted method of predicting signal coverage over irregular terrain. Longley-Rice calculations are incorporated into several commercial computer coverage prediction software programs.

[23] NTIA recognizes that there may be inaccuracies in the FCC database and also that there may have been changes in station facilities after the NTIA calculations were run. NTIA will update its calculation for a station when necessary to ensure the accuracy of its population estimate.

[24] NTIA obtained information from the FCC's station database and used a commercially available software program, Vsoft Probe 3, to calculate population within the FCC 50/50 protected contour (62 dBu for channels 2–6, 68 dBu for channels 7–13, and 74 dBu for channels 14–69) using the Longley-Rice model. All population figures are from the 2000 Census.

[25] *See* http://www.ers.usda.gov/Data/RuralUrbanContinuumCodes/2003/. The ERS has classified each county in the country based on its 2003 population on a nine-point continuum. Counties with a classification of 6, 7, 8, and 9 contain an urban population of fewer than 20,000 and comprise 55 percent of all counties in the United States. *See* http://www.ers.usda.gov/Briefing/Rurality/RuralUrbCon/ for information on the codes.

during the evaluation of the application.[26]

Rurality Factors. In its comments, the Community Broadcasters Association (CBA) noted that ''[n]othing in the wording of the statute indicates stations should be 'eligible' only if they exclusively serve communities of fewer than 20,000 inhabitants.''[27] NTIA is mindful that the Act, by reference to section 610(b)(2) of the Rural Electrification Act of 1937, cited above, permits participation in the Upgrade Program by stations serving areas with a population of greater than 20,000. Stations that serve areas with populations greater than 20,000 should first check the ERS site referenced above to quickly determine whether the county(ies) served contain urban areas greater than 20,000. If there are no counties within the coverage area with an urban population greater than 20,000, the station meets the rural communities requirements.

For those stations that cover urban areas greater than 20,000, APTS suggested that NTIA look at the Rural Utilities Service (RUS) Public Television Station Digital Television Grant Program, which uses a rurality analysis as part of its grant process.[28] This RUS program provides funds for the transition of full-power and low-power public television stations to digital operation. Many of these stations serve areas with populations greater than 20,000. The RUS determines a rurality score based on the measure of the rural character of the station's coverage area.[29]

Section 610(b)(2) of the Rural Electrification Act of 1937 applies to programs operated by the RUS and the Act applies this section to the Upgrade Program.[30] In considering how to apply section 610(b)(2) to areas with populations greater than 20,000, NTIA looked to RUS's administration of its programs for guidance on a definition of eligible rural communities. Following the principles used in the RUS Public Television Station Digital Television Grant Program, but adjusted to the needs and information available to the Upgrade Program, NTIA will consider the coverage within a low-power station's FCC 50/50 contour as the service area of the station to determine a rurality score.[31]

NTIA will provide applicants with the population within a station's FCC 50/50 protected contour. The Upgrade Program's web-based application form will contain links to the FCC and U.S. Census Bureau websites so applicants can obtain the population within urban areas greater than 20,000 within the FCC 50/50 protected contour.[32] The application form will then automatically calculate a Rurality Score — between six and nine points — based on the percentage of rural population within the FCC 50/50 protected contour area.[33] The Rurality Score an application receives will be used as part of the application selection procedure, which is discussed under Section 6.

In addition to the above-referenced three methods to determine population within a station's coverage contour, applicants may present their own population calculations for NTIA consideration. Applicants must fully document how their coverage was estimated. The applicant's estimated coverage contour and population is subject to acceptance by NTIA.

2. Station Eligibility

As noted in the prior section, the Act requires that both the applicant station and the community it serves be eligible for a project to receive funds from the Upgrade Program. Section 3009(a) of the Act states that ''each licensee of an eligible low-power television station may receive reimbursement.''[34] The term ''eligible low-power television station'' is defined in Section 3009(b) of the Act to mean ''a low-power television broadcast station, Class A television station, television translator station, or television booster station— (1) that is itself broadcasting exclusively in analog format; and (2) that has not converted from analog to digital operations prior to the date of enactment of the Digital Television Transition and Public Safety Act of 2005.''[35] The date of enactment was February 8, 2006.

In its Upgrade Program Notice, NTIA identified the following issues regarding the interpretation of Section 3009(b) that were discussed at the Public Meetings:

(1) Whether a station must hold an FCC license to be considered ''broadcasting'' or be permitted to hold an FCC Construction Permit or program test authority.

(2) Whether a station meets the statutory requirement (''broadcasting exclusively in analog format'') if it has a Construction Permit, program test authority, or license for a digital companion channel or has flash-cut to digital.

(3) Whether NTIA should establish a uniform deadline of eligibility (DOE) applicable to all applicants when determining a station's eligibility regarding the two previous items. If so, should the DOE be (a) the date of enactment of the Act (i.e., February 8, 2006), (b) the closing date for receipt of Upgrade Program applications for the applicable grant round, (c) the same date as the Expenditure Start Date discussed in the section titled Reimbursement, below, or (d) some other date.

(4) Whether a governmental subsidiary can be considered a non-profit corporation and therefore may qualify for ''priority reimbursement.''

(5) Whether NTIA should adopt the same requirements regarding station eligibility for the Upgrade Program as NTIA adopted for the Digital-to-Analog Conversion Program (Conversion Program) and published in the October 29, 2007, **Federal Register** (72 Fed. Reg. 61,109–61,114). The Conversion Program was established under Section 3008 of the Act and contains language identical to Section 3009 establishing the Upgrade Program regarding the definition of an eligible station.[36]

NTIA received many comments regarding station eligibility requirements. The comments primarily focused on two issues: (1) that a station should have an FCC authorization, and (2) the date by which a station received that authorization from the FCC.

FCC Authorizations. All the comments NTIA received in response to the issue of station eligibility supported a requirement that a station have an FCC authorization to qualify for the Upgrade Program. There were, however, varying

[26] *See* 7 U.S.C. § 950bb(b)(2).

[27] CBA Comments (CBA) at 2 (Nov. 14, 2008).

[28] APTS at 3.

[29] 7 C.F.R. § 1740.8.

[30] *See* the Act, *supra* note 1, at § 3009(a).

[31] The RUS procedure defines the service area as the population within at least one county and within all counties that are at least 75 percent covered by a station. *See* 7 C.F.R. § 1740.89(c). NTIA believes that defining the coverage area as the population within the FCC 50/50 protected contour is a more accurate representation of the station's service area. NTIA will provide the total population within the FCC 50/50 protected contour so applicants will be able to subtract the urban population to determine the rurality of the coverage area.

[32] Urban areas are shown in yellow on the FCC contour maps at (http://www.fcc.gov/mb/video/tvq.html) and population data of urban areas can be found on the U.S. Census Bureau's American Factfinder website at http://factfinder.census.gov/home/saff/main.html?_lang=en.

[33] The Rurality Score is based on the percentage of the population in the FCC 50/50 protected contour area that is rural (i.e., not living within urban areas greater than 20,000). The score is rounded using the 5/4 method. For example, a station that covers an area 64 percent rural would receive a Rurality Score of 6. A station that covers an area 65 percent rural would receive a Rurality Score of 7. A station that covers an area 66 percent rural also would receive a Rurality Score of 7.

[34] *See* the Act, *supra* note 1, 120 Stat. at 26.

