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

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

FEDERAL RESERVE SYSTEM

12 CFR Part 225

[Regulation Y; Docket No. R–1356]

Capital Adequacy Guidelines; Small Bank Holding Company Policy Statement: Treatment of Subordinated Securities Issued to the United States Treasury Under the Emergency Economic Stabilization Act of 2008

AGENCY: Board of Governors of the Federal Reserve System (Board).

ACTION: Interim final rule with request for public comment.

SUMMARY: The Board has adopted, and is seeking public comment on an interim final rule (interim final rule or rule) to support in a timely manner, the full implementation and acceptance of the capital purchase program of the U.S. Department of Treasury (Treasury) and promote the stability of banking organizations and the financial system. This rule permits bank holding companies that have made a valid election to be taxed under Subchapter S of Chapter 1 of the U.S. Internal Revenue Code (S–Corp BHCs) and bank holding companies organized in mutual form (Mutual BHCs) to include the full amount of any new subordinated debt securities issued to the Treasury under the capital purchase program announced by the Secretary of the Treasury on October 14, 2008 (Subordinated Securities) in tier 1 capital for purposes of the Board's risk-based and leverage capital guidelines for bank holding companies, provided that the Subordinated Securities will count toward the limit on the amount of other restricted core capital elements includable in tier 1 capital; and allows bank holding companies that are subject to the Board's Small Bank Holding Company Policy Statement and that are S–Corps or Mutual BHCs to exclude the Subordinated Securities from treatment as debt for purposes of the debt-to-equity standard under the Small Bank Holding Company Policy Statement.

DATES: The interim final rule will become effective on June 1, 2009. Comments must be received by July 1, 2009.

ADDRESSES: You may submit comments, identified by Docket No. R–1356, by any of the following methods:

- *Agency Web Site: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: regs.comments@federalreserve.gov.* Include docket number in the subject line of the message.
- *FAX:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room MP–500 of the Board's Martin Building (20th and C Street, NW.) between 9 a.m. and 5 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT: Norah M. Barger, Deputy Director, (202) 452–2402, John F. Connolly, Manager, (202) 452–3621, or Michael J. Sexton, Manager, (202) 452–3009, Division of Banking Supervision and Regulation; or Kieran J. Fallon, Assistant General Counsel, (202) 452–5270, April C. Snyder, Counsel, (202) 452–3099, or Benjamin W. McDonough, Senior Attorney, (202) 452–2036, Legal Division; Board of Governors of the Federal Reserve System, 20th Street and Constitution Ave., NW., Washington, DC 20551. For the hearing impaired *only,* Telecommunication Device for the Deaf (TDD), (202) 263–4869.

SUPPLEMENTARY INFORMATION:

Capital Guidelines

On October 3, 2008, President Bush signed into law the Emergency Economic Stabilization Act of 2008 (EESA), Division A of Public Law No. 110–343, 122 Stat. 3765 (2008). Pursuant to the authorities granted by the EESA, and in order to restore liquidity and stability to the financial system, on October 14, 2008, the Secretary of the Treasury announced a program within the Troubled Asset Relief Program (TARP) established by section 101 of the EESA to provide capital to eligible banks, bank holding companies and savings associations (collectively, banking organizations), as well as certain other financial institutions (the Capital Purchase Program or CPP).

As of April 20, 2009, Treasury had invested approximately $198 billion under the CPP in newly issued senior perpetual preferred stock of banking organizations (Senior Perpetual Preferred Stock) that are not S–Corps or organized in mutual form. In order to support the CPP and promote the stability of banking organizations and the financial system through Treasury's investments in Senior Perpetual Preferred Stock, the Board published an interim final rule on October 22, 2008 (October interim final rule) permitting bank holding companies that issued Senior Perpetual Preferred Stock to the Treasury under the CPP to include all of the Senior Perpetual Preferred Stock in their tier 1 capital without limit. The Board today published a final rule on the capital treatment of the Senior Perpetual Preferred Stock substantially identical to the October interim final rule.[1]

Since the time that Treasury announced the terms of the Senior Perpetual Preferred Stock, Treasury has worked towards developing terms under which banking organizations organized as S–Corps or in mutual form could participate in the Capital Purchase Program. This is consistent with the goal of the CPP, which is to promote financial stability by offering capital support to all viable banking organizations regardless of their form of organization.

S–Corp BHCs generally may not participate in the CPP through the issuance of Senior Perpetual Preferred

[1] Published elsewhere in today's issue.

Stock because, under the Internal Revenue Code, S–Corps may not issue more than one class of equity security. Bank holding companies organized in mutual form also cannot issue Senior Perpetual Preferred Stock because of their mutual ownership structure.

On January 14, 2009, Treasury announced the terms under which it will purchase newly-issued subordinated debt securities from S–Corps under the Capital Purchase Program. These terms are designed to facilitate S–Corp participation in the CPP in a manner that is as economically comparable as possible, consistent with the legal structure of S–Corp BHCs, the Board's capital adequacy guidelines, and the Internal Revenue Code, to institutions that have issued Senior Perpetual Preferred Stock. In particular, Treasury will purchase from S–Corps that are eligible to participate in the CPP subordinated debt securities that rank senior to common stock but that are subordinated to the claims of depositors and other creditors (Subordinated Securities), unless such other claims are explicitly made pari passu or subordinated to the Subordinated Securities.[2]

As with other CPP participants, the aggregate amount of Subordinated Securities that may be issued by an S–Corp to Treasury must be (i) not less than one percent of the S–Corp's risk-weighted assets, and (ii) not more than the lesser of (A) $25 billion and (B) three percent of its risk-weighted assets.[3] In connection with its purchase of the Subordinated Securities, the Treasury also will receive warrants to purchase, upon net settlement, a number of additional Subordinated Securities in an amount equal to 5 percent of the amount of Subordinated Securities purchased on the date of investment.

Similar to the Senior Perpetual Preferred Stock, Subordinated Securities issued pursuant to the CPP must include certain features designed to make them attractive to a wide array of generally sound S–Corp banking organizations and to encourage such companies to replace such securities with private capital once the financial markets return to more normal conditions. In particular, the Subordinated Securities will bear an initial interest rate of 7.7 percent per annum, which will increase to 13.8 percent per annum five years after issuance.[4] An S–Corp issuer may redeem the Subordinated Securities at 100 percent of their issuance price, plus accrued and unpaid interest. In all cases, Treasury must consult with the appropriate Federal banking agency before a banking organization may redeem the Subordinated Securities.[5] In addition, following the redemption of all outstanding Subordinated Securities, an S–Corp issuer shall have the right to repurchase any warrants for additional Subordinated Securities held by Treasury.

Under the Board's current risk-based and leverage capital adequacy guidelines for bank holding companies (Capital Guidelines),[6] the Subordinated Securities would be ineligible for tier 1 capital treatment because they are subordinated debt, but would be eligible for inclusion in tier 2 capital.[7] However, the Subordinated Securities were purposefully structured to have features that are very close to those of the subordinated notes underlying trust preferred securities that qualify for tier 1 capital as a restricted core capital element for bank holding companies (qualifying trust preferred securities). Like such junior subordinated notes, the Subordinated Securities would be deeply subordinated and junior to the claims of depositors and other creditors of the issuing bank holding company. Furthermore, as required of the junior subordinated notes underlying qualifying trust preferred securities, interest payable on the Subordinated Securities may be deferred by the issuing S–Corp BHC for up to 20 quarters without creating an event of default. Principal and accrued interest on such securities would only become due and payable if interest is deferred more than 20 quarters or if the issuing S–Corp BHC enters bankruptcy, is liquidated, or if one or more of its major bank subsidiaries is put into receivership. Additionally, under the terms of the Capital Purchase Program, the Subordinated Securities have a maturity of 30 years, which is the same minimum term required for such junior subordinated notes.[8]

In addition, like the Senior Perpetual Preferred Stock, the Subordinated Securities will be issued to Treasury as part of a nationwide program, established by Treasury under the EESA, to provide capital to eligible banking organizations that are in generally sound financial condition in order to increase the capital available to banking organizations and thereby promote stability in the financial markets and the banking industry as a whole.[9] Treasury will purchase these Subordinated Securities under special powers granted by Congress to the Secretary of the Treasury in the EESA to achieve these important public policy objectives. In addition, the terms of the Subordinated Securities issued under the CPP provide that redemption is subject to the approval of the Federal Reserve.[10] In light of this provision, the Board recently specified in Federal Reserve SR letter 09–4 [11] that any bank holding company that intends to redeem Subordinated Securities issued to Treasury under the CPP should first consult with Federal Reserve supervisory staff. After reviewing a request by a bank holding company to redeem Subordinated Securities, the Board may take such actions as are necessary or appropriate to restrict the bank holding company from redeeming such securities if the redemption would be inconsistent with the safety and soundness of the bank holding company.[12] Each of these factors, and the features of the Subordinated Securities that are comparable to those of qualifying trust preferred securities, is important to the determinations made by the Board with respect to the appropriate regulatory capital treatment of the Subordinated Securities.

For these reasons and in order to support the participation of S–Corp

[2] On April 7, 2009, the Treasury announced a term sheet for top-tier Mutual BHCs under which these banking organizations issue subordinated debt to Treasury under the CPP on substantially the same terms as S–Corp BHCs. This interim final rule also accords the same capital treatment to Subordinated Securities issued by Mutual BHCs as those issued by S–Corp BHCs, and accordingly, any reference to a S–Corp BHC in the notice shall also be deemed to include a Mutual BHC unless the context otherwise requires.

[3] Treasury has announced that it is considering re-opening the Capital Purchase Program for institutions with total assets under $500 million and raising—from 3 percent to 5 percent of risk-weighted assets—the amount of capital instruments for which qualifying institutions can apply.

[4] The interest payments on the Subordinated Securities will be tax deductible for shareholders of the issuing S–Corp and therefore this interest rate is economically comparable (assuming a 35 percent marginal tax rate) to the dividend payments on the Senior Preferred Stock, which are not tax deductible.

[5] *See* section 7001 of the American Recovery and Reinvestment Act of 2009, Public Law No. 111–5, 123 Stat. 115.

[6] 12 CFR part 225, Appendices A and D.

[7] *See* 12 CFR part 225, Appendix A, sections II.A.2. and II.A.2.d.

[8] 12 CFR part 225, Appendix A, section II.A.1.c.iv.

[9] This interim final rule addresses only the regulatory capital treatment of Subordinated Securities. Details about the CPP, including eligibility requirements and the general terms and conditions of the Subordinated Securities and warrants associated with such securities, are available at *http://www.financialstability.gov.*

[10] *See* 12 CFR part 225, Appendix A, section II.A.1.c.ii.(2).

[11] SR 09–4, ''Applying Supervisory Guidance and Regulations on the Payment of Dividends, Stock Redemptions, and Stock Repurchases at Bank Holding Companies,'' March 27, 2009.

[12] *See* 12 CFR part 225, Appendix A, sections II.(iii) and II.A.1.c.ii.(2).

BHCs in the Capital Purchase Program, promote the stability of banking organizations and the financial system, and help banking organizations meet the credit needs of creditworthy customers, the Board has adopted this interim final rule to permit S–Corp BHCs that issue new Subordinated Securities to the Treasury under the TARP to include the full amount of such securities in tier 1 capital for purposes of the Board's Capital Guidelines.[13]

The Board is allowing the full amount of the Subordinated Securities to count in tier 1 capital to provide similar regulatory capital treatment to the instruments issued by S–Corp BHCs and other bank holding companies under the Capital Purchase Program and in light of the special and unique public policy objectives of the CPP. However, the interim final rule requires an S–Corp BHC to take into account the amount of Subordinated Securities in determining the amount of *other* restricted core capital elements the company may include in its tier 1 capital.[14] Thus, for example, if the amount of Subordinated Securities issued by an S–Corp BHC equals or exceeds 25 percent of the company's tier 1 capital elements, the company may not include any other currently outstanding or future restricted core capital elements in tier 1 capital, and any such restricted core capital elements in the company's tier 1 capital elements could only be included in tier 2 capital. This approach is designed to give the Subordinated Securities tier 1 treatment that is equivalent to that provided Senior Perpetual Preferred Stock, while preventing a S–Corp BHC's tier 1 capital from becoming dominated by instruments that are, or have features similar to, restricted core capital elements. The following examples provide an explanation of how this computation will operate; each example assumes that the bank holding company's limit on inclusion of restricted core capital elements in tier 1 capital is $25 million.

- *Example 1.* The bank holding company has no existing restricted core capital elements and issues $30 million of Subordinated Securities to the Treasury. The bank holding company may include the full $30 million in tier 1 capital, but may not include any additional restricted core capital elements that it issues in tier 1 capital unless its limit expands.
- *Example 2.* The bank holding company has $10 million of previously issued trust preferred securities included in tier 1 capital and issues $30 million of Subordinated Securities. The $30 million of Subordinated Securities is includable in tier 1 capital, and the $10 million of trust preferred securities is includable in tier 2 capital. The bank holding company may not include the trust preferred securities in tier 1 capital, because the $30 million of Subordinated Securities exceeds the bank holding company's $25 million limit on inclusion of restricted core capital elements in tier 1 capital.
- *Example 3.* The bank holding company has no restricted core capital elements and issues $20 million of Subordinated Securities to Treasury. The $20 million of Subordinated Securities is includable in tier 1 capital, and the bank holding company may issue an additional $5 million of other restricted core capital elements (e.g., trust preferred securities or cumulative perpetual preferred securities) and include them in its tier 1 capital.

The Board expects S–Corp BHCs that issue Subordinated Securities, like all other bank holding companies, to hold capital commensurate with the level and nature of the risks to which they are exposed. In addition, the Board expects banking organizations that issue Subordinated Securities to appropriately incorporate the obligations of the Subordinated Securities into the organization's liquidity and capital funding plans.

The Board notes that, as a matter of prudential policy and practice, it generally has not allowed subordinated debt to be included in tier 1 capital. Furthermore, the Board has restricted the amount of qualifying trust preferred securities that may be included in core capital, along with other restricted core capital elements, to an aggregate total that may not exceed 25 percent of the sum of all core capital elements, including restricted core capital elements (which will be computed net of goodwill less any associated deferred tax liability as of March 31, 2011).[15] The Board has long expressed concern about banking organizations including debt instruments of any kind in tier 1 capital given the contractual obligations they place on the issuing banking organization and consequent limited ability to absorb losses. The Board also expressed concerns with the inclusion in tier 1 capital of instruments that provide for a step-up in dividend or coupon rates.[16] In light of these concerns, the Board previously has declined to allow subordinated debt to be included in tier 1 capital and has restricted the amount of qualifying trust preferred securities that may be included in tier 1 capital. The Board remains concerned that instruments with debt or debt-like features have limited ability to absorb losses.

However, as discussed above, issuance of the Subordinated Securities is consistent with a strong public policy objective, which is to increase the capital available to banking organizations generally in the current environment and thereby promote stability in the financial markets and the banking industry as a whole and facilitate the ability of banking organizations to meet the needs of creditworthy households, businesses, and other customers. In addition, the Board notes that other terms and public policy considerations related to the Subordinated Securities mitigate supervisory concerns. As with qualifying trust preferred securities, the Subordinated Securities allow the issuing bank holding company to defer interest payments for five years. Furthermore, under the terms of the CPP, issuers of this instrument generally will not be allowed to repurchase equity securities or trust preferred securities for ten years after the issuance of the Subordinated Securities or increase common dividends for three years after issuance without the consent of the Treasury. These restrictions promote in an important way the overall safety and soundness of the issuer. Moreover, as previously discussed, Treasury must consult with the Board before an S–Corp BHC may redeem the Subordinated Securities. These features, viewed in light of the unique, temporary, and extraordinary nature of the CPP, countervail in many respects the Board's concerns with regard to the subordinated debt nature of the securities. As previously noted, the Board also would retain general

[13] *See* 12 CFR part 225, Appendices A and D.

[14] 12 CFR part 225, Appendix A, section II.A.1.b.

[15] *See* 74 FR 12076 (March 23, 2009).

[16] For example, in a 1992 policy statement on subordinated debt, the Board noted: ''Although payments on debt whose rates increase over time on the surface may not appear to be directly linked to the financial condition of the issuing organization, such debt (sometimes referred to as expanding or exploding rate debt) has a strong potential to be credit sensitive in substance. Organizations whose financial condition has strengthened are more likely to be able to refinance the debt at a rate lower than that mandated by the preset increase, whereas institutions whose condition has deteriorated are less likely to be able to do so. Moreover, just when these latter institutions would be in the most need of conserving capital, they would be under strong pressure to redeem the debt as an alternative to paying higher rates and, thus, would accelerate depletion of their resources.'' *See* 12 CFR § 250.166(b)(4) at n. 4. Furthermore, the Board has not permitted bank holding companies to include capital instruments in tier 1 capital if they include dividend rate step-ups.

supervisory authority with respect to any S–Corp BHC.

In light of the instrument- and circumstances-specific nature of the Board's determination, the Board strongly cautions bank holding companies against construing the inclusion of the Subordinated Securities in tier 1 capital as in any way detracting from the Board's longstanding stance regarding the unacceptability of including other forms of subordinated debt in tier 1 capital.

Small Bank Holding Company Policy Statement

In order to maintain competitive equality between large and small bank holding companies, the Board also is amending its Small Bank Holding Policy Statement (Policy Statement) to allow bank holding companies that are subject to the Policy Statement and that are S–Corp BHCs to exclude the Subordinated Securities from debt for purposes of the Policy Statement.[17] Generally, bank holding companies with less than $500 million in consolidated assets (small bank holding companies) are not subject to the Capital Guidelines and instead are subject to the Policy Statement. The Policy Statement limits the ability of a small bank holding company to pay dividends if its debt-to-equity ratio exceeds certain limits. However, the Policy Statement currently provides that small bank holding companies may exclude from debt an amount of subordinated debt associated with qualifying trust preferred securities up to 25 percent of the bank holding company's equity (as defined in the Policy Statement), less goodwill on the parent company's balance sheet, in determining compliance with the requirements of certain provisions of the Policy Statement.[18] The practical effect of excluding the Subordinated Securities from debt for purposes of the Policy Statement is to allow issuance of Subordinated Securities by small bank holding companies without exceeding the debt-to-equity ratio standard that would disallow the payment of dividends by such small bank holding companies. In turn, this allows small bank holding companies that issue Subordinated Securities to downstream Treasury's investment in the form of the Subordinated Securities as additional common stock to subsidiary depository institutions (that counts as tier 1 capital of the depository institutions) and to pay dividends to the small bank holding company's shareholders to the extent appropriate and permitted by the Federal Reserve.

Because, as previously discussed, the Subordinated Securities and the junior subordinated notes underlying qualifying trust preferred securities have very similar features, and to facilitate the participation of small bank holding companies in the Capital Purchase Program, the Board has adopted this interim final rule to allow small bank holding companies that are S–Corp BHCs to exclude the Subordinated Securities from the definition of debt for purposes of the debt-to-equity ratio standard under the Policy Statement. The factors and considerations discussed above apply equally to the Board's decision to modify the Policy Statement in this manner.

The Board solicits comments on all aspects of the rule.

Administrative Procedure Act

Pursuant to sections 553(b) and (d) of the Administrative Procedure Act (5 U.S.C. 553(b) and (d)), the Board finds that there is good cause for issuing this interim final rule and making the rule effective on June 1, 2009, and that it is impracticable, unnecessary, or contrary to the public interest to issue a notice of proposed rulemaking and provide an opportunity to comment before the effective date. The Board has adopted the rule in light of, and to help address, the continuing unusual and exigent circumstances in the financial markets. The rule will allow S–Corp BHCs to immediately include the full amount of Subordinated Securities they issue to Treasury under the CPP in tier 1 capital. This will help promote stability in the banking system and financial markets. The rule also will allow small bank holding companies that are S–Corp BHCs to exclude the Subordinated Securities from the definition of debt for purposes of the debt-to-equity ratio standard of the Policy Statement.

The Board believes it is important to provide S–Corp BHCs immediately with guidance concerning the capital treatment of the Subordinated Securities so that they may make appropriate judgments concerning the extent of their participation in the CPP and to provide S–Corp BHCs with immediate certainty concerning the regulatory capital treatment of the Subordinated Securities for capital planning purposes. (Treasury recently completed the documentation for issuances of the Subordinated Securities by S–Corp BHCs.) The Board is soliciting comment on all aspects of the rule and will make such changes that it considers appropriate or necessary after review of any comments received.

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA), generally requires that an agency prepare and make available for public comment an initial regulatory flexibility analysis in connection with a notice of proposed rulemaking.[19] Under regulations issued by the Small Business Administration,[20] a small entity includes a bank holding company with assets of $175 million or less (a small bank holding company). As of December 31, 2008, there were approximately 2,586 small bank holding companies.

As a general matter, the Capital Guidelines apply only to a bank holding company that has consolidated assets of $500 million or more. Therefore, the changes to the Capital Guidelines will not affect small bank holding companies. In addition, the rule would reduce burden and benefit small bank holding companies by allowing them to exclude the Subordinated Securities from treatment as debt for purposes of the debt-to-equity standard under the Policy Statement. This treatment is similar to the current treatment of junior subordinated notes underlying trust preferred securities under the Policy Statement. Furthermore, the Board estimates that the changes to the Policy Statement will affect less than one percent of small bank holding companies. Accordingly, the Board certifies that this interim final rule does not have a significant impact on a substantial number of small bank holding companies.

Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3506), the Board has reviewed the interim final rule to assess any information collections. There are no collections of information as defined by the Paperwork Reduction Act in the interim final rule.

Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act, Public Law No. 106–102, requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The Board invites comment on how to make the interim final rule easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could the rule be more clearly stated?

[17] 12 CFR part 225, Appendix C.

[18] 12 CFR part 225, Appendix C, section 2, n. 3.

[19] *See* 5 U.S.C. 603(a).

[20] *See* 13 CFR 121.201.

• Are the requirements in the rule clearly stated? If not, how could the rule be more clearly stated?

• Do the regulations contain technical language or jargon that is not clear? If so, which language requires clarification?

• Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes would make the regulation easier to understand?

• Would more, but shorter, sections be better? If so, which sections should be changed?

• What else could we do to make the regulation easier to understand?

List of Subjects in 12 CFR Part 225

Administrative practice and procedure, Banks, Banking, Federal Reserve System, Holding companies, Reporting and recordkeeping requirements, Securities.

Board of Governors of the Federal Reserve System

12 CFR Chapter II

Authority and Issuance

■ For the reasons stated in the preamble, the Board of Governors of the Federal Reserve System amends part 225 of chapter II of title 12 of the Code of Federal Regulations as follows:

PART 225—BANK HOLDING COMPANIES AND CHANGE IN BANK CONTROL (REGULATION Y)

■ 1. The authority citation for part 225 continues to read as follows:

Authority: 12 U.S.C. 1817(j)(13), 1818, 1828(o), 1831i, 1831p–1, 1843(c)(8), 1844(b), 1972(1), 3106, 3108, 3310, 3331–3351, 3906, 3907, and 3909; 15 U.S.C. 1681s, 1681w, 6801 and 6805.

■ 2. Appendix A to part 225 is amended as set forth below:

■ a. In section II.A.1.a.iv., remove ''and'' from the end of paragraph (3), remove the period from the end of paragraph (4), add a semicolon and ''and'' to the end of subparagraph (4), and add a new paragraph (5) to read as follows; and

■ b. In section II.A.1.b.i., amend paragraph (1) by adding the following sentence to the end of paragraph (1) to read as follows:

Appendix A to Part 225—Capital Adequacy Guidelines for Bank Holding Companies: Risk-Based Measure

II. * * *
A. * * *
1. * * *
a. * * *
iv. * * *

(5) Subordinated debentures issued to the Treasury under the TARP (TARP Subordinated Securities) established by the EESA by a bank holding company that has made a valid election to be taxed under Subchapter S of Chapter 1 of the U.S. Internal Revenue Code (S–Corp BHC) or by a bank holding company organized in mutual form (Mutual BHC).

b. * * *

i. * * *

(1) * * * Notwithstanding the foregoing, the full amount of TARP Subordinated Securities issued by an S–Corp BHC or Mutual BHC may be included in its tier 1 capital, provided that the banking organization must include the TARP Subordinated Securities in restricted core capital elements for the purposes of determining the aggregate amount of other restricted core capital elements that may be included in tier 1 capital in accordance with this section.