[35] *Id.*

[36] 73 Fed. Reg. at 59,587 (internal footnotes omitted).

suggestions on what type of FCC authorization would be appropriate. Some commenters indicated that a station must hold an FCC license, while others recommended that stations holding an FCC Construction Permit should be eligible.[37]

NTIA has determined to interpret the Act's definition of a ''low-power television broadcast station, Class A television station, television translator station, or television booster station'' as a station authorized by the FCC to use the television broadcast spectrum. These terms are defined by the FCC at 47 C.F.R. §§ 74.701 and 73.6001. NTIA notes that authorization for broadcast, however, does not mean that the FCC must have issued a license for the station. The FCC's Rules permit a station to begin broadcasting service or program tests once it has completed construction and filed for a license showing that it complies with the FCC's technical requirements and engineering standards.[38] The FCC also has authorized low-power television stations under Special Temporary Authority (STA).[39] NTIA has decided to adopt these FCC definitions in order to include the broadest applicant pool for the program.

Date of Eligibility. NTIA believes that one of the key issues regarding station eligibility is when the applicant station must hold the required FCC broadcast authorization. Many commenters suggested that NTIA use the date of enactment of the Act — February 8, 2006 — as the date by which the applicant station must hold an FCC broadcast authorization.[40]

In determining the eligibility of a low-power station to participate in the Upgrade Program, NTIA is mindful that the Act establishes a two-and-one-half year period between the February 8, 2006, the date of enactment, and the October 1, 2008, the authorized start date of the Upgrade Program.[41] Further, the Act requires that the Upgrade Program distribute funds on a reimbursement basis; i.e., station operators must expend their own funds prior to receiving reimbursement from NTIA. Inasmuch as Congress requires that low-power operators seek reimbursement from NTIA for prior upgrade expenses, it is entirely consistent with the Act that NTIA establish the date of station eligibility as the date of enactment, February 8, 2006. NTIA thus will accept applications from those low-power stations that were authorized by the FCC prior to February 8, 2006. This includes those stations authorized to broadcast as well as those low-power stations whose construction was authorized by the FCC prior to February 8, 2006.

NTIA recognizes that applications for many low-power stations were tendered to the FCC in 2000, but were mutually exclusive with other applicants and Construction Permits and could not immediately be awarded by the FCC. The clear intent of the Act is to facilitate the conversion of television stations in the United States to digital broadcasting.[42] NTIA believes that it is contrary to Congressional intent to exclude those low-power stations that received FCC authorizations and that were constructed in good faith prior to the announcement of this Upgrade Program. NTIA believes that those low-power stations that were authorized by the FCC prior to the date of enactment should be afforded the same opportunity to seek NTIA funds for upgrade to digital as those that were already broadcasting on that date. All stations, however, must broadcast exclusively in analog prior to submission of an application for Upgrade Program funds, i.e., the station must be constructed and licensed by the FCC as an analog low-power station prior to submission of an Upgrade Program application.

NTIA is mindful that the Act that established the Upgrade Program also initially established a firm deadline, February 17, 2009, for the digital transition of full-power television stations.[43] While the Act permitted low-power stations to operate in analog after that date, the authorization of the Upgrade Program is another clear example of action by the Federal government to move all television broadcasting to digital. In an action taken in October 2005, the FCC authorized low-power stations with analog Construction Permits to construct digital stations without having to first construct an analog station.[44] Given these actions by the Congress and the FCC, NTIA believes that any low-power station authorized by the FCC after the date of enactment should have been constructed directly as a digital station. By establishing February 8, 2006, the date of enactment, as the date on which to determine station eligibility, NTIA opens the Upgrade Program to all stations authorized to broadcast in analog on that date. NTIA cannot, however, accept applications from those analog stations authorized after the date of enactment.

The Act further includes in the definition of an eligible station the requirement that the station ''has not converted from analog to digital operations prior to the date of enactment of the Digital Television Transition and Public Safety Act of 2005,'' i.e., February 8, 2006.[45] NTIA considers that a station has converted from analog to digital operations when it begins digital broadcasting. Applicants must be able to certify that they did not begin digital broadcasting prior to February 8, 2006.

In sum, NTIA will require that on February 8, 2006: (a) the station held either (1) a Construction Permit for an analog low-power station that was subsequently licensed by the FCC for analog broadcasts, or (2) an FCC broadcast license or STA for an analog low-power station; and (b) the station was not broadcasting in digital.

3. Reimbursement

The Act states that eligible stations ''may receive reimbursement for

[37] For example, Vegas PBS recommended that funding be ''available to stations with a valid analog station license or Construction Permit (CP) as of the date of legislation, provided that stations were not already broadcasting in digital before that date.'' Vegas PBS at 1. It also suggested that ''[h]olding of a digital license, without operating DTV facilities, by an analog broadcaster should not be disqualifying.'' *Id.* KRHP asserted that stations should hold ''[a]n FCC license. (I wouldn't think that 'Construction Permits' and/or 'test authority' would not be what the legislators intended here).'' KRHP at 2. In their comments, Charlie Cannaliato and Lee Good agreed that ''[a] Construction Permit (CP) would not qualify for funds as it is not operational.'' Cannaliato and Good Comments (Cannaliato and Good) at 2 (June 1, 2008). Couzens, however, stated that ''a construction permit should be treated in the same manner as a license, consistent with FCC practice. A permit holder has authority to begin broadcasting at any time.'' Couzens at 2.

[38] *See* 47 C.F.R. § 74.14.

[39] *See* 47 C.F.R. § 74.25. As of February 2009, at least 22 stations were operating under STAs.

[40] *See, e.g.*, KRPH at 2; Vegas PBS at 1; OAB at 2; APTS at 2; Indian Wells Comments (Indian Wells) at 1 (Nov. 14, 2008).

[41] During this two-and-one-half year period, 343 low-power stations began analog broadcasting where construction was authorized prior to the date of enactment, and 24 new low-power licensees began analog broadcasts where construction was authorized after the date of enactment.

[42] In addition to the Conversion Program and Upgrade Program authorized and funded by the Act, it mandated the cessation of full-power analog television broadcasts, set forth an auction of spectrum to be released after the digital transition, established and funded a $1.5 billion dollar program to assist consumers with analog television sets in receiving digital broadcasts, and provided $30 million to assist in the digital conversion of television stations in the New York City area. *See* the Act, *supra* note 1, at §§ 3002–3005, 3007, 120 Stat. at 21–25.

[43] The DTV Delay Act subsequently extended this date to June 12, 2009. *See supra* note 1.

[44] *FCC Commences Accepting Applications for On-channel Digital Conversion of Low Power TV and TV Translator Stations and Announces Availability of Revised Application Forms 346 and 301–CA*, Public Notice, DA 05–2546, 20 F.C.C. Rcd. 15353 (Oct. 4, 2005).

[45] *See* the Act, *supra* note 1, 120 Stat. at 26.

equipment to upgrade low-power television stations from analog to digital.''[46] While the phrase ''reimbursement'' is not defined in Section 3009 of the Act, NTIA understands that the common usage of the term requires that an eventual grant recipient of the Upgrade Program must first make payments for the eligible costs funded by the grant, and then the grant recipient would receive funds to cover those payments from NTIA. Two issues related to the implementation of a reimbursement procedure are relevant to the Upgrade Program. The issue of an Expenditure Start Date was raised in the Upgrade Program Notice and discussed at the public meetings. A second issue, on the timing of the reimbursement, was raised in the written comments.

Expenditure Start Date. The Expenditure Start Date was the primary issue that NTIA identified in the Upgrade Program Notice regarding the interpretation of the reimbursement clause of Section 3009 of the Act. NTIA proposed the Expenditure Start Date as the date after which NTIA would accept expenditures eligible for reimbursement. NTIA asked whether the Expenditure Start Date should be the date of enactment — February 8, 2006 — or another date, and, if another date, which one.[47]

The comments NTIA received on the Expenditure Start Date primarily supported the date of enactment, February 8, 2006. For example, APTS supported that date ''in order to make the Upgrade Program as inclusive as possible within the statutory language and not to penalize stations that have made early transitions.''[48] Indian Wells stated that setting different dates for the Expenditure State Date and the Date of Eligibility discussed earlier would be ''condoning an unnecessary paradox.''[49]

NTIA believes that establishing February 8, 2006, as the Expenditure Start Date is the appropriate date to fulfill the purposes of the Upgrade Program. Using February 8, 2006, would fulfill Congressional intent of upgrading low-power stations to digital. After passage of the Act, many stations have upgraded with the expectation that their costs would be reimbursed under the Upgrade Program. Using the February 8, 2006, date as the date after which NTIA will reimburse stations is consistent with Section 3009(b)(2) of the Act, which defines an eligible station as one ''that has not converted from analog to digital operations prior to the date of enactment of the Digital Television Transition and Public Safety Act of 2005.''[50] Finally, the February 8, 2006, date would be easily understood by applicants and would ease NTIA's administration of the program.

Timing of the Reimbursement. Although not raised in the Upgrade Program Notice, the comments received by NTIA raised an issue regarding the timing of the reimbursement. Commenters were concerned that NTIA would require that stations expend all funds required for a project prior to obtaining NTIA's reimbursement funds. Some commenters stated that the stations do not have the funds to purchase equipment and then wait for NTIA reimbursement.[51] WYDC stated it most succinctly, ''no need to require the stations to spend the funds first — they don't have the money!''[52] APTS and the Oregon Association of Broadcasters (OAB) suggested that NTIA could advance funds ''up front.''[53] NTA suggested that the Upgrade Program provide an advance of 80 percent with the balance paid after completion of work.[54] CBA suggested that NTIA issue ''Reimbursement Letters of Credit'' akin to a bank letter of credit, which could provide equipment manufacturers the assurance that NTIA grant funds would cover the cost.[55] Cannaliato and Good proposed that NTIA issue coupons to stations, which would then use the coupons to purchase equipment from manufacturers.[56]

NTIA appreciates the conditions under which low-power stations operate and the difficulties many may have in raising the funds required to upgrade to digital operations. The Upgrade Program intends to assist those stations to the maximum extent permitted by the Act. The Act clearly requires, however, the reimbursement of costs. NTIA therefore can provide neither funds in advance nor letters of credit or coupons as these are other forms of advance payment. NTIA will issue reimbursements only after stations have expended funds to upgrade to digital operations.

Stepped Reimbursement. OPB suggested that one method of implementing the reimbursement process would be ''a stepped approach with grant money furnished in steps such that the small organization need only come up with the money for the first conversion. After that, the NTIA funds would be in effect 'seed money' for the rest as the conversion is accomplished.''[57] NTIA believes that OPB's suggestion of a stepped approach for funding is consistent with the Act's requirement that the Upgrade Program reimburse eligible costs after a station is upgraded to digital. Therefore, NTIA will hold monthly grant rounds during the next year so applicants have opportunities to file applications for reimbursement as soon as an upgrade is completed.

During each grant round, applicants will be able to request reimbursement of eligible equipment costs for one or more stations that have completed the upgrade to digital. The application must include copies of the paid invoices for eligible equipment for each station, as well as a copy of each station's FCC digital license, STA, FCC Form 347 (''Application for a Low Power TV, TV Translator or TV Booster Station License''), or FCC Form 302–CA (''Application for Class A Television Broadcast Station Construction Permit or License'') for a license to cover a Construction Permit. NTIA intends to accept applications monthly after the initial Priority Round, so operators can routinely seek reimbursement and continue their station upgrades.

These procedures will assist those stations that cannot raise all the funds they require up front for digital upgrade, especially those small non-profit organizations in rural areas targeted for priority by the Act, and will also ensure the immediate distribution of the maximum amount of funds to stations prepared to complete the digital upgrade of their facilities. Further information on application selection procedures are explained in Section 6.

4. Priority Reimbursement

The Act states that priority reimbursement shall be given to

[46] *Id.*

[47] 73 Fed. Reg. at 59,587–59,588.

[48] APTS at 3.

[49] Indian Wells at 5; *see also* KGCS Comments at 3 (Oct. 21, 2008). The only other suggestion was from KRHP, which suggested a date shortly after the applications were made available. KRHP at 3.

[50] *See* the Act, *supra* note 1, 120 Stat. at 26.

[51] For example, APTS said that stations ''lack the capital to complete conversion projects up front even if they would be able to receive reimbursement.'' APTS at 4. Indian Wells commented that ''[w]e don't think that translator operators like ourselves will [be] able to obtain bank monies without availability of, at the least, an NTIA financial instrument to offer as loan collateral.'' Indian Wells at 2. Walla Walla stated that ''[i]f we could know there would be a certain amount of grant money coming, perhaps we could take out a loan first, then pay it back with grant funds, but this idea is not necessarily good management, and makes us a little nervous.'' Walla Walla at 2. *See also* Belo at 3; Hillberry at 1; WYDC/WJKP/WBGT Comments (WYDC) at 1 (Nov. 1, 2008); Oregon Public Broadcasting Comments (OPB) at 1 (June 18, 2008).

[52] WYDC at 1.

[53] *See* APTS at 4; OAB at 5. OAB said that ''any award which is not up front will be fruitless as the applicants would not have the ability to order the necessary replacement equipment.'' *Id.*

[54] NTA 1 at 2.

[55] CBA at 3.

[56] Cannaliato and Good at 3.

[57] OPB at 1.

''eligible low-power television stations in which the license is held by a non-profit corporation and eligible low-power television stations that serve rural areas of fewer than 10,000 viewers.''[58] In Upgrade Program Notice, NTIA identified the following issues regarding the interpretation of this requirement in Section 3009 that were discussed at the Public Meetings:

Whether NTIA should:

(1) have an exclusive period during which only applicants who qualify for the priority can apply?

(2) establish a priority reimbursement category within a larger grant round?

(3) provide additional points, if the grants are competitive, to those applicants that meet the criteria for priority reimbursement?

(4) require that stations meet both criteria (licensee held by a non-profit corporation and that serve rural areas of fewer than 10,000 viewers) to receive the priority?

(5) use the same benchmark in determining the priority reimbursement population requirement (''rural areas of fewer than 10,000 viewers'') as used in determining population eligibility requirement (''any area of the United States that is not contained in an incorporated city or town with a population in excess of 20,000 inhabitants'')?

(6) adopt the same requirements regarding priority reimbursement for the Upgrade Program as it adopted for the Conversion Program and published in the October 29, 2007, **Federal Register** (72 Fed. Reg. 61,109–61,114).[59]

Non-Profit Corporation. NTIA received many comments in response to the questions NTIA raised regarding implementation of the priority reimbursement section of the Act. Most of the comments received address the interpretation of the term ''non-profit corporation.'' Almost all of the comments on the issue recommended the widest possible interpretation of this term to include governmental units and other non-profit organizations that may not be organized as corporations.[60]

While NTIA understands commenters' recommendations that NTIA consider organizations such as governmental subsidiaries, or organizations that act in a manner similar to non-profits, as a ''non-profit corporation'' for the purpose of receiving priority under Section 3009, NTIA cannot do so as a matter of law. Since the Act does not define the term ''non-profit corporation,'' NTIA will use the common definition of the term non-profit corporation as a corporation that has received a determination of non-profit status under state or Federal law.[61] As a general rule, state and local governments would not qualify for priority compensation unless the unit has a separate corporate charter and has received a determination of non-profit status. NTIA will require that applicants supply evidence of non-profit corporate status, such as an Internal Revenue Service (IRS) letter or other documentation submitted to establish the nature of the entity holding the license. Whether or not an entity has been organized as a non-profit corporation entitled to priority reimbursement under the Upgrade Program would be determined by review of the state, territorial, or tribal articles of incorporation or other documentation submitted to establish the nature of the entity holding the license.