* * * * *

■ 3. In appendix C to part 225, revise footnote 3 in section 2 to read as follows:

Appendix C to Part 225—Small Bank Holding Company Policy Statement

* * * * *

2. * * *

[3] The term *debt,* as used in the ratio of debt to equity, means any borrowed funds (exclusive of short-term borrowings that arise out of current transactions, the proceeds of which are used for current transactions), and any securities issued by, or obligations of, the holding company that are the functional equivalent of borrowed funds.

Subordinated debt associated with trust preferred securities generally would be treated as debt for purposes of paragraphs 2.C., 3.A., 4.A.i., and 4.B.i. of this policy statement. A bank holding company, however, may exclude from debt an amount of subordinated debt associated with trust preferred securities up to 25 percent of the holding company's equity (as defined below) less goodwill on the parent company's balance sheet in determining compliance with the requirements of such paragraphs of the policy statement. In addition, a bank holding company subject to this policy statement that has not issued subordinated debt associated with a new issuance of trust preferred securities after December 31, 2005, may exclude from debt any subordinated debt associated with trust preferred securities until December 31, 2010. Bank holding companies subject to this policy statement also may exclude from debt until December 31, 2010, any subordinated debt associated with refinanced issuances of trust preferred securities originally issued on or prior to December 31, 2005, provided that the refinancing does not increase the bank holding company's outstanding amount of subordinated debt. Subordinated debt associated with trust preferred securities will not be included as debt in determining compliance with any other requirements of this policy statement.

In addition, notwithstanding any other provision of this policy statement and for purposes of compliance with paragraphs 2.C., 3.A., 4.A.i., and 4.B.i. of this policy statement, both a bank holding company that is organized in mutual form and a bank holding company that has made a valid election to be taxed under Subchapter S of Chapter 1 of the U.S. Internal Revenue Code may exclude from debt subordinated debentures issued to the United States Department of the Treasury under the Troubled Asset Relief Program established by the Emergency Economic Stabilization Act of 2008, Division A of Pub. L. No. 110–343, 122 Stat. 3765 (2008).

The term *equity,* as used in the ratio of debt to equity, means the total stockholders' equity of the bank holding company as defined in accordance with generally accepted accounting principles. In determining the total amount of stockholders' equity, the bank holding company should account for its investments in the common stock of subsidiaries by the equity method of accounting.

Ordinarily the Board does not view redeemable preferred stock as a substitute for common stock in a small bank holding company. Nevertheless, to a limited degree and under certain circumstances, the Board will consider redeemable preferred stock as equity in the capital accounts of the holding company if the following conditions are met: (1) The preferred stock is redeemable only at the option of the issuer; and (2) the debt to equity ratio of the holding company would be at or remain below .30:1 following the redemption or retirement of any preferred stock. Preferred stock that is convertible into common stock of the holding company may be treated as equity.

* * * * *

By order of the Board of Governors of the Federal Reserve System, May 21, 2009.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E9–12626 Filed 5–29–09; 8:45 am]

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FEDERAL RESERVE SYSTEM

12 CFR Part 225

[Regulation Y; Docket No. R–1336]

Capital Adequacy Guidelines: Treatment of Perpetual Preferred Stock Issued to the United States Treasury Under the Emergency Economic Stabilization Act of 2008

AGENCY: Board of Governors of the Federal Reserve System (Board).

ACTION: Final rule.

SUMMARY: The Board is adopting a final rule to allow bank holding companies that have issued senior perpetual preferred stock to the U.S. Department of the Treasury under the capital purchase and other programs established by the Secretary of the Treasury under the Emergency

Economic Stabilization Act of 2008, to include such capital instruments in tier 1 capital for purposes of the Board's risk-based and leverage capital guidelines for bank holding companies.

DATES: The final rule will become effective on July 1, 2009.

FOR FURTHER INFORMATION CONTACT: Norah M. Barger, Deputy Director, (202) 452–2402, or John F. Connolly, Manager, (202) 452–3621, Division of Banking Supervision and Regulation; or Kieran J. Fallon, Assistant General Counsel, (202) 452–5270, or Benjamin W. McDonough, Senior Attorney, (202) 452–2036, Legal Division; Board of Governors of the Federal Reserve System, 20th Street and Constitution Ave., NW., Washington, DC 20551. For the hearing impaired *only*, Telecommunication Device for the Deaf (TDD), (202) 263–4869.

SUPPLEMENTARY INFORMATION: On October 17, 2008, the Board issued an interim final rule (interim rule) to allow bank holding companies that issue senior perpetual preferred stock to the U.S. Department of Treasury (Treasury) under the Troubled Asset Relief Program (TARP) established by section 101 of the Emergency Economic Stabilization Act of 2008 (Senior Perpetual Preferred Stock), to include such capital instruments in tier 1 capital for purposes of the Board's risk-based and leverage capital guidelines for bank holding companies.[1] The Board is now adopting the interim rule as a final rule without substantive changes.[2]

The Emergency Economic Stabilization Act of 2008 (EESA), Division A of Public Law 110–343, 122 Stat. 3765 (2008), was intended, among other things, ''to immediately provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States.'' [3] Pursuant to the authorities granted by the EESA, and in order to restore liquidity and stability to the financial system, on October 14, 2008, Treasury announced the establishment of the Capital Purchase Program (CPP) under the TARP.[4] Through the CPP, Treasury has provided capital to eligible banks, bank holding companies, savings and loan holding companies, and savings associations (collectively, banking organizations) by purchasing Senior Perpetual Preferred Stock of the banking organizations.[5] As of April 20, 2009, the Treasury had invested approximately $198 billion in U.S. banking organizations through the CPP.

The Senior Perpetual Preferred Stock issued under the CPP is perpetual preferred stock in the issuing banking organization, is senior to the issuer's common stock, and is pari passu with the issuer's existing preferred shares as to liquidation preference and dividends (other than preferred shares which by their terms rank junior to the issuer's most senior class of existing preferred shares). All Senior Perpetual Preferred Stock issued by bank holding companies provide for cumulative dividends. The aggregate amount of Senior Perpetual Preferred Stock that may be issued by a banking organization to Treasury under the CPP must be (i) not less than one percent of the organization's risk-weighted assets, and (ii) not more than the lesser of (A) $25 billion and (B) three percent of the organization's risk-weighted assets.[6]

As noted in the preamble to the interim rule, the Senior Perpetual Preferred Stock issued under the CPP includes several features that are designed to make it attractive to a wide array of generally sound banking organizations and encourage such banking organizations to replace the Senior Perpetual Preferred with private capital in an expeditious, but prudent, manner.

In particular, the Senior Perpetual Preferred Stock issued under the CPP has an initial dividend rate of five percent per annum, which will increase to nine percent per annum five years after issuance. In addition, following the redemption of all the Senior Perpetual Preferred Stock issued under the CPP, a banking organization will have the right to repurchase any other equity security of the organization (such as warrants or equity securities acquired through the exercise of such warrants) held by Treasury.

In the preamble to the interim rule, the Board recognized that some of the features of the Senior Perpetual Preferred Stock issued under the CPP if included in preferred stock issued to private investors would render the preferred stock ineligible for tier 1 capital treatment or limit its inclusion in tier 1 capital under the Board's capital guidelines for bank holding companies. Bank holding companies generally may not include in tier 1 capital perpetual preferred stock (whether cumulative or noncumulative) that has a dividend rate step-up. Furthermore, the amount of eligible cumulative perpetual preferred stock that a bank holding company may include in its tier 1 capital generally is subject to a 25 percent limit.[7]

The interim rule permits bank holding companies to include all Senior Perpetual Preferred Stock issued to Treasury under the TARP in tier 1 capital without limit. The Board sought comment on all aspects of the interim rule, including this treatment. The Board has carefully reviewed and analyzed the issues raised by commenters and has decided to adopt the interim rule as a final rule without substantive changes. The Board received seven comments on the interim rule from individuals and trade groups. Commenters largely supported the interim rule.[8] Commenters acknowledged the Board's concerns with certain features of the Senior Perpetual Preferred Stock, including its dividend rate step-up. However, commenters noted that other factors mitigate these concerns. Commenters noted, for example, that issuers will not be allowed to repurchase other stock or increase common dividends for three years after the issuance of the Senior

[1] 73 FR 62851 (October 22, 2008). A correction to a citation in the interim rule was published on October 27, 2008. 73 FR 63624 (October 27, 2008).

[2] This final rule addresses only the regulatory capital treatment of the Senior Perpetual Preferred Stock. Details about the Capital Purchase Program and other programs established by the Treasury under the EESA, including eligibility requirements and the general terms and conditions of the senior perpetual preferred stock issued to Treasury and warrants associated with such stock, are available at *http://www.financialstability.gov/*.

[3] *See* 12 U.S.C. 5201(1).

[4] On November 17, 2008, the Treasury announced a term sheet under the CPP for privately-held financial institutions. On April 7, 2009, the Treasury announced term sheets for public and non-public holding companies with a top-tier parent that is organized in mutual form. These term sheets have substantially the same terms as the term sheet that was announced on October 14, 2008, for publicly-held financial institutions. For purposes of the interim rule and the final rule, the preferred stock issued to Treasury pursuant to these term sheets is considered to be senior perpetual preferred stock issued to Treasury under the TARP.

[5] In a separate rule document published elsewhere in today's issue of the **Federal Register**, the Board is publishing an interim final rule to allow bank holding companies that are ''S-corporations'' to include in tier 1 capital subordinated notes issued to the Treasury under the CPP for purposes of the Board's risk-based and leverage capital guidelines for bank holding companies. (June 1, 2009).

[6] Treasury has announced that it is considering re-opening the Capital Purchase Program for institutions with total assets under $500 million and raising—from 3 percent to 5 percent of risk-weighted assets—the amount of capital instruments for which qualifying institutions can apply.

[7] *See* 12 CFR part 225, Appendix A, sections II.A.1.a.ii., II.A. a.iv.(1), II.A.1.b.i., and II.A.1.b.ii.(2). Until March 31, 2011, internationally-active banking organizations generally are expected, but not required, to limit the amount of qualifying cumulative perpetual preferred stock (including related surplus) and qualifying trust preferred securities included in tier 1 capital to 15 percent of the sum of core capital elements. 12 CFR part 225, Appendix A, section II.A.1.b.ii.(3).

[8] One commenter recommended that the Board take steps to make its capital adequacy guidelines easier to understand. This comment is addressed below.

Perpetual Preferred Stock. In addition, commenters argued that the dividend rate step-up of the Senior Perpetual Preferred Stock would help achieve the fundamental public policy objective of replacing the U.S. Government's equity investment with private capital in a prompt, safe, and sound manner.

The Board concurs that the specific features of the Senior Perpetual Preferred Stock and the unique circumstances and purposes of the Capital Purchase Program and TARP largely mitigate the Board's concerns about the dividend rate step-up. The Senior Perpetual Preferred Stock is issued to Treasury as part of a nationwide, temporary, and emergency program, established by Treasury under the EESA, to provide capital to eligible banking organizations and thereby promote stability in the financial markets and the banking industry as a whole and help restore economic growth.

Since publication of the interim rule, the Treasury has established two additional programs under the EESA pursuant to which Treasury may purchase Senior Perpetual Preferred Stock from bank holding companies—the Targeted Investment Program (TIP) and Capital Assistance Program (CAP). In addition, the Treasury has established the Asset Guarantee Program (AGP), under which Treasury may receive Senior Perpetual Preferred Stock from a bank holding company as a premium for guaranteeing assets of the company.[9]

The interim final rule adopted by the Board, by its terms, applies to all Senior Perpetual Preferred Stock issued to Treasury under the TARP, including any Senior Perpetual Preferred Stock issued under the TIP, CAP, or AGP. The Board recognizes that the Senior Perpetual Preferred Stock issued by bank holding companies to Treasury under the TIP and AGP (TIP/AGP Preferred) and under the CAP (CAP Preferred) has certain features that differ from the Senior Perpetual Preferred Stock issued under the CPP. For example, both the TIP/AGP Preferred and CAP Preferred have a higher initial interest rate, but no interest rate step-up feature. In addition, the CAP Preferred is convertible to common stock of the issuing banking organization at the organization's option (subject to the approval of the appropriate Federal banking agency), and must convert to common stock of the issuer after seven years.[10] Although the higher initial interest rate makes the TIP/AGP Preferred and CAP Preferred somewhat less desirable from a capital perspective because of its added cost to the issuing bank holding company, the Board believes that this feature is mitigated by the lack of an interest rate step-up (in the case of both instruments) and the convertibility of the CAP Preferred.

In addition, the CPP, TIP, CAP, and AGP each seek to advance the same key government objectives underlying the EESA—fostering financial market stability, and supporting the availability of credit to consumers during the current stressed market conditions. As noted above, the EESA was adopted to ''immediately provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States.'' [11] Treasury's authority to make investments, and to provide commitments to make investments, under the TARP, including through the CPP and other programs, ends on December 31, 2009, subject to a potential extension to October 3, 2010.[12] The emergency nature and statutorily-limited duration of the TARP helps to ensure that the Senior Perpetual Preferred Stock issued by banking organizations will serve its intended purpose as a provisional vehicle for buttressing the capital bases of banking organizations and stabilizing the financial system during a period of severe economic stress, while preserving the preeminent importance of private capital to the stability of banking organizations in the longer-term.

The Board also notes that, since the adoption of the interim rule, the EESA has been amended to permit a banking organization to redeem the Senior Perpetual Preferred Stock without regard to the source of the funds used to redeem the stock and without regard to any waiting period.[13] The Board notes, however, that the amendment requires that Treasury consult with the appropriate Federal banking agency before a banking organization may make such a redemption.[14] In addition, the terms of the Senior Perpetual Preferred Stock issued under the CPP, TIP, CAP, and AGP provide that redemption is subject to the approval of the Federal Reserve, which provision remains effective.[15] In light of this provision, the Board recently noted in Federal Reserve SR letter 09–4 [16] that any bank holding company that intends to redeem Senior Perpetual Preferred Stock issued to Treasury under the CPP, TIP, CAP, or AGP should first consult with Federal Reserve supervisory staff. After reviewing a request by a bank holding company to redeem Senior Perpetual Preferred Stock, the Board may take such actions as are necessary or appropriate to restrict the bank holding company from redeeming such securities if the redemption would be inconsistent with the safety and soundness of the bank holding company.[17]

For these reasons and in order to continue to support the strong public policy objectives of the CPP, TIP, CAP, and AGP and promote the stability of banking organizations and the financial system, the Board has adopted the interim rule in final form. The final rule—like the interim rule—permits bank holding companies that have issued Senior Perpetual Preferred Stock to the Treasury under the TARP to include such stock without limit as tier 1 capital for purposes of the Board's risk-based and leverage capital guidelines for bank holding companies.[18] The Board's decision to include Senior Perpetual Preferred Stock as an unrestricted core capital element in bank holding companies' tier 1 capital is based on each of the factors discussed above—including the emergency and temporary nature of the legislation authorizing the acquisition of such stock by the Treasury—as well as

[9] Details about the TIP, CAP, and AGP are available at *http://www.financialstability.gov*.

[10] After conversion, the Convertible Preferred, as qualifying common stockholders' equity, would be includable without limit in the tier 1 capital of a bank holding company as a core capital element for purposes of the Board's risk-based and leverage capital guidelines for bank holding companies. *See* 12 CFR part 225, Appendix A, section II.A.1.a.i.

[11] *See supra*, n. 3.

[12] *See* 12 U.S.C. 5230. Treasury's authority under the TARP may be extended until October 3, 2010, only upon a written certification to the Congress by the Secretary of the Treasury. This certification must ''include a justification of why the extension is necessary to assist American families and stabilize financial markets, as well as the expected cost to the taxpayers for such an extension.'' Id.

[13] *See* section 7001 of the American Recovery and Reinvestment Act of 2009 (ARRA), Public Law 111–5, 123 Stat. 115 (2009). Previously, during the first three years that the Senior Perpetual Preferred Stock was outstanding, a banking organization was required to redeem the stock with cash proceeds from the banking organization's issuance of common stock or perpetual preferred stock that (i) qualifies as tier 1 capital of the organization and (ii) the proceeds of which are no less than 25 percent of the aggregate issue price of the Senior Perpetual Preferred Stock. *See* 73 FR 62852 (October 22, 2008).

[14] *See* section 7001 of the ARRA.

[15] *See* 12 CFR part 225, Appendix A, section II.A.1.c.ii.(2).

[16] SR 09–4, ''Applying Supervisory Guidance and Regulations on the Payment of Dividends, Stock Redemptions, and Stock Repurchases at Bank Holding Companies,'' March 27, 2009.

[17] *See* 12 CFR 225.4(b)(1); 12 CFR part 225, Appendix A, sections II.(iii) and II.A.1.c.ii.(2).

[18] *See* 12 CFR part 225, Appendices A and D.

those presented in the interim rule, and is further supported by the commenters and the points they raised.

As noted in the preamble to the interim rule, the Board expects bank holding companies that issue Senior Perpetual Preferred Stock under the CPP, TIP, CAP, and AGP like all other bank holding companies, to hold capital commensurate with the level and nature of the risks to which they are exposed. In addition, the Board expects bank holding companies that issue Senior Perpetual Preferred Stock to appropriately incorporate the dividend features of the stock into the organization's liquidity and capital funding plans. Bank holding companies should not construe the Board's decision to allow the inclusion of the Senior Perpetual Preferred Stock as an unrestricted core capital element in bank holding companies' tier 1 capital as in any way (1) detracting from the Board's longstanding stance regarding the unacceptability of a rate step-up in other tier 1 capital instruments or (2) reflecting a decision by the Board to allow cumulative perpetual preferred stock to be includable in bank holding companies' tier 1 capital in excess of the limits established for restricted core capital elements under the Board's capital guidelines for bank holding companies.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires an agency that is issuing a final rule to prepare and make available a regulatory flexibility analysis that describes the impact of the final rule on small entities.[19] The RFA provides that an agency is not required to prepare and publish a regulatory flexibility analysis if the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities.[20] Under regulations issued by the Small Business Administration,[21] a small entity includes a bank holding company with assets of $175 million or less (a small bank holding company). As of December 31, 2008, there were approximately 2,586 small bank holding companies.

As a general matter, the Board's risk-based and leverage capital guidelines for bank holding companies apply only to a bank holding company that has consolidated assets of $500 million or more. Accordingly, this final rule will not affect small bank holding companies and, for this reason, the Board hereby certifies that the rule will not have a significant impact on a substantial number of small bank holding companies.

Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3506), the Board has reviewed the final rule to assess any information collections. There are no collections of information as defined by the Paperwork Reduction Act in the final rule.

Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act, Public Law 106–102, requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The Board invited comment on how to make the interim rule easier to understand. The Board received one comment generally criticizing the Board's capital adequacy guidelines as difficult to understand.

The Board acknowledges that the regulation of a banking organization's capital is a complex area. The Board's capital guidelines necessarily must reflect this complexity. Nevertheless, the Board has endeavored to present this final rule, like all of its capital rules, in a manner that, in light of the nature and complexity of the subject matter, is as brief, comprehensible, and straightforward as possible.

List of Subjects in 12 CFR Part 225

Administrative practice and procedure, Banks, Banking, Federal Reserve System, Holding companies, Reporting and recordkeeping requirements, Securities.

Board of Governors of the Federal Reserve System

12 CFR Chapter II

Authority and Issuance

■ For the reasons stated in the preamble, the Board of Governors of the Federal Reserve System amends part 225 of chapter II of title 12 of the Code of Federal Regulations as follows:

PART 225—BANK HOLDING COMPANIES AND CHANGE IN BANK CONTROL (REGULATION Y)

■ 1. The authority citation for part 225 continues to read as follows:

Authority: 12 U.S.C. 1817(j)(13), 1818, 1828(o), 1831i, 1831p–1, 1843(c)(8), 1844(b), 1972(1), 3106, 3108, 3310, 3331–3351, 3906, 3907, and 3909; 15 U.S.C. 1681s, 1681w, 6801 and 6805.

■ 2. In appendix A to part 225:

■ a. Revise section II.A.1.a.ii.; and

■ b. Revise footnote 8 in section II.A.1.c.ii.(2) to read as follows:

Appendix A to Part 225—Capital Adequacy Guidelines for Bank Holding Companies: Risk-Based Measure

II. * * *

A. * * *

1. * * *

a. * * *

ii. Qualifying noncumulative perpetual preferred stock, including related surplus, and senior perpetual preferred stock issued to the United States Department of the Treasury (Treasury) under the Troubled Asset Relief Program (TARP), established by the Emergency Economic Stabilization Act of 2008 (EESA), Division A of Public Law 110–343 (which for purposes of this appendix shall be considered qualifying noncumulative perpetual preferred stock), including related surplus;

* * * * *

c. * * *

ii. * * *

(2) * * *

[8] Notwithstanding this provision, senior perpetual preferred stock issued to the Treasury under the TARP, established by the EESA, may be included in tier 1 capital. In addition, traditional convertible perpetual preferred stock, which the holder must or can convert into a fixed number of common shares at a preset price, generally qualifies for inclusion in tier 1 capital provided all other requirements are met.

* * * * *

By order of the Board of Governors of the Federal Reserve System, May 21, 2009.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E9–12628 Filed 5–29–09; 8:45 am]

BILLING CODE 6210–02–P

DEPARTMENT OF THE TREASURY

Fiscal Service

31 CFR Part 356

[Docket No. BPD GSRS 09–01; Department of the Treasury Circular, Public Debt Series No. 1–93]

Sale and Issue of Marketable Book-Entry Treasury Bills, Notes, and Bonds

AGENCY: Bureau of the Public Debt, Fiscal Service, Treasury.

ACTION: Final rule.

SUMMARY: The Department of the Treasury (''Treasury'' or ''We'') is issuing in final form amendments to the Uniform Offering Circular for the Sale and Issue of Marketable Book-Entry Treasury Bills, Notes, and Bonds. This final rule makes conforming changes to several sections of the Uniform Offering Circular to be consistent with Treasury's

[19] 5 U.S.C. 603(a).

[20] 5 U.S.C. 605(b).

[21] *See* 13 CFR 121.201.

current auction practices. The first change modifies the description of Treasury bills to clarify that they may be issued at a discount or at par, depending upon the auction results. The second change clarifies that the rate or yield bid in Treasury bill or Treasury fixed-principal securities auctions must be a positive number or zero. The third change eliminates a provision related to ''guaranteed bid'' arrangements that was intended for multiple-price auctions. Because Treasury no longer conducts multiple-price auctions, the provision is no longer needed or effective. The fourth change updates an example of the proration of auction awards at the highest accepted yield or discount rate to reflect the change in minimum and multiple bid amounts to $100 for all Treasury marketable securities auctions that became effective in 2008. The fifth change modifies the provision for the notification of auction awards and settlement amounts to provide language consistent with related provisions of the Uniform Offering Circular. Finally, we are updating several references to the Bureau of the Public Debt's Web site to reflect the current URL.

DATES: Effective June 1, 2009.

ADDRESSES: This final rule is available on the Bureau of the Public Debt's Web site at: *http://www.treasurydirect.gov.* It is also available for public inspection and copying at the Treasury Department Library, Room 1428, Main Treasury Building, 1500 Pennsylvania Avenue, NW., Washington, DC 20220. To visit the library, call (202) 622–0990 for an appointment.

FOR FURTHER INFORMATION CONTACT: Lori Santamorena, Lee Grandy, or Kevin Hawkins, Department of the Treasury, Bureau of the Public Debt, Government Securities Regulations Staff, (202) 504–3632.

SUPPLEMENTARY INFORMATION: Part 356 of title 31 of the Code of Federal Regulations, also referred to as the Uniform Offering Circular (''UOC'' or ''auction rules''), sets out the terms and conditions for the sale and issuance by the Treasury to the public of marketable book-entry Treasury bills, notes, and bonds.[1] The UOC, together with the offering announcement for each auction, represents a comprehensive statement of the terms and conditions. This final rule makes conforming changes to the UOC to reflect Treasury's current auction practices.

[1] The UOC was published as a final rule in January 1993. *See* 58 FR 412, January 5, 1993. The circular, as amended, is codified at 31 CFR part 356.

I. Treasury Bills Description

The UOC currently describes Treasury bills as being ''issued at a discount.''[2] Under certain market conditions, however, an auction can result in Treasury bills being issued at par (in essence yielding zero percent).[3] Treasury bill offering announcements,[4] starting in December 2008, clarified, in a footnote, that ''Treasury bills will be issued at a discount or at par.'' In keeping with Treasury's practice of incorporating the terms and conditions of Treasury auctions into the UOC, the description of Treasury bills at 31 CFR 356.5(a)(1) is being modified to state that Treasury bills may be ''issued at a discount or at par, depending upon the auction results.''