Non-profit corporations are usually thought of as those entities organized under section 501(c) of the IRS Code. Indian Wells raised the question of whether those organizations organized under section 501(c)(4) of the IRS Code are eligible for priority.[62]

Under a provision of the 1995 Lobbying Disclosure Act known as the ''Simpson Amendment,'' section 501(c)(4) organizations that receive Federal funds may not engage in any lobbying activities, even with their own private funds. NTIA recognizes that some station licensees may be organized under section 501(c)(4) of the IRS Code, but do not engage in prohibited lobbying. Therefore, if an organization organized under 501(c)(4) certifies that it engages in no lobbying activities, NTIA will be able to accept the application for the Upgrade Program and afford the applicant priority reimbursement.

Rural areas with fewer than 10,000 people. The Act also requires that NTIA give priority reimbursement to ''eligible low power television stations that serve rural areas of fewer than 10,000 viewers.''[63] Comments received on this issue generally echoed the comments noted earlier in Section 1 regarding the determination of community eligibility.[64] APTS recommended that NTIA adopt ''the same benchmarks in determining the priority reimbursement population requirement as in determining the base eligibility requirement.''[65] NTIA agrees and believes that using the same benchmark would simplify the administration of the Upgrade Program. As discussed earlier in Section 1, the use of the FCC 50/50 protected contour using the Longley-Rice model will provide the most accurate determination of the population within a station's service area. NTIA will provide the appropriate population information to each applicant as part of the Upgrade Program's application process. Those stations with populations under 10,000 will be afforded priority reimbursement if they are in a rural area.[66]

Implementation of the Priority. In addition to determining how to establish the priority for reimbursement, NTIA must also determine how to implement this priority. One of the questions NTIA asked in the Upgrade Program Notice was whether NTIA should require that stations meet both criteria (i.e., where the license is held by a non-profit corporation and stations that serve rural areas of fewer than 10,000 viewers) in order to receive the priority. Commenters were split on this issue. For example, KRHP and KGCS supported the need to meet both criteria, while APTS felt that an applicant need only meet one of the criteria.[67]

When NTIA implemented the priority provision for the Conversion Program, which is based on identical language regarding priority as the Upgrade Program, NTIA concluded that an applicant need only fulfill one category to be eligible for priority reimbursement.[68] NTIA has determined that it is too narrow of an interpretation

[58] *See* the Act, *supra* note 1, 120 Stat. at 26.

[59] 73 Fed. Reg. at 59,588. The Conversion Program was established under Section 3008 of the Act and contains language identical to Section 3009 establishing the Upgrade Program regarding priority consideration (reimbursement).

[60] Hillberry at 1; OAB at 3; APTS at 5; Indian Wells at 4; Couzens at 4; KGCS Comments (KGCS) at 1 (Oct. 21, 2008); Greg Best Consulting Comments (GBC) at 1 (Nov. 14, 2008). OPB, which recommended that applicants be organized under section 501(c)(3), supported including governmental bodies as non-profit organizations if there were ''a maximum cap, so there is a chance that the smaller groups can get funds.'' OPB at 3.

[61] It is a basic principle of statutory construction that in the absence of a statutory definition, ''we construe a statutory term in accordance with its ordinary or natural meaning.'' *FDIC v. Meyer*, 510 U.S. 471, 476 (1994).

[62] Indian Wells at 4. Section 501(c)(4) of the IRS Code refers to social welfare organizations.

[63] *See* the Act, *supra* note 1, 120 Stat. at 26.

[64] For example, OAB again supported using the census population of the community of license for determining the priority reimbursement. OAB at 4. OPB supported city of license population. OPB at 3.

[65] APTS at 5.

[66] If the station's coverage contour is nearly all within a large urban area (shown in yellow on the FCC's coverage map), it will not qualify for the priority, even if it serves fewer than 10,000 people.

[67] KRHP at 3; KGCS at 3; *but see* APTS at 4.

[68] *See* 72 Fed. Reg. at 61,112 (providing that ''an applicant requesting priority compensation must (i) be a non-profit corporation; *or* (ii) serve fewer than 10,000 people within the low-power station's 50/50 service contour'') (emphasis added).

of the Act to require applicants to fulfill both categories to be eligible for priority reimbursement from the Upgrade Program. Therefore, as directed by the statute, NTIA will give priority reimbursement to any applicant that is *either* (1) a non-profit corporation as provided above, *or* (2) a station that serves fewer than 10,000 people within the low-power station's 50/50 Longley-Rice service contour.

NTIA recognizes that hundreds of stations could qualify for priority reimbursement under this policy. In order to fulfill Congressional intent that the Upgrade Program provide priority reimbursement to stations operated by non-profit corporations and to those stations serving rural communities, NTIA believes that it is appropriate to award additional priority to stations meeting *both* criteria. As explained further in Section 6 on application selection procedures, NTIA will award additional priority reimbursement to those stations that are *both* (1) a non-profit corporation as provided above, *and* (2) a station that serves fewer than 10,000 people within the low-power station's 50/50 Longley-Rice service contour.

NTIA received few comments regarding how the priority reimbursement should be administered. Several commenters recommended that NTIA establish a window of approximately 30 to 60 days to receive applications requesting priority reimbursement, after which applications would be open to all qualified applicants.[69] NTIA created such a window for priority applicants in the Conversion Program and believes that such a window is an effective way to implement the required priority reimbursement for the Upgrade Program.[70] NTIA will, therefore, hold a Priority Round open only to those stations which qualify for priority reimbursement.

As discussed further in Section 6 on the application selection procedures, NTIA will assign priority points to those stations meeting the two criteria discussed earlier. Awards will be based on the number of points a station receives and NTIA expects that those stations qualifying for priority reimbursement will be funded first. CBA asks that NTIA limit the funds going to priority stations to 50 percent of the total program funds.[71] NTIA declines to limit the Upgrade Program funds to those stations that qualify for priority reimbursement in order to fulfill Congress's intent to provide as much assistance as possible to stations operated by non-profits and those stations that serve rural communities.

In sum, NTIA will award ten points to those stations that serve an area of fewer than 10,000 people and will also award ten points to those stations that are licensed to a non-profit corporation. First, NTIA will conduct a grant round restricted to those stations meeting the priority criteria discussed above (Priority Round) with a July 13, 2009 Closing Date so stations that qualify for the priority can quickly receive reimbursement and continue their phased upgrade, if appropriate. After that Priority Round Closing Date, NTIA will continue to provide priority to those stations that meet these criteria during the monthly grant rounds.

5. Eligible Equipment and Costs

The Act states that reimbursement shall be given for ''equipment to upgrade low-power television stations from analog to digital,'' but does not provide further guidance regarding which equipment or costs should be supported by the program.[72] In the Upgrade Program Notice, NTIA identified three issues regarding the interpretation of this provision: (1) what costs or equipment should be eligible for reimbursement under the program; (2) whether there should be a formula or a limit on the amount of funds awarded to a single station; and (3) if so, what should they be or how should they be determined?[73]

NTIA received many comments recommending the equipment that should be funded under the Upgrade Program, many of them with specific recommendations.[74] While all the commenters supported the replacement of analog transmission equipment, several noted that upgrade costs would be different (1) depending on different transmit power levels, (2) if a station could modify its existing equipment rather than having to purchase a new transmitter, (3) if the station were to change its transmit channels, or (4) if the station is an originating station.[75] Several commenters also raised the question whether the Upgrade Program should support installation or planning (engineering) costs.[76]

All the commenters that discussed the issue recommended that NTIA place a cap on the level of funding for grants. The suggested caps generally range from $6,000 to $10,000 for upgrade of small translators and up to $20,000 for more complex projects.[77] Most of the commenters, including CBA and NTA, the two national organizations that represent low-power stations, recognized that their proposed cap was not intended to cover all costs, but was a reasonable funding level given the demands on the program. CBA and NTA both recommended caps of $20,000.[78]

After reviewing the comments and suggestions regarding the equipment the Upgrade Program should fund, NTIA determined that, due to limited funds, eligible equipment should be limited to the basic transmission equipment required for a low-power television,

[69] APTS suggested that ''each grant cycle should begin with a 30– to 60–day period for applications for priority reimbursement. After that, the cycle should be open to all applicants.'' APTS at 6; *see also* CBA at 3; Vegas PBS at 1.