II. Competitive Bid Format

Treasury is adding a sentence to each of the descriptions of the competitive bid formats for Treasury bills and Treasury fixed-principal securities in 31 CFR 356.12 to clarify that the rate or yield bid must be a positive number or zero.[5]

III. Guaranteed Bids

The UOC contains several provisions to regulate bidders[6] in a Treasury auction. We are eliminating a provision at 31 CFR 356.14(a) related to ''guaranteed bid'' arrangements in Treasury auctions that is no longer needed. Specifically, we are eliminating the provision in 31 CFR 356.14(a) that states, ''If a bid from a depository institution or a dealer fulfills a guarantee to a customer to sell a specified amount of securities at an agreed-upon price, or a price fixed in terms of an agreed-upon standard, then the bid is a bid of that depository institution or dealer. It is not a customer bid.'' This particular provision dates back to 1995 when Treasury conducted multiple-price auctions, which are auctions in which each successful competitive bidder pays the price equivalent to the yield or rate that it bid. Prior to the close for submission of competitive bids, certain dealers were entering into arrangements to guarantee their customers[7] a price conditioned on the outcome of the auction (*e.g.,* the weighted average yield determined in the auction).[8] This provision was added in response to and intended to address that specific practice. In 1998, Treasury shifted to single-price auctions for all Treasury marketable securities, which are auctions in which all successful bidders pay the same price regardless of the yields or rates they each bid.[9] Because Treasury no longer conducts multiple-price auctions, the provision is no longer needed or effective. Treasury expects any depository institution or dealer guaranteeing bids in a single-price auction to reexamine this practice, confirm that the bidder has been properly identified on the bid, and raise any questions with Treasury staff. Questions related to particular facts and circumstances may be directed to the Government Securities Regulations Staff at the telephone number listed above.

Treasury expects transparency in the submission of all auction bids, including those for customers, to maintain the integrity of the auction process. All auction participants, including bidders, customers, and submitters must comply with Treasury's auction rules. This rule makes no changes to the general UOC requirements of 31 CFR 356.12 bidding restrictions, 31 CFR 356.13 net long position reporting, 31 CFR 356.14 proper identification of customers, 31 CFR 356.16 certifications, and 31 CFR 356.24 confirmations required from any customer awarded a par amount equal to or greater than $750 million.

IV. Proration Example

On March 20, 2008, Treasury amended the UOC to lower the minimum and multiple par amounts for which bidders may bid in all Treasury marketable securities auctions from $1,000 to $100.[10] We are updating the example in 31 CFR 356.21(a) of the proration of auction awards at the highest accepted yield or discount rate to reflect the $100 minimum and multiple bid amounts.

V. Settlement Notification

The UOC includes certain notification requirements of auction awards. We are making a nonsubstantive change to the

[2] 31 CFR 356.5(a)(1).

[3] The 4-week bill auctions conducted on December 9, 16, and 23, 2008, resulted in Treasury bills being issued at par. *See* Treasury securities auction 2008 press releases for 4-week bills at: *http://treasurydirect.gov/instit/annceresult/press/preanre/2008/2008_4week.htm.*

[4] *Id.*

[5] 31 CFR 356.12(c)(1)(i) and (ii).

[6] The UOC defines a ''bidder'' at 31 CFR 356.2 to include persons and entities who offer to purchase Treasury securities in an auction through a depository institution or dealer.

[7] *See* definition of ''customer'' at 31 CFR 356.2.

[8] *See* 60 FR 13906, March 15, 1995. The ''guarantee bid'' provision was subsequently moved from the definition of ''bid'' in 31 CFR 356.2 to 31 CFR 356.14(a) when the UOC was converted to plain language in 2004. *See* 69 FR 45202, July 28, 2004.

[9] *See* November 1998 Quarterly Refunding Statement remarks by Gary Gensler, Treasury Assistant Secretary for Financial Markets (October 28, 1998) *http://www.treas.gov/press/releases/rr2782.htm.*

[10] *See* 73 FR 14937, March 20, 2008.

first sentence in 31 CFR 356.24(c) to conform to the language in 31 CFR 356.24(a).

VI. Web Site References

Information regarding Treasury's marketable securities auctions can be found on or accessed by way of the Bureau of the Public Debt's Web site. The Web site has changed and it can now be accessed at *http://www.treasurydirect.gov* instead of its previous address, *http://www.publicdebt.treas.gov.* Therefore, we are updating the references to the Web site at 31 CFR 356.23(a) and 31 CFR 356.31(a) accordingly.

Procedural Requirements

This final rule only makes conforming changes to the UOC and, therefore, does not meet the criteria for a ''significant regulatory action'' pursuant to Executive Order 12866. Because this rule relates to public contracts and procedures for United States securities, the notice, public comment, and delayed effective date provisions of the Administrative Procedure Act are inapplicable, pursuant to 5 U.S.C. 553(a)(2).

As no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) do not apply.

There is no new collection of information contained in this final rule, and, therefore, the Paperwork Reduction Act does not apply. The Office of Management and Budget has approved the collections of information already contained in 31 CFR part 356, under control number 1535–0112. Under the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number.

List of Subjects in 31 CFR Part 356

Bonds, Federal Reserve System, Government securities, Securities.

■ For the reasons set forth in the preamble, 31 CFR part 356 is amended as follows:

PART 356—SALE AND ISSUE OF MARKETABLE BOOK-ENTRY TREASURY BILLS, NOTES, AND BONDS (DEPARTMENT OF THE TREASURY CIRCULAR, PUBLIC DEBT SERIES NO. 1–93)

■ 1. The authority citation for part 356 continues to read as follows:

Authority: 5 U.S.C. 301; 31 U.S.C. 3102, *et seq.;* 12 U.S.C. 391.

■ 2. Section 356.5 is amended by revising paragraph (a)(1) to read as follows:

§ 356.5 What types of securities does the Treasury auction?

* * * * *

(a) * * *

(1) Are issued at a discount or at par, depending upon the auction results;

* * * * *

■ 3. Section 356.12 is amended by revising paragraphs (c)(1)(i) and (ii) to read as follows:

§ 356.12 What are the different types of bids and do they have specific requirements or restrictions?

* * * * *

(c) * * *

(1) * * *

(i) *Treasury bills.* A competitive bid must show the discount rate bid, expressed with three decimals in .005 increments. The third decimal must be either a zero or a five, for example, 5.320 or 5.325. We will treat any missing decimals as zero, for example, a bid of 5.32 will be treated as 5.320. The rate bid may be a positive number or zero.

(ii) *Treasury fixed-principal securities.* A competitive bid must show the yield bid, expressed with three decimals, for example, 4.170. We will treat any missing decimals as zero, for example, a bid of 4.1 will be treated as 4.100. The yield bid may be a positive number or zero.

* * * * *

■ 4. Section 356.14 is amended by revising paragraph (a) to read as follows:

§ 356.14 What are the requirements for submitting bids for customers?

(a) *Institutions that may submit bids for customers.* Only depository institutions or dealers may submit bids for customers (*see* definitions at § 356.2), or for customers of intermediaries, under the requirements set out in this section.

* * * * *

■ 5. Section 356.21 is amended by revising paragraph (a) to read as follows:

§ 356.21 How are awards at the high yield or discount rate calculated?

(a) *Awards to submitters.* We generally prorate bids at the highest accepted yield or discount rate under § 356.20(a)(2) of this part. For example, if 80.15% is the announced percentage at the highest yield or discount rate, we award 80.15% of the amount of each bid at that yield or rate. A bid for $100 million at the highest accepted yield or discount rate would be awarded $80,150,000 in this example. We always make awards for at least the minimum to bid, and above that amount we make awards in the appropriate multiple to bid. For example, Treasury bills may be issued with a minimum to bid of $100 and multiples to bid of $100. Say we accept an $18,000 bid at the high discount rate, and the percent awarded at the high discount rate is 88.27%. We would award $15,900 to that bidder, which is an upward adjustment from $15,888.60 ($18,000 × .8827) to the nearest multiple of $100. If we were to award 4.65% of bids at the highest accepted rate, for example, the award for a $100 bid at that rate would be $100, rather than $4.65, in order to meet the minimum to bid for a bill issue.

* * * * *

■ 6. Section 356.23 is amended by revising paragraph (a) to read as follows:

§ 356.23 How are the auction results announced?

(a) After the conclusion of the auction, we will announce the auction results through a press release that is available on our Web site at *http://www.treasurydirect.gov.*

* * * * *

■ 7. Section 356.24 is amended by revising paragraph (c) to read as follows:

§ 356.24 Will I be notified directly of my awards and, if I am submitting bids for others, do I have to provide confirmations?

* * * * *

(c) *Notification of awards and settlement amounts to a depository institution having an autocharge agreement with a submitter or a clearing corporation.* We will provide notice to each depository institution that has entered into an autocharge agreement with a submitter or a clearing corporation of the amount to be charged, on the issue date, to the institution's funds account at the Federal Reserve Bank servicing the institution. We will provide this notification no later than the day after the auction.

* * * * *

■ 8. Section 356.31 is amended by revising paragraph (a) to read as follows:

§ 356.31 How does the STRIPS program work?

(a) *General.* Notes or bonds may be ''stripped''—divided into separate principal and interest components. These components must be maintained in the commercial book-entry system. Stripping is done at the option of the holder, and may occur at any time from issuance until maturity. We provide the CUSIP numbers and payment dates for the principal and interest components in auction announcements and on our

Web site at *http://www.treasurydirect.gov.*

* * * * *

Gary Grippo,

Acting Fiscal Assistant Secretary.

[FR Doc. E9–12787 Filed 5–28–09; 4:15 pm]

BILLING CODE 4810–39–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2009–0218]

Drawbridge Operation Regulation; Sacramento River, Knights Landing, CA

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Eleventh Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Knights Landing Drawbridge across the Sacramento River, mile 90.1, at Knights Landing, CA. The deviation is necessary to allow the bridge owner, California Department of Transportation, to perform maintenance and replace the paint coating system for the drawbridge. This deviation allows the bridge to remain in the closed-to-navigation position during the deviation period.

DATES: This deviation is effective from 7 a.m. on June 1, 2009 to 7 a.m. on November 26, 2009.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2009–0346 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–2009–0218 in the Docket ID box, pressing Enter, and then clicking on the item in the Docket ID column. This material is also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail David H. Sulouff, Chief, Bridge Section, Eleventh Coast Guard District; telephone 510–437–3516, e-mail *David.H.Sulouff@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: California Department of Transportation requested a temporary change to the operation of the Knights Landing Drawbridge, mile 90.1, Sacramento River, at Knights Landing, CA. The drawbridge opens on signal if at least 12 hours' notice is given as required by 33 CFR 117.189(b). The deviation period would allow the drawspan to remain in the closed-to-navigation position from 7 a.m. on June 1, 2009 to 7 a.m. on November 26, 2009, to perform maintenance and replace the paint coating system on the drawbridge.

The Knights Landing Drawbridge navigation span provides a minimum vertical clearance of 3 feet above the 100-year floodplain. During the deviation period, the vertical clearance will be reduced by no more than 5 feet, due to an under-deck work platform and sealed containment the length of the bridge. Navigation on the waterway consists mainly of recreational vessels. During the past 7 years, in addition to the annual bridge openings for maintenance, the bridge drawspan was open one time for a sailboat.

No alternative routes are available. The bridge drawspan can open for an emergency if 72 hours' advance notice is given to the bridge owner. This temporary deviation has been coordinated with all affected waterway users. No objections to the proposed temporary deviation were raised.

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

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

Dated: May 14, 2009.

P.F. Zukunft,

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

[FR Doc. E9–12599 Filed 5–29–09; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2009–0330]

RIN 1625–AA00

Safety Zone; June and July Northwest Harbor Safety Zone; Northwest Harbor, San Clemente Island, CA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a safety zone on the navigable waters of the Northwest Harbor of San Clemente Island in support of the Naval Underwater Detonation. This safety zone is necessary to ensure non-authorized personnel and vessels remain safe by keeping clear of the hazardous area during the training activity. Persons and vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port (COTP) or his designated representative.

DATES: This rule is effective from June 1, 2009 through July 31, 2009.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2009–0330 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–2009–0330 in the Docket ID box, pressing Enter, and then clicking on the item in the Docket ID column. They are also available for inspection or copying at two locations: the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or e-mail Petty Officer Kristen Beer, Waterways Management, U.S. Coast Guard Sector San Diego, Coast Guard; telephone 619–278–7262, e-mail *Kristen.A.Beer@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

The Coast Guard is issuing this temporary final rule without prior

notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because immediate action is necessary to ensure the safety of commercial and recreational vessels in the vicinity of any underwater detonation on the dates and times this rule will be in effect and delay would be contrary to the public interest.