[70] During the Conversion Program, NTIA accepted only applications requesting priority consideration during the first three months of the program. *See* 72 Fed. Reg. at 61,109.

[71] CBA at 3 (asserting that ''[t]his proposed 50/50 division is equitable even though the number of very rural translator licensees may be greater than the number of less rural LPTV stations because the technical configuration of originating LPTV stations makes conversion to digital significantly more expensive'').

[72] *See* the Act, *supra* note 1, 120 Stat. at 26.

[73] 73 Fed. Reg. at 59,588.

[74] *See, e.g.*, Cannaliato and Good at 2; KGCS at 2; KRHP at 2; OPB at 2; NTA 1 at 2; NTA Comments (NTA 2) at 1–2 (Nov. 17, 2008); Hillberry at 1; Indian Wells at 3; GBC at 3; OAB at 5; APTS at 4; CBA at 4; KPVM Television, Inc. Comments (KPVM) at 1 (Oct. 30, 2008); RTZ Systems Comments (RTZ Systems) at 1 (Oct. 31, 2008).

[75] *See* Cannaliato and Good at 1; OPB at 2 (commenting on the costs of converting different power levels); Hillberry at 2 and NTA 1 at 2 (both commenting on relative costs of modifying vs. replacement); NTA 1 at 2 and APTS at 4 (both commenting on costs of changing channels); CBA at 5 (commenting about originating and non-origination stations).

[76] For example, Cannaliato and Good recommended $500 for installation per site to cover mileage, technical help per diem, miscellaneous cables and connectors, etc. Cannaliato and Good at 3. Other comments thought that funding installation costs would be desirable but not critical. OPB at 2; GBC at 4; KRPH at 2; Indian Wells at 3. Indian Wells also supported the funding of engineering costs in support of the FCC license. Indian Wells at 3. GBC supported $1,500 for engineering costs after two years, if funds are available. GBC at 4.

[77] Cannaliato and Good at 2; Hillberry at 2; Indian Wells at 3 (recommending funding caps for simpler upgrades in the $6,000 to $10,000 range); CBA at 5 (recommended a $12,000 cap); GBC at 4 (recommending a $25,000 cap for simpler projects); APTS at 6 (recommending a $30,000 cap). *See also* Cannaliato and Good at 2; NTA 1 at 2; RTZ Systems at 1; Hillberry at 2; OAB at 5; CBA at 5 (recommending a cap ranging from $20,000 to $25,000 for more complex projects); Indian Wells at 4 (recommending a $10,000 cap for more complex projects); APTS at 5 (recommending a $40,000 cap); OPB at 2; GBC at 4 (recommending a $75,000 cap); KRPH at 1 (recommending at $150,000 cap).

[78] NTA ''suggested that a maximum level of $20,000 is a good compromise between covering all costs and having a reasonable level of funding available for all applicants.'' NTA 1 at 2. Similarly, CBA states that it ''believes that it to be more helpful to the digitization of the translator and LPTV industry as a whole to limit the types of equipment eligible for SEC. 3009 [Upgrade Program] reimbursement to transmission equipment, rather than funding anything and everything these stations could use in the digitalization conversion process.'' CBA at 4.

Class A, translator, or booster station to broadcast a digital signal. As part of the application process, NTIA will provide applicants with two funding caps and corresponding listings of eligible equipment/costs. One listing is based on the *modification* of an existing 100 watt NTSC station to digital (25 watts ATSC) and will have an award cap of $6,000, as recommended by several commenters. The other equipment cost listing is based on the *replacement* of a similar 100 watt NTSC with a new 25 watt digital unit, with a cap of $20,000 as recommended by CBA, NTA, and others. NTIA has researched upgrade costs of basic transmission equipment and found that these proposed cap levels are a fair reflection of the upgrade cost to stations. Grantees will be permitted to exceed these equipment list expenditure caps to purchase similar, but more powerful equipment using their own funds. As discussed in Section 3, grantees will be required to provide NTIA with paid invoices for eligible equipment when submitting an application.

6. Application Selection Procedures

NTIA also raised several issues in the Upgrade Program Notice and public meetings about how NTIA should select grant recipients. Issues discussed include how applications should be selected for funding and whether NTIA should consider any of the following alternatives:

(1) **Uniform grants.** If all 7,000 low-power stations were eligible for the program, each station could receive a grant of approximately $9,000; if only half the stations were eligible for the program, the uniform grant would be approximately $18,000, etc.

(2) **First-come, first-served.** NTIA could fund complete applications from otherwise eligible stations on a first-come, first-served basis, until all funds are awarded. A provision would have to be devised to provide for the stations that meet the statutory requirements for priority reimbursement.

(3) **Competitive grant cycle.** If NTIA were to award funds on a competitive basis, what selection factors and criteria should it establish to evaluate applications?

(4) **Single or multiple grant cycles.** How many grant cycles should NTIA plan to award the funds during the authorized period fiscal year 2009 through fiscal year 2012?[79]

Issues discussed also included the administrative matters related to the efficient implementation of the Upgrade Program, including preparation and submission of applications, payment of funds, and grantee post-award obligations.

Uniform Grants and First-Come, First-Served Grants. The comments submitted express stations' desire for a simple electronic application procedure.[80] As part of this desire for a simple application procedure, many comments were supportive of NTIA's issuance of uniform grants or grants made on a first-come, first-served basis and not a competitive grant program.[81] GBC, however, opposed a first-come, first-served grant system ''because constraints upon the resources of the staff of the station may result in poor applications or not allow the stations that need it most to receive program funding.''[82] KNXT felt that NTIA should give ''one point for each condition met. Stations should be awarded grants with the most points getting the highest priority.''[83] No comments were received, however, on how the points should be assigned. Several comments were received recommending that applicants have the ability to submit funding requests for multiple station upgrades as part of a single application.[84]

NTIA cannot accept the recommendation that it issue uniform grants as it did in the Conversion Program. For the Conversion Program, NTIA's research indicated that there were sufficient funds available so all qualified stations could receive a uniform grant.[85] NTIA is not able to estimate the number of applicants eligible for the Upgrade Program. Therefore, it is unable to apply the same process used in the Conversion Program. Further, as discussed earlier in Section 5 on Eligible Equipment and Costs, the costs of upgrade will vary depending on a number of factors, including station power, channel selection, and whether the equipment can be modified or must be replaced. Given the limited availability of funds, NTIA believes that the needs of more stations can better be addressed if the caps reflect the needs of the project. NTIA, therefore, believes that it will be able to assist more stations by not awarding uniform grants to each station. In the interest of simplifying the program while at the same time responding to the needs of different stations, NTIA has established two levels of Upgrade Program awards, $6,000 and $20,000 as discussed earlier in Section 5.

NTIA appreciates the recommendation that the Upgrade Program distribute funds on a first-come, first-served basis. We find, however, that such a procedure would be inconsistent with the objectives of the program. A primary requirement of the Act is that NTIA provide priority reimbursement to stations operated by non-profit corporations or those that serve rural communities of fewer than 10,000. NTIA cannot reconcile a first-come, first-served grant program with the requirement to provide priority reimbursement. NTIA has, therefore, designed the Upgrade Program as a competitive grant program so that it can provide priority reimbursement to those stations that meet the objectives of the Act. NTIA is, however, mindful of a statement by Couzens that the application form should be a simple one-page form with ''mechanistic go/no-go tests.''[86] NTIA agrees that the application process should be as easy and simple as possible. Applications will be fully reviewed by staff to ensure eligibility criteria, as described above, are met.