Under 5 U.S.C. 553(d)(3), for the reason stated above, the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**.

Background and Purpose

The Officer in Charge (OIC) of the Southern California Offshore Range will be conducting intermittent training involving the detonation of military grade explosives underwater throughout June and July 2009. This safety zone is necessary to ensure non-authorized personnel and vessels remain safe by keeping clear of the hazardous area during the training activity.

Discussion of Rule

The Coast Guard is establishing a safety zone that will be enforced from June 1, 2009 through July 31, 2009. The limits of the safety zone will be the navigable waters of the Northwest Harbor of San Clemente Island bounded by the following coordinates: 33°02′06″ N, 118°35′36″ W; 33°02′00″ N, 118°34′36″ W; thence along San Clemente Island shoreline to 33°02′06″ N, 118°35′36″ W. This safety zone is necessary to ensure non-authorized personnel and vessels remain safe by keeping clear of the hazardous area during the training activities. Persons and vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port, or his designated representative.

Regulatory Analyses

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

Regulatory Planning and Review

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

We expect the economic impact of this rule to be so minimal that a full Regulatory Evaluation is unnecessary. This determination is based on the size and location of the safety zone. Commercial and recreational vessels will not be allowed to transit through the designated safety zone during the specified times while training is being conducted.

Small Entities

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

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

This rule will affect the following entities, some of which may be small entities: The owners or operators of commercial and recreational vessels intending to transit or anchor in a portion of the Northwest Harbor of San Clemente Island from June 1, 2009 through July 31, 2009.

This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons. Although the safety zone will apply to the entire width of the harbor, commercial and recreational vessels will be allowed to pass through the zone with the permission of the Coast Guard patrol commander. Before the effective period, the Coast Guard will issue a broadcast notice to mariners (BNM) alerts.

Assistance for Small Entities

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

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

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health

Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

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 023–07 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. This rule involves the establishment of a safety zone. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add a new temporary section § 165.T11–195 to read as follows:

§ 165.T11–195 Safety Zone; June and July Northwest Harbor Safety Zone; Northwest Harbor, San Clemente Island, CA.

(a) *Location*. The limits of the safety zone will include the navigable waters of the Northwest Harbor of San Clemente Island bounded by the following coordinates: 33°02′06″ N, 118°35′36″ W; 33°02′00″ N, 118°34′36″ W; thence along the coast of San Clemente Island to 33°02′06″ N, 118°35′36″ W.

(b) *Enforcement Period*. This section will be enforced from June 1, 2009 through July 31, 2009 during naval training exercises. If the training is concluded prior to the scheduled termination time, the COTP will cease enforcement of this safety zone and will announce that fact via Broadcast Notice to Mariners.

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

(1) *Designated representative* means any Commissioned, Warrant, or Petty Officers of the Coast Guard, Coast Guard Auxiliary, or local, state, and federal law enforcement vessels who have been authorized to act on the behalf of the COTP.

(2) *Non-authorized personnel and vessels,* means any civilian boats, fishermen, divers, and swimmers.

(d) *Regulations*. (1) Entry into, transit through or anchoring within this safety zone is prohibited unless authorized by the COTP San Diego or his designated representative.

(2) Non-authorized personnel and vessels requesting permission to transit through the safety zone may request authorization to do so from the COTP San Diego or his designated representative. They may be contacted on VHF–FM Channel 16, or at telephone number (619) 278–7033.

(3) Naval units involved in the exercise are allowed in confines of the established safety zone.

(4) All persons and vessels shall comply with the instructions of the Coast Guard COTP or his designated representative.

(5) Upon being hailed by U.S. Coast Guard or other official personnel by siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed.

(6) The Coast Guard may be assisted by other federal, state, or local agencies and the U.S. Navy.

Dated: May 6, 2009.

T.H. Farris,

Captain, U.S. Coast Guard, Captain of the Port San Diego.

[FR Doc. E9–12600 Filed 5–29–09; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2009–0125]

RIN 1625–AA00

Safety Zone; Paradise Point Fourth of July Fireworks; Mission Bay, San Diego, CA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the navigable waters of Mission Bay in support of the Paradise Point Fourth of July Fireworks. This temporary safety zone is necessary to provide for the safety of the crew, spectators, and other users and vessels of the waterway. Persons and vessels are prohibited from entering into, transiting through, or anchoring within this temporary safety zone unless authorized by the Captain of the Port or his designated representative.

DATES: This rule is effective from 8:45 p.m. to 9:30 p.m. on July 3, 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–2009–0125 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–2009–0125 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 or e-mail Petty Officer Kristen Beer, Waterways Management, U.S. Coast Guard Sector San Diego, Coast Guard; telephone 619–278–7262, e-mail *Kristen.A.Beer@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 April 6, 2009, we published a notice of proposed rulemaking (NPRM) entitled Safety Zone; Paradise Point Fourth of July Fireworks; Mission Bay, San Diego, CA in the **Federal Register** (74 FR 15417). We received no comments on the proposed rule. No public meeting was requested, and none was held.

Background and Purpose

The Paradise Point Resort is sponsoring the Paradise Point Resort Fourth of July Fireworks, which will include a fireworks presentation originating from a barge located at approximately 32°46.36′ N, 117°14.57′ W. The safety zone will encompass all navigable waters within 600 feet of the fireworks barge. This temporary safety zone is necessary to provide for the safety of the crew, spectators, and other users and vessels of the waterway.

Regulatory Analyses

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

Regulatory Planning and Review

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

This determination is based on the size and location of the safety zone. Commercial vessels will not be hindered by the safety zone. Recreational vessels will not be allowed to transit through the established safety zone during the specified times unless authorized to do so by the Captain of the Port or his 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 will affect the following entities, some of which may be small entities: The owners or operators of vessels intending to transit or anchor in a portion of Mission Bay from 8:45 p.m. to 9:30 p.m. on July 4, 2009.

This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons. This rule will be enforced only 45 minutes late in the evening when vessel traffic is low. Vessel traffic can pass safely around the zone. Before the effective period, the Coast Guard will publish a local notice to mariners (LNM) and will issue broadcast notice to mariners (BNM) alerts via marine channel 16 VHF before the temporary safety zone is enforced.

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 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 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded 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. This rule involves the establishment of a safety zone.

An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add a new temporary zone § 165.T11–162 to read as follows:

§ 165.T11–162 Safety Zone; Paradise Point Fourth of July Fireworks; Mission Bay, San Diego, CA.

(a) *Location*. The limits of the safety zone are all the navigable waters within 600 feet of the fireworks barge located at approximately 32°46.36′ N, 117°14.57′ W.

(b) *Enforcement Period*. This section will be enforced from 8:45 p.m. to 9:30 p.m. on July 3, 2009. If the event concludes prior to the scheduled termination time, the Captain of the Port will cease enforcement of this safety zone and will announce that fact via Broadcast Notice to Mariners.

(c) *Definitions*. The following definition applies to this section: *designated representative* means any commissioned, warrant, and petty officers of the Coast Guard on board Coast Guard, Coast Guard Auxiliary, and local, state, and federal law enforcement vessels who have been authorized to act on the behalf of the Captain of the Port.

(d) *Regulations*. (1) Entry into, transit through or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port of San Diego or his designated on-scene representative.

(2) Mariners requesting permission to transit through the safety zone may request authorization to do so from the Patrol Commander (PATCOM). The PATCOM may be contacted on VHF–FM Channel 16.

(3) All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or the designated representative.

(4) Upon being hailed by U.S. Coast Guard patrol personnel by siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed.

(5) The Coast Guard may be assisted by other federal, state, or local agencies.

Dated: May 5, 2009.

T.H. Farris,

Captain, U.S. Coast Guard, Captain of the Port San Diego.

[FR Doc. E9–12601 Filed 5–29–09; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 223, 261

RIN 0596–AB81

Sale and Disposal of National Forest System Timber; Special Forest Products and Forest Botanical Products

AGENCY: Forest Service, USDA.

ACTION: Notice of delay of effective date.

SUMMARY: The Department is delaying the effective date of this rule. The Department previously delayed the effective date on March 30, 2009. More time is needed for the Forest Service to properly respond to the comments and to consider any potential changes to the rule. A **Federal Register** document will be published in the future that responds to the comments and sets the effective date. The rule regulates the sustainable free use, commercial harvest, and sale of special forest products and forest botanical products from National Forest System lands.

DATES: Effective May 29, 2009, the effective date for the rule published at 73 FR 79367, December 29, 2008, and delayed at 74 FR 14049, March 30, 2009, is delayed indefinitely. Forest Service will publish notification in the **Federal Register** when an effective date is established.

FOR FURTHER INFORMATION CONTACT: Richard Fitzgerald, Forest Service, Forest Management Staff, (202) 205–

1753. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The Department is delaying the effective date of the final rule published December 29, 2008 (73 FR 79367), which regulates the sustainable free use, commercial harvest, and sale of special forest products and forest botanical products from National Forest System lands. The Department previously delayed the effective date on March 30, 2009 (74 FR 14049). Further delay is necessary, because more time is needed for the Forest Service to properly respond to the comments and to consider any potential changes to the rule.

Dated: May 27, 2009.

Ann Bartuska,

Acting Deputy Under Secretary, Natural Resources and Environment.

[FR Doc. E9–12685 Filed 5–29–09; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 38

RIN 2900–AM53

Headstone and Marker Application Process

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This final rule amends the Department of Veterans Affairs (VA) regulations concerning headstones and markers furnished by the Government through the VA headstone and marker program. It updates ordering procedures for headstones and markers and provides instructions for requesting the addition of a new emblem of belief to VA's list of emblems available for inscription on Government-furnished headstones and markers. Additionally, this final rule establishes criteria to guide VA's decisions on requests to add new emblems of belief to the list.

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

FOR FURTHER INFORMATION CONTACT: Lindee Lenox, Director, Memorial Programs Service, Office of Field Programs, National Cemetery Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420. Telephone: (202) 501–3100 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: On January 19, 2007, VA published a notice of proposed rulemaking in the **Federal Register** (72 FR 2480). We proposed to amend VA's regulations concerning procedures for ordering Government-furnished headstones and markers and to establish requirements for requesting the addition of a new emblem of belief to VA's list of emblems available for inscription on headstones and markers. We provided a 60-day comment period, which ended on March 20, 2007, and received 538 comments from 522 individuals and 16 organizations. Of the 538 comments, 256 expressed support for VA's approval of a specific emblem of belief. Several other commenters suggested that VA conduct a review of all existing emblem inscriptions to ensure compliance with the proposed rule. Since the proposed rule concerned the procedures for adding a new emblem to the list of emblems available for inscription, not whether a specific emblem should be added pursuant to the proposed procedures or whether each of the 2,774,634 graves currently maintained by VA are marked in accordance with the proposed procedures, these comments are beyond the scope of this rulemaking and will not be addressed in this document.

Several commenters generally questioned the rulemaking process and our standard statements of compliance with regulatory law. A few commenters also requested that we send them separate, written responses to each of their comments. VA is required to follow the rulemaking procedures established by the Administrative Procedure Act, other Federal statutes, and various Executive Orders. Comments concerning those procedures are also beyond the scope of this rulemaking and will not be addressed in this document.

Based on the rationale set forth in the proposed rule and in this document, we adopt the provisions of the proposed rule as a final rule with the changes indicated below.

Application Process

Many commenters recommended that VA establish a period within which it must act on a request to add a new emblem of belief to its list of emblems available for inscription on Government-furnished headstones and markers. We disagree and will not make any changes based on these comments.

To ensure that individuals are afforded every opportunity to substantiate their claims and receive the full benefit of VA's duty to assist, VA has not established arbitrary or unnecessary deadlines for deciding applications for veterans benefits. For the same reasons, we decline to establish such a deadline for emblem requests. Under 38 CFR 38.632(f), VA will provide individuals who submit an incomplete emblem request notice concerning the status of their request and an opportunity to submit additional information. Also, in § 38.632(g), we clarify that VA will decide applications for new emblems only if they are complete. Although we decline to establish an arbitrary deadline for deciding an emblem request, § 38.632(g)(1) limits such requests to cases of immediate need. The request must relate to an application for a Government-furnished headstone or marker for an eligible deceased individual. Previously organizations could request that VA add their emblem to the list of emblems available for inscription when there was no immediate need. Many of the submissions we received from organizations were not actual applications, but merely letters of interest that required research, review, and written responses. Under the new ''immediate need'' requirement in § 38.632(g)(1), VA will be able to process applications for new emblems within a reasonable time after an interment or other memorial ceremony.

Several commenters suggested that VA could provide greater transparency in the emblem request process by providing notice of receipt of requests and information concerning the status of requests.

We agree that it is important to keep applicants apprised of the status of their requests. As described above regarding § 38.632(g), VA will decide complete requests as soon as possible. Upon receipt of an incomplete request to add a new emblem of belief, § 38.632(f) provides that VA will notify the applicant in writing of any missing information and that he or she has 60 days to submit the information. Further, if the Under Secretary for Memorial Affairs determines that an emblem represents a belief but would adversely affect the dignity and solemnity of the cemetery environment, § 38.632(h)(2) provides for additional notice to the individual concerning remedial options. These measures provide sufficient transparency, and we decline to impose additional administrative requirements at this time.

Some commenters suggested that VA allow living veterans and servicemembers, particularly servicemembers deployed to or serving in combat zones, to request a new emblem of belief in advance of need. We

will not make any changes based on these comments.

VA has a substantial interest in timely providing inscribed headstones and markers for interments or other memorial ceremonies. By this we mean that it is VA's obligation to respond to veterans' next-of-kins' or personal representatives' requests for inscribed, Government-furnished headstones and markers without undue delay. There are currently over 23 million veterans and 1.4 million active duty servicemembers. In addition, VA currently receives approximately 350,000 applications for Government-furnished headstones and markers annually. VA has imposed the immediate need requirement to ensure that it meets its obligation to provide headstones and markers for interments and memorial ceremonies as expeditiously as possible with available resources. We decline to further burden those resources by reviewing requests for new emblems prior to time of need. However, we note that veterans and servicemembers may at any time make their burial wishes known to their next-of-kin or personal representatives and may provide them a completed VA Form 40–1330, Application for Standard Government Headstone or Marker, for their use if the need arises. Servicemembers may also prepare this form in advance and have it added to their service department records.

Several commenters inquired about VA's application of the good cause exception in § 38.632(g)(1) for replacement headstones and markers. Good cause will generally exist for purposes of providing a replacement headstone or marker if VA denies an emblem request but subsequently adds the emblem to the list of emblems available for inscription. Whether there is good cause in other situations will depend upon the facts as determined by VA's case-by-case review.

A few commenters questioned whether VA's action on an individual request for a new emblem of belief based upon immediate need would also apply to all future requests for the same emblem. The final rule prescribes procedures for adding new emblems of belief to VA's list of emblems available generally for inscription on Government-furnished headstones and markers. Upon approval of an applicant's request for addition of a new emblem of belief, the emblem will be added to the list and available for inscription on all Government-furnished headstones or markers.

Evaluation Criteria

Several commenters asserted that VA should either approve all emblems of belief or discontinue the program. The Federal Government has a long history of furnishing headstones and markers inscribed with emblems of belief to the family members or personal representatives of deceased veterans for interments or memorial ceremonies. The headstone and marker program was administered by the Department of the Army until 1973 when Congress created the National Cemetery System and transferred authority for the program to VA. Our experience has shown that emblem of belief inscriptions are requested for the majority of Government-furnished headstone and markers. Discontinuing this program might cause veterans' survivors to suffer unnecessary grief and anguish during a very difficult time. Further, as we describe below, we believe that we can address the commenters' concerns by imposing only very narrow, viewpoint-neutral restrictions on the design of emblems of belief and expressly prohibiting VA evaluation of the beliefs that they represent. Accordingly, we decline the commenters' suggestion that we either approve all emblems of belief or discontinue the optional inscription of emblems.

Many commenters criticized proposed § 38.632(b)(3), which defined ''belief system'' as meaning ''genuine and non-frivolous'' religious opinions, doctrines and/or principles. They also objected to the provision in proposed § 38.632(h) that allowed the Under Secretary for Memorial Affairs to consider ''information from any source'' in evaluating a belief system and asserted that any claim of authority by VA to ascertain a belief system's genuineness and non-frivolousness is unconstitutional. Other commenters objected on constitutional grounds to proposed § 38.632(e), which would require applicants to establish that an emblem is ''widely used and recognized as the symbol of a distinct belief system'' and produce supplemental information concerning recognition of the decedent's belief system by a group, organization, or another Federal agency. Some commenters suggested that VA limit its discretion to ascertaining whether an eligible decedent's declared belief system was sincerely held or was a belief system that played a role equivalent to a religious belief system in the life of that individual.

After carefully considering the comments and the applicable law, we agree with the commenters that it is difficult to establish objective criteria in VA's regulations for evaluating the religious beliefs of eligible deceased veterans and family members consistent with the First Amendment. In *United States* v. *Seeger,* 380 U.S. 163, 184–185 (1965), the Supreme Court held that courts ''are not free to reject beliefs because they consider them 'incomprehensible.' Their task is whether the beliefs professed by [an individual] are sincerely held and whether they are, in his own scheme of things, religious.'' *See also Thomas* v. *Review Bd. of the Indiana Employment Sec. Div.,* 450 U.S. 707, 714 (1981) (The issue of whether a belief qualifies as a religion ''is not to turn upon a judicial perception of the particular belief or practice in question.''). In *Wallace* v. *Jaffree,* 472 U.S. 38, 52 (1985), the Court held that an ''individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority.'' It rejected the notion that this right ''merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.'' *Id.*

In other contexts, courts have applied various tests and indicia in an effort to determine whether a belief or practice has a religious character for First Amendment purposes. *See Seeger,* 380 U.S. at 163; *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972); *Kalka* v. *Hawk,* 215 F.3d 90, 98 (D.C. Cir. 2000); *Alvarado* v. *City of San Jose,* 94 F.3d 1223 (9th Cir. 1996); *Dettmer* v. *Landon,* 799 F.2d 929 (4th Cir. 1986); *Africa* v. *Commonwealth of Pennsylvania,* 662 F.2d 1025 (3rd Cir. 1981). However, we have determined that these tests are not readily adaptable to promulgation of binding, objective criteria in the Department's regulations. For example, the *Seeger* test, under which one would evaluate whether the claimed belief occupies the same place in the life of the adherent as an orthodox belief in God holds in the life of another individual, would require some degree of subjective judgment on the part of a Department official. Given the difficulty in establishing objective criteria that can withstand constitutional challenge, we will not evaluate any belief for which an individual requests inscription of an emblem of belief on a Government-furnished headstone or marker. We have determined that it is necessary to clarify instead that VA's discretion is limited to ascertaining whether an emblem that assertedly represents the decedent's religion or religious belief system should be precluded because it is, for reasons unrelated to religious beliefs, inappropriate for inscription in VA cemeteries or on Government-furnished headstones and markers. In the absence

of evidence to the contrary, VA will accept an applicant's statement regarding the religious or functionally equivalent belief of a deceased eligible individual. VA will attempt to resolve factual disputes concerning the emblem that represents the decedent's belief in accordance with the decedent's expressed preference. In cases where the decedent did not state a preference, VA would look to the individual(s) most likely to have the best knowledge of the decedent's religious or functionally equivalent belief, which would be the first individual(s) listed in § 38.632(g)(2)(ii) as follows: the decedent's surviving spouse; the decedent's children 18 years of age or older; the decedent's parents; or the decedent's siblings.

We also agree that emblems representing individuals' sincerely held beliefs are appropriate for inscription on Government-furnished headstones and markers even if such beliefs are not promulgated or endorsed by any specific church, organized denomination, or religious organization. The Supreme Court has rejected the notion that ''to claim the protection of the Free Exercise Clause one must be responding to the commands of a particular religious organization.'' *See Frazee* v. *Illinois Dep't of Employment Sec.,* 489 U.S. 829, 833 (1989) (appellant asserted he was a Christian but did not claim to be a member of a particular Christian sect). Further, we have determined that it would not be too burdensome for VA to provide for the inscription of an emblem that represents an individual's, as opposed to a group's, asserted religious belief system. As indicated on VA Form 40–1330, VA already accommodates individual requests for inscription of other optional (birth date, date of death, military rank, military awards, and war service) and additional (terms of endearment, nicknames, military or civilian credentials or accomplishments, and special military unit designations) items, and digital imaging technology has allowed VA's contractors to achieve considerable flexibility in processing inscription requests. Accordingly, we have modified the rule to accommodate the religious beliefs of decedents who during their lives were not affiliated with a religious group.

We wish to emphasize that we will not require an individual requesting inscription of a new emblem of belief to provide supplemental information to support his or her assertion that a particular belief was sincerely held by the decedent and played a role functionally equivalent to that of religion in the life of the decedent. Also, we will not establish criteria for ''affiliated organizations'' or require endorsement from such organizations. VA recognizes that several denominations or sects may adhere to a religious or functionally equivalent belief, each with its own emblem design. As described in this final rule, we have determined that it is appropriate to impose only minor, reasonable limits on religious emblems, to ensure that they do not undermine the purpose of Government-furnished headstones and markers or have an adverse impact on the dignity and solemnity of cemeteries honoring those who served the nation. In doing so, VA's discretion will be limited to evaluating emblems only for that narrow purpose. VA will not evaluate an individual's sincerely-held religious or functionally equivalent belief. VA's acceptance of an applicant's statement regarding the religious or functionally equivalent belief of a deceased eligible individual does not constitute an endorsement or approval of that belief.

Several commenters objected to proposed § 38.632(b)(4), under which we proposed to prohibit inscription of emblems that are obscene or have an adverse impact on the dignity and solemnity of cemeteries. The commenters suggested that we remove the provision because the terms ''obscene'' and ''adverse impact'' are too ambiguous or ill-defined, and leave room for arbitrary or subjective decision-making. We agree that the constitutional obscenity standard, which includes a determination of whether the average person applying contemporary community standards would find that the expression appeals to the prurient interest, would be difficult to apply in the context of VA's emblems of belief determinations. To ensure clarity and consistency, the availability of markers furnished by the Federal Government should not turn on local community standards. Moreover, emblems depicting certain kinds of sexual content may be inappropriate for display on Government-furnished markers even if those emblems might not be deemed obscene. Accordingly, we have removed that standard and will prohibit instead emblems that explicitly or graphically depict or describe sexual content that is shocking, titillating, or pandering in nature. However, we disagree with and decline the commenters' suggestion that we avoid establishing a standard for determining whether an emblem is appropriate for inscription on Government-furnished headstones and markers.

National cemeteries and Government-furnished headstones and markers serve a particular, congressionally mandated purpose, namely, to commemorate the gallant dead in a manner commensurate with the dignity of their sacrifice. *See* 38 U.S.C. 2403(c) (cemeteries under VA control shall be considered ''shrines as a tribute to our gallant dead''); *see also* 38 U.S.C. 2306(a) (eligibility for Government-furnished headstones and markers). Under 38 U.S.C. 2404(a), VA has authority to promulgate all rules and regulations necessary and appropriate for administration of national cemeteries. Section 2404(c)(1) further authorizes VA to provide ''appropriate'' grave markers and to prescribe rules concerning inscription of information on those markers. We interpret these clear statutory provisions as authorizing VA to prohibit inscription of emblems that would have an adverse impact on the dignity and solemnity of cemeteries.

The commenters object to the proposed ''adverse impact'' standard because it is susceptible to multiple interpretations. However, we note that regulatory language is not unconstitutionally vague simply because it is susceptible to multiple interpretations. *See Nat'l Endowment for the Arts* v. *Finley,* 524 U.S. 569, 583 (1998) (''decency and respect for the diverse beliefs and values of the American public'' was not an unconstitutionally vague evaluation criteria). ''[W]hen the Government is acting as a patron rather than a sovereign, the consequences of imprecision are not constitutionally severe.'' *Id.* at 589. Nonetheless, we have determined that it would be helpful to expand the definition of ''emblem of belief'' in § 38.632(b)(2) to identify certain kinds of emblems that would have an adverse impact on the dignity and solemnity of cemeteries. In this regard, we have proscribed emblems that are graphic depictions or descriptions of sexual content that is shocking, titillating, or pandering in nature; or that include coarse or abusive language or images. In our view, these restrictions are reasonable in light of the express purpose of National Cemeteries and Government-furnished headstones and markers. Moreover, such exclusions do not impermissibly discriminate on the basis of viewpoint. *Cf. Bethel School Dist. 403* v. *Fraser,* 478 U.S. 675 (1986) (school district did not engage in impermissible viewpoint discrimination, or otherwise violate the First Amendment, by disciplining a student for giving a lewd speech at a school assembly).