Web-based Application Form. NTIA will use the Conversion Program application procedure as the basic model for the Upgrade Program. NTIA will make an Online Fillable Form available on the web for completion by all applicants. Applicants will be able to prepare applications for multiple stations on a simple Internet website. Information for stations will be automatically entered from the FCC's database whenever possible and can be revised by the applicant. The application website will provide an easy link to other websites mentioned earlier for applicants to obtain FCC coverage maps or U.S. Census Bureau population data for urban areas, if needed. Finally, the applications must be signed and mailed to NTIA for receipt on or before the relevant closing dates indicated in the **DATES** section of this announcement.

Because the Upgrade Program grants are considerably larger than the $1,000 per station awards of the Conversion Program, applicants will be required to submit several additional forms required by the Department of Commerce, as discussed further in Section III, Application Procedures. These additional forms also will be available on the Upgrade Program

[79] 73 Fed. Reg. 59,588.

[80] GBC at 5; Cannaliato and Good at 1; OPB at 4; Vegas PBS at 1.

[81] OPB at 4; KGCS at 1; KYDC at 1; Hillberry at 1; Indian Wells at 5; Vegas PBS at 8; OAB at 6; CBA at 5.

[82] GBC at 5.

[83] KNXT Comments at 1 (Oct. 24, 2008).

[84] APTS at 6; OPB at 4.

[85] To date, NTIA has been able to award every qualified application to the Conversion Program a grant of $1,000 as originally proposed.

[86] Couzens at 2.

application website, and applicant information will be automatically inserted by the application program when possible. For the most part, these additional forms will require only a signature certifying the applicant's compliance with Departmental requirements.

Length of Award Period. Since NTIA requires that a station complete its digital upgrade prior to submission of the application, the Upgrade Program will operate in a manner similar to that of the Conversion Program. After an award is made, payment and project close-out will proceed with a minimum of grantee paperwork.

Funds Available During Fiscal Year 2009. APTS and CBA responded to the issue of how NTIA should plan to award the funds during the authorized period of fiscal year 2009 through fiscal year 2012. APTS recommended that funds be distributed during each of the four authorized fiscal years, with a majority of funds awarded in fiscal year 2009 ''to encourage licensees to conduct expeditious transitions.''[87] CBA also recommended distribution of funds during the four fiscal years, with the largest amount in fiscal year 2009, although it also supported the distribution of all funds in fiscal year 2009 ''provided that this rapid distribution does not necessitate a dramatic increase in the overhead cost of the implementation'' of the program.[88]

NTIA believes that the best way to encourage stations to upgrade to digital is to make all the funds in the Upgrade Program immediately available to applicants. Although an accelerated distribution of funds would impact overhead costs, NTIA believes that the benefit of making the reimbursement of funds available to the stations quickly would benefit the public by receiving the benefits of digital television broadcasts. NTIA, therefore, announces that it will fund qualified applications up to the full approximately $44 million available in the Upgrade Program. This Notice establishes a Closing Date for the Priority Round as July 13, 2009. Applications will then be accepted on a monthly basis, beginning August 10, 2009 until all grant funds are awarded.

Competitive Grant Program. The Upgrade Program will be a competitive grant program, but one that will use simplified application procedures. As discussed above, NTIA will assign points to those stations meeting the two priority criteria in Section 4. Also, points will be awarded based on the degree of rurality of the communities served as discussed in Section 1. Awards will be based on the number of points a station receives, and those stations qualifying for priority reimbursement will be funded first during each grant round.

II. Award Information

A. Eligibility

An eligible station is a low-power television broadcast station, Class A television station, television translator station, or television booster station (1) that is itself broadcasting exclusively in analog format; and (2) that has not converted from analog to digital operations prior to February 8, 2006.

In order to qualify for the Upgrade Program, an eligible station must provide service to a rural community that is eligible under the Act. Further discussion of the determination of eligible rural communities will be found in Part I, Section B.1 and Part IV, Section A.

B. Funding Availability

Approximately $44 million is available for grants for the Low-Power Television and Translator Upgrade Program. NTIA will provide updated information on a periodic basis at its website http://www.ntia.doc.gov/lptv regarding program awards and funds remaining for grants.

C. Cost Share

There are no cost share requirements for this program.

III. Application Procedures

A. Content and Form of Application Submission

All applicants must use the official Office of Management and Budget (OMB)-approved Application Forms as listed below for the fiscal year 2009 grant cycle. These forms include a combination of government-wide Standard Forms (SF–424, SF–424A, SF–424B, SF–LLL), Department of Commerce form (CD–511), and Upgrade Program form (DTV–5).

To apply for an Upgrade Program grant, an applicant must file an original and one copy of a complete application in paper form or submit the application electronically via the Grants.gov website. NTIA does not accept pre-applications.

All forms required for the Upgrade Program application and the Online Fillable Form are available on the Internet at http://www.ntia.doc.gov/lptv/Application/appform.htm. Applicants can complete many parts of the Upgrade Program application on the Internet using the Online Fillable Form found on this website. The Online Fillable Form requires no special software. Applicants will be able to save, edit, and print their forms. The software will complete all math operations, transfer, and place correct figures in appropriate locations, provide help for each question, and check for common errors. **The form must be printed and submitted with original signatures.** NTIA does not accept facsimile or email applications.

Alternatively, you may submit your application electronically by completing the application forms available at the Grants.gov website. If your organization is not registered with the Central Contractor Registration, it must do so at http://www.ccr.gov. The e-business point-of-contact at your organization will then be able to register you as an authorized organization representative. The Grants.gov registration process takes three to five business days. Applications filed electronically through Grants.gov do not need the original signatures as required below.

A complete application includes the following items:

Information about the APPLICANT and the APPLICATION

SF–424 Form, ''Application for Federal Assistance,'' which provides general information about the applicant, the type of project submitted, and the estimated project cost. This form is a certification and the original application must contain an original signature from an authorized representative of the applicant organization.

DUNS number must be entered into item 8(c) of the SF–424. All applicants are required to provide a Dun and Bradstreet Data Universal Numbering System (DUNS) number when applying for Federal grants. For additional information, *see* 67 Fed. Reg. 66,177 (Oct. 30, 2002); 68 Fed. Reg. 17,000 (April 8, 2003). Applicants can receive a DUNS number at no cost by calling the dedicated toll-free DUNS Number request line 1–866–705–5711 or via the Internet (http://www.dnb.com).

SF–424A Form, ''Budget Information Non-Construction Programs.'' This form is required from all applicants, in spite of the reference to ''non-construction'' programs.[89] The Online Fillable Form will automatically prepare this form after the equipment sections of the application (DTV–5 form) are completed. All applicants must submit only page 1 of the form with

[87] APTS at 5.

[88] CBA at 5.

[89] The Upgrade Program will not be using Federal SF–424C, ''Budget Information—Construction Programs,'' which is used for projects to construct highways, airports, etc.

information on the appropriate lines in item 6, column 1.

Exhibit A. If the applicant is a Non-Profit Corporation, submit an IRS Letter or equivalent document showing your organization's tax-exempt status.

Exhibit B. Provide the following certifications in this Exhibit:

Standard Form 424B, ''Assurances—Non-Construction Programs.'' This form is required from all applicants, in spite of the reference to ''non-construction'' programs, and must have an original signature on the second page.[90]

Department of Commerce Form CD–511, ''Certification Regarding Lobbying.'' This form is required from all applicants and must have an original signature.

Standard Form LLL, ''Disclosure of Lobbying Activities.'' This form is required from all applicants that employ lobbyists in an effort to obtain a grant.

Information for EACH STATION for which Upgrade Program Funding is requested.

DTV–5 Form, ''Upgrade Program Supplemental Application.'' This form requests information specific to the Upgrade Program application, such as information for each station for which funding is requested, including a request for eligible equipment.

Exhibit [call letters] — 1. FCC Documents. All applicants must submit a copy of the most current FCC authorization for the analog station that was upgraded and the most current FCC authorization for the corresponding completed digital station. Applicants that have modified an existing transmission system must submit a copy of their transmission system modification letter filed with the FCC pursuant to section 74.796(b)(5) of the FCC Rules, 47 C.F.R. § 74.796(b)(5).

Exhibit [call letters] — 2. FCC Coverage Map. All applicants must provide maps of the analog station's coverage area. Applicants requesting funds for several stations at the same site must supply a map for each analog station, since the power levels and service areas of the stations may be different. Maps of the analog station's service area for stations that have built digital companion channels can be printed from the following FCC website: http://www.fcc.gov/mb/video/tvq.html. To locate the proper map, enter the station's call sign. If more than one record appears, select the current license (Status = LIC). When the station page opens, scroll down to the record that is licensed, and select Area: Service Contour Map. The page Service Area on a Tiger Census Map will open. Print this page and submit it with the application. Maps of the analog station's service area for stations that have flash-cut are no longer available from the FCC website and will be provided by NTIA as part of the Online Fillable Form and must be printed and submitted as part of the application.

Exhibit [call letters] — 3. Rurality Score Worksheet or other Population Documentation. The Rurality Score Worksheet is required only from a station which has an urban area in its coverage with a population greater than 20,000. Applicants who checked item 15(d) on the DTV–5 form should place their documentation of population coverage here.

Exhibit [call letters] — 4. Invoices. Place copies of paid invoices for the eligible costs in this Exhibit.

B. Submission Dates and Times

Completed applications for the Priority Round must be received at NTIA no later than 5 p.m., Eastern Daylight Time July 13, 2009, the Priority Round Closing Date. Applicants must ensure that the carrier they use guarantees delivery of the application by the Priority Round Closing Date. Applicants should note that all material sent via the U.S. Postal Service (including ''Overnight'' or ''Express Mail'') is subject to delivery delays of up to two weeks due to mail security procedures at the Department of Commerce. If an application is received after the Priority Round Closing Date due to (1) carrier error, when the carrier accepted the package with a guarantee for delivery by the Priority Round Closing Date and Time, or (2) significant weather delays or natural disasters, NTIA will, upon receipt of proper documentation, consider the application as having been received by the deadline. NTIA will not accept applications posted on the Priority Round Closing Date or later and received after the deadline.

After August 10, 2009, applications for the next grant round must be received at NTIA by 5 p.m., Eastern Time, the first business day of each subsequent month as long as funds are available (Closing Dates). Applications received after any of the monthly Closing Dates will be held until the next grant round.

Applicants submitting applications by hand-delivery are notified that all packages must be cleared by the Department of Commerce security office. Entrance to the Department of Commerce Building for security clearance is through entrance number 10 on the 15th Street side of the building. Due to screening procedures at the Department of Commerce, packages arriving via the U.S. Postal Service are irradiated, which can damage the contents. NTIA encourages applicants to consider the impact of this procedure in selecting their application delivery method.

NTIA encourages applicants who wish to apply through Grants.gov to submit their applications in advance of the deadline. Applications submitted electronically via the Grants.gov website must be received and logged by Grants.gov by 5 p.m., Eastern Daylight Time on the Priority Round Closing Date or the subsequent monthly Closing Dates. Difficulties encountered by applicants filing through Grants.gov will not justify filing deadline extensions. If a system problem occurs or you have technical difficulties with an electronic application, please use the customer support resources available at the Grants.gov website. As soon as possible after the Priority Round Closing Date and subsequent monthly Closing Dates, the designated Administrative Contacts of all applicants are sent notices by email that their submissions have been received and giving the file number assigned to each application by NTIA.

Applications not received by a deadline will be held until the deadline for the next grant round for processing. NTIA also will hold until the next grant round any application that lacks information necessary to complete the processing of the application, including individual stations within the application. NTIA will inform the applicant of the information required to process the application.

NTIA will reject and return any application that is materially incomplete or when it finds that either the applicant or the project is ineligible for funding. Applicants will be informed of the reason for the return of any application.

C. Funding Restrictions

1. Equipment Costs

These grants fund only equipment plus installation costs when installation must be performed by contractors. Eligible equipment for the Upgrade Program includes the apparatus necessary for the upgrade of analog low-power television stations, Class A television stations, translator stations and boosters to digital — including translators; mask filters; transmit antennas; encoders; multiplexers; receive antennas and lines; regenerators;

[90] The Upgrade Program will not be using Federal SF–424D, ''Assurances for Construction Programs,'' which is used for projects to construct highways, airports, etc.

GPS filers; surge suppressors; and engineering services and installation.

A complete listing of equipment eligible for funding by the Upgrade Program is posted on the NTIA website at http://www.ntia.doc.gov/lptv.[91] The website provides applicants with two funding levels and corresponding listings of eligible equipment/costs. One listing is based on the *modification* of an existing 100 watt NTSC station to digital (25 watts ATSC) and has an award cap of $6,000. The other equipment listing is based on the *replacement* of a similar 100 watt NTSC station with a new 25 watt digital unit, with a cap of $20,000. Grantees will be permitted to exceed these equipment list expenditure caps to purchase similar, but more powerful, equipment using their own funds. NTIA does not fund salary expenses, including staff installation costs.

2. Audit Costs

Audits must be performed in accordance with audit requirements contained in OMB Circular A–133, Audits of States, Local Governments, and Non-Profit Organizations, revised June 30, 1997, and as revised in the **Federal Register** on June 27, 2003. OMB Circular A–133 requires that non-profit organizations, Government agencies, Indian tribes, and educational institutions expending $500,000 or more in Federal funds during a one-year period conduct a single audit in accordance with guidelines outlined in the circular. Other audits may be conducted by the Office of the Inspector General. NTIA will fund audit costs only in exceptional circumstances.

3. Indirect Costs

Indirect costs are not supported by this program.

D. Mailing and Delivery Address for Applications

The mailing and delivery address for the Upgrade Program is:

NTIA Upgrade Program, Room H–4812, U.S. Department of Commerce, 1401 Constitution Avenue, N.W., Washington, DC 20230.

Hand-deliveries of applications must be made through Room 1874, located at Department of Commerce's entrance number 10 on 15th Street, N.W.

The Upgrade Program does not accept facsimile submissions, but does provide an Online Fillable Form at its website, http://www.ntia.doc.gov/ptfp, and accepts electronic applications submitted through Grants.gov. Further information on the Online Fillable Form and Grants.gov is contained in Part A of this section, Content and Form of Application Submission.

IV. Application Review Information

A. Evaluation Criteria

Each application that is timely received, is materially complete, and proposes an eligible project will be considered under the evaluation criteria described here.

Each station identified in an application will receive a score based on the three evaluation criteria that were discussed in Part I, Funding Opportunity Description, and summarized in Section 6., Application Selection Procedures.

The three criteria used to evaluate applications are listed below.

(1) Degree of rurality of communities served: 0–10 points.

A station whose FCC 50/50 Longley-Rice coverage contour serves an area that does not include an urban area with population greater than 20,000 people will receive ten points. A station whose coverage contours include urban areas with a population greater than 20,000 can receive between six and nine points. Stations receiving fewer than six points are not located in an eligible rural community and thus not eligible to participate in the Upgrade Program.[92]

(2) Whether the station serves fewer than 10,000 viewers: 10 points.

A station serving a population within the FCC 50/50 Longley-Rice coverage contour of fewer than 10,000 people who are not within an urban area will receive ten points.

(3) Whether the FCC license of the applicant is held by a non-profit corporation: 10 points.

Stations whose FCC license is held by a non-profit corporation will receive ten points.

Each station in an application can be assigned a maximum of 30 points.

The Upgrade Program Online Fillable Form application will assist applicants in completing the above evaluation criteria. When necessary, NTIA will revise scores to reflect NTIA's evaluation of the documentation presented.

B. Review and Selection Process

Applicants are required to complete the Upgrade Program Online Fillable Form Application (DTV–5). Once the required information is entered on the form by applicants, a numerical score for each of the three criteria listed above will be generated automatically for each of the applicant's stations. NTIA staff will review the documentation submitted by the applicants in support of the generated scores for accuracy and completeness. Applications also may receive a technical assessment by NTIA engineers.

Each station will receive a separate score. The NTIA staff prepares a rank order based on the scores and technical assessments and provides the Upgrade Program Director with funding recommendations. The Upgrade Program Director recommends the funding order of the applications and presents the recommendations to the Associate Administrator, Office of Telecommunications and Information Applications, for review and approval. The Upgrade Program Director's recommendations and the Associate Administrator's review and approval take into account the following selection factors:

(a) Rank level of station scores;

(b) The program staff recommendations;

(c) The geographic distribution of the proposed grant awards; and

(d) The availability of funds.

Upon approval by the Associate Administrator, the Upgrade Program Director's recommendations are presented to the Selecting Official, the NTIA Administrator. The NTIA Administrator makes final award selections taking into consideration the Upgrade Program Director's recommendations and the degree to which the slate of applications, taken as a whole, satisfies the program's stated purposes.

Prior to award, applications may be negotiated between NTIA and the applicant to resolve any differences between the original request and what NTIA is willing to consider funding. Some applications may be dropped from the slate due to lack of FCC authorization, an applicant's inability to make adequate assurances or certifications, or other reasons. Negotiation of an application does not ensure that a final award will be made.

C. Anticipated Announcement and Award Dates

NTIA anticipates that awards will be announced 30 to 90 days after the Priority Round Closing Date and each subsequent monthly Closing Date.

V. Award Administration Information

A. Award Notices

Successful applicants are sent a standard Department of Commerce

[91] The eligible equipment is shown on the online application form under section ''Station/Site Specific Info,'' item 17. The equipment you are eligible for will appear after you indicate your current transmission equipment.

[92] *See* the discussion under Part I, Section B.1. Community Eligibility — Rurality Factors.

Grant Award package, ''Financial Assistance Award'' Form CD–450, containing all of the terms and conditions of the award. The CD–450 signed by the grants officer is the authorizing document and is sent to the applicant's designated Administrative Contact via overnight delivery service, thus a street address is very important and must be included on the first page of the application. Two copies of the CD–450 must be signed and returned to the National Institute of Standards and Technology, Grants and Agreements Management Division (NIST/GAMD) within 30 days. NIST/GAMD provides grant administrative services for all Upgrade Program grants.

Unsuccessful applicants are designated ''deferred'' and will be held until the next grant round. Ineligible applications will be returned.

B. Administrative and National Policy Requirements

1. Payment of Federal Funds

All awards are made on a reimbursement basis only. The Department will not make any payment under an award, until the grantee has returned the signed CD–450 accepting the award and unless and until the recipient complies with all relevant requirements.

2. Protection of Equipment

The grantee will comply with 15 C.F.R. § 14.34 regarding the use, maintenance of records, and disposal of Upgrade Program funded equipment.

VI. Agency Contacts

Upgrade Program Officers are prepared to give technical assistance to potential applicants before the Priority Round Closing Date and each subsequent monthly Closing Date, within available resources. They may be contacted by telephone at (202) 482–5802, by fax at (202) 482–2156, or by mail at the address given in Part III D (NTIA Upgrade Program mailing and delivery address for applications), above. The Upgrade Program's email address is lptv@ntia.doc.gov.

The program officers, their email addresses, direct phone numbers, and their areas of responsibility are listed below:

Lynn Chadwick (lchadwick@ntia.doc.gov, (202) 482–8338): Projects from States in the Upper Mid-West and the Rocky Mountains, Colorado, Kansas, Montana, Nebraska, Nevada, North Dakota, South Dakota, Utah, and Wyoming.

Larry Dyer, (ldyer@ntia.doc.gov, (202) 482–1762): Projects from States along the Pacific Coast, Alaska, California, Hawaii, Oregon, and Washington.

Brian Gibbons (bgibbons@ntia.doc.gov, (202) 482–6094): Projects from the remaining States and U.S. Territories.

Applicants may also contact: William Cooperman, Upgrade Program Director (wcooperman@ntia.doc.gov, (202) 482–5802).

Charles Mellone, Chief Engineer (cmellone@ntia.doc.gov, (310) 456–1357): Equipment questions from all applicants.

NTIAHelpdesk@ntia.doc.gov ((202) 482–4631): Contact for electronic access problems.

''Frequently Asked Questions'' about Upgrade Program grants and applications are answered online at http://www.ntia.doc.gov/lptv.

Questions regarding Department of Commerce grant policies may be directed to: Joyce Brigham, NIST/GAMD Grants Officer (Joyce.brigham@nist.gov, (301) 975–6329)

VII. Other Information

A. FCC Authorizations

Applications for a station only may be submitted by that station's FCC licensee. Applicants are urged to submit their FCC applications with as much time before the Priority Round Closing Date or subsequent monthly Closing Date as possible. No grant will be awarded for a project without submission of a copy of a station's FCC digital license, STA, FCC Form 347 (Application for a Low Power TV, TV Translator or TV Booster Station License), or FCC Form 302–CA (Application for Class A Television Broadcast Station Construction Permit or License) for a license to cover a Construction Permit.

B. Department of Commerce Procedural Matters

The Department of Commerce Pre-Award Notification of Requirements for Grants and Cooperative Agreements is applicable to this solicitation.[93]

C. Executive Order 12866

This notice has been determined to be not significant for the purposes of Executive Order 12866.

D. 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.

E. Executive Order 12372 (Intergovernmental Review)

Applications under this program are not subject to the provisions of Executive Order 12372 ''Intergovernmental Review of Federal Programs.''

F. Administrative Procedures Act and Regulatory Flexibility Act

Prior notice and an opportunity for public comment are not required by the Administrative Procedures Act, or any other law, for rules related to public property, loans, grants, benefits or 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 is not required and has not been prepared.

G. Paperwork Reduction Act (PRA)

The Upgrade Program includes new collection of information requirements on the DTV–5 form that are subject to the Paperwork Reduction Act. Upgrade Program application form has been approved by OMB under Control Number 0660–0029.

The information collection will be used by NTIA to review applications from low-power television and translator stations requesting Federal assistance to purchase digital transmission equipment. The estimate in information collection burden hours is one hour for each station. Approximately 4,000 stations are eligible for the Federal assistance under the Upgrade Program. All applicants must use the official OMB-approved Application Forms as listed below for fiscal years 2009 through 2012 grant cycles. These Forms include a combination of government-wide Standard Forms (SF–424, SF–424A, SF–424B, SF–LLL), Department of Commerce form (CD–511), and Upgrade Program forms (DTV–5). The response estimates above include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Notwithstanding any other provision of the law, no person is required to respond to, and no person is subject to a penalty for failure to comply with, an information collection subject to the PRA requirements unless that information collection displays a currently valid OMB Control Number.

[93] *See* Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements, Notice, 73 Fed. Reg. 7696 (February 11, 2008).

Dated: May 6, 2009.

Dr. Bernadette McGuire-Rivera,

Associate Administrator, Office of Telecommunications and Information Applications.

[FR Doc. E9–10961 Filed 5–11–09; 8:45 am]

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S. 39/P.L. 111–18
To repeal section 10(f) of Public Law 93-531, commonly known as the "Bennett Freeze". (May 8, 2009; 123 Stat. 1611)
Last List May 11, 2009

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