We have carefully avoided judging an individual's religious or functionally equivalent belief and intend only to

proscribe the inscription of emblems that are not appropriate for cemeteries and Government-furnished headstones and markers that honor deceased veterans. We acknowledge that proscribing explicit or graphic sexual content and coarse or abusive language inserts a minor but unavoidable element of subjectivity in VA's decisions. However, the Court of Appeals for the Federal Circuit has emphasized that restrictions on speech in nonpublic fora ''may be reasonable if they are aimed at preserving the property for its intended use.'' *Griffin* v. *Sec'y of Veterans Affairs,* 288 F.3d 1309, 1323 (Fed. Cir. 2002) (citing *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n,* 460 U.S. 37, 50–51 (1983)). In *Griffin,* the Federal Circuit held that ''the government has established national cemeteries to serve particular commemorative and expressive roles'' in a nonpublic forum. *Griffin,* 288 F.3d at 1324. The court also held that the nature and function of the national cemeteries make the preservation of dignity and decorum a paramount concern, and that the Government ''must have greater discretion to decide what speech is permissible in national cemeteries than in those fora which serve no patriotic purpose.'' *Id.* Because the judgments necessary to ensure that cemeteries remain sacred to the honor and memory of those interred or memorialized there may defy objective description and may vary with individual circumstances, the court concluded that ''the discretion vested in VA administrators by [the challenged regulation] is reasonable in light of the characteristic nature and function of national cemeteries.'' *Griffin,* at 1325.

The Federal Circuit's analysis in *Griffin* may be extended to the provision of Government-furnished headstones and markers, even if they are not placed in a national cemetery. In *Perry* v. *McDonald,* 280 F.3d 159, 171 (2d Cir. 2001), the Court of Appeals for the Second Circuit held that viewpoint-neutral restrictions on the speech depicted on vanity license plates need only be reasonable in light of the purpose of the forum. *See also Griffin,* 288 F.3d at 1321 (''restraints on speech in a nonpublic forum will be upheld unless they are unreasonable or they embody impermissible viewpoint discrimination''). The court stated that ''automobile license plates are governmental property intended primarily to serve a governmental purpose'' and must be approved prior to issuance. *Perry,* 280 F.3d at 169. Similarly, in a 1948 opinion, the Army Judge Advocate General (JAG) held that title to Government-furnished headstones and markers, which are installed for the express Government purpose of commemorating deceased veterans in a respectful manner, remains with the Government. The VA Office of the General Counsel has interpreted the law regarding ownership of headstones and markers consistent with the JAG opinion since the transfer of the national cemetery system to VA in 1973. The fact that VA makes available to the applicant the option of inscribing an emblem does not detract from the proprietary interest the Government maintains in the headstone or marker or from the solemn purpose of the headstone or marker.

As a check on discretion, § 38.632(g)(4) states that an adverse impact determination ''may not be made based on the content of the religious or functionally equivalent belief that the emblem represents.'' Section 38.632(h)(2) provides for notice concerning any VA determination that an emblem design is inappropriate and an opportunity to modify the design before any final decision. Finally, should any applicant disagree with the Under Secretary's decision concerning the design of an emblem, the decision is a final agency action for purposes of judicial review under the Administrative Procedure Act. *See* 5 U.S.C. 701–706. Accordingly, this final rule is narrowly-tailored to ensure that VA meets its obligation to provide headstones and markers that appropriately honor the service of deceased veterans.

Other Administrative Matters

Some commenters expressed concern about the requirement in proposed § 38.632(e)(7) concerning trademark and copyright restrictions. The commenters found it contradictory for VA to limit inscription of emblems to those that are free from copyright and trademark restrictions because VA currently allows for inscription of two emblems that are not free from such restrictions. Other commenters suggested that VA should not restrict an emblem that has copyright or trademark protections if the copyright or trademark owner has authorized inscription of the emblem on Government-furnished headstones and markers.

VA administers the headstone and marker program with the assistance of over 165 contractors and 40 vendors. The list of emblems available for inscription on Government-furnished headstones and markers is distributed to these contractors and vendors and to the general public for purposes of expediting the application for and delivery of headstones and markers. Emblems are added to the list for the future general use of all applicants for Government-furnished headstones and markers. Further, VA does not have the resources or legal duty to monitor and protect the intellectual property rights of others. That duty belongs to the owner of the intellectual property. For these reasons, VA has determined that it is not feasible to add restricted-use emblems to the list of emblems available for inscription. Nonetheless, we agree with the commenters that there is a less restrictive alternative to proscribing inscription of intellectual property.

Accordingly, we will modify § 38.632(e)(2) to clarify that the requested emblem must be free of copyright or trademark restrictions or authorized by the owner for inscription on Government-furnished headstones and markers. A few commenters also inquired about inscription technology and the costs to individuals for inscribing an emblem of belief on a headstone or marker. Regarding inscription technology, VA contracts with private vendors for the procurement and inscription of headstones and markers. As technologies improve, VA amends contracts to incorporate improved and diverse manufacturing techniques to take advantage of new inscription technologies. There are no costs imposed on families to inscribe emblems on Government-furnished headstone or markers.

Paperwork Reduction Act

Although this final rule will impose a new information collection for requests to add a new emblem of belief to VA's list of emblems available for inscription on Government-furnished headstones and markers, VA has concluded that this new requirement will affect fewer than 10 individuals within any 12-month period. Under 5 CFR 1320.3(c), requests that do not impose a collection of information on 10 or more entities within any 12-month period do not constitute a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521). Therefore, this final rule contains no provisions constituting a new collection of information. Furthermore, the Office of Management and Budget (OMB) previously approved all collections of information referenced in this final rule under control number 2900–0222. This rule does not change those collections.

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 OMB unless OMB waives such review, 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 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 to be a significant regulatory action under the Executive Order because it may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Regulatory Flexibility Act

The Secretary hereby certifies that this final 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. 601–612. This final rule primarily affects only individuals who request Government-furnished headstones and markers for deceased eligible veterans. Therefore, pursuant to 5 U.S.C. 605(b), this rule is exempt from the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604.

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

Catalog of Federal Domestic Assistance Program Number

The Catalog of Federal Domestic Assistance program numbers and titles for this proposed rule are 64.201, National Cemeteries; and 64.202, Procurement of Headstones and Markers and/or Presidential Memorial Certificates.

List of Subjects in 38 CFR Part 38

Administrative practice and procedure, Cemeteries, Veterans.

Approved: February 20, 2009.

John R. Gingrich,

Chief of Staff, Department of Veterans Affairs.

■ For the reasons set out in the preamble, the Department of Veterans Affairs amends 38 CFR part 38 as follows:

PART 38—NATIONAL CEMETERIES OF THE DEPARTMENT OF VETERANS AFFAIRS

■ 1. The authority citation for part 38 continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

■ 2. Revise § 38.632 to read as follows:

§ 38.632 Headstone or marker application process.

(a) *General.* This section contains procedures for ordering a Government-furnished headstone or marker through the National Cemetery Administration (NCA) headstone and marker application process for burial or memorialization of deceased eligible veterans and eligible family members. It also contains procedures for requesting the inscription of new emblems of belief on Government-furnished headstones and markers.

(b) *Definitions.* For purposes of this section:

(1) *Applicant* means the decedent's next-of-kin (NOK), a person authorized in writing by the NOK, or a personal representative authorized in writing by the decedent to apply for a Government-furnished headstone or marker and, in appropriate instances, a new emblem of belief for inscription on a Government-furnished headstone or marker.

(2) *Emblem of Belief* means an emblem that represents the decedent's religious affiliation or sincerely held religious belief system, or a sincerely held belief system that was functionally equivalent to a religious belief system in the life of the decedent. In the absence of evidence to the contrary, VA will accept as genuine an applicant's statement regarding the sincerity of the religious or functionally equivalent belief system of a deceased eligible individual. The religion or belief system represented by an emblem need not be associated with or endorsed by a church, group or organized denomination. Emblems of belief do not include social, cultural, ethnic, civic, fraternal, trade, commercial, political, professional or military emblems. VA will not accept any emblem that would have an adverse impact on the dignity and solemnity of cemeteries honoring those who served the Nation, including (but not limited to) emblems that contain explicit or graphic depictions or descriptions of sexual organs or sexual activities that are shocking, titillating, or pandering in nature; and emblems that display coarse or abusive language or images.

(3) *Federally-administered cemetery* means a VA National Cemetery, Arlington National Cemetery, the Soldiers' and Airmen's Home National Cemetery, a military post or base cemetery of the Armed Forces, a service department academy cemetery, and a Department of the Interior National Cemetery.

(4) *Headstones or markers* means headstones or markers that are furnished by the Government to mark the grave or memorialize a deceased eligible veteran or eligible family member.

(5) *State veterans cemetery* means a cemetery operated and maintained by a State or territory for the benefit of deceased eligible veterans or eligible family members.

(c) *Headstone or Marker Application Process.* (1) Headstones or markers will be ordered automatically during the process of arranging burial or memorialization for a deceased eligible veteran or eligible family member in a national cemetery or a State veterans cemetery that uses the NCA electronic ordering system. Cemetery staff will order a Government-furnished headstone or marker by entering information received from the applicant directly into the NCA electronic ordering system. Unless a new emblem of belief is requested (see paragraph (d)(1) of this section), no further application is required to order a Government-furnished headstone or marker when the national or state cemetery uses the NCA electronic ordering system.

(2) Submission of a completed VA Form 40–1330 (Application for Standard Government Headstone or Marker) is required when a request for a Government-furnished headstone or marker is not made using the NCA electronic ordering system. VA Form 40–1330 requires the applicant to provide information about the decedent,

inscription preferences, and placement of headstone or marker. There is a space in the Remarks section of VA Form 40–1330 for applicants to clarify information or make special requests, to include an emblem of belief that is not currently available. To access VA Form 40–1330 use the following link: *http://www.va.gov/vaforms/va/pdf/40–1330.pdf.*

(d) *Application Process for New Emblems of Belief.* When there is an immediate need, and the applicant requests a new emblem of belief for inscription on a new, first Government-furnished headstone or marker for a deceased eligible individual, the following procedures will apply:

If the burial or memorialization of an eligible individual is in a:	The applicant must:
(1) Federally-administered cemetery or a State veterans cemetery that uses the NCA electronic ordering system.	(i) Submit a written request to the director of the cemetery where burial is requested indicating that a new emblem of belief is desired for inscription on a Government-furnished headstone or marker; and (ii) Provide the information specified in paragraph (e) of § 38.632 to the NCA Director of Memorial Programs Service.
(2) Private cemetery (deceased eligible veterans only), Federally-administered cemetery or a State veterans cemetery that does not use the NCA electronic ordering system.	(i) Submit a completed VA Form 40–1330 to the NCA Director of Memorial Programs Service, indicating in the REMARKS section of the form that a new emblem of belief is desired; and (ii) Provide the information specified in paragraph (e) of § 38.632 to the NCA Director of Memorial Programs Service.

(e) *Application.* The applicant must identify the deceased eligible individual for whom a request has been made to add a new emblem of belief to those emblems of belief available for inscription on Government-furnished headstones and markers. The application must include the following:

(1) Certification by the applicant that the proposed new emblem of belief represents the decedent's religious affiliation or sincerely held religious belief system, or a sincerely held belief system that was functionally equivalent to a religious belief system in the life of the decedent.

(2) A three-inch diameter digitized black and white representation of the requested emblem that is free of copyright or trademark restrictions or authorized by the owner for inscription on Government-furnished headstones and markers and can be reproduced in a production-line environment in stone or bronze without loss of graphic quality.

(f) *Incomplete application.* If VA determines that an application for a new emblem of belief is incomplete, VA will notify the applicant in writing of any missing information and that he or she has 60 days to submit such information or no further action will be taken. If the applicant does not submit all required information or demonstrate that he or she has good cause for failing to provide the information within 60 days of the notice, then the applicant will be notified in writing that no further action will be taken on the request for a new emblem.

(g) *Evaluation criteria.* The Director of NCA's Office of Field Programs shall forward to the Under Secretary for Memorial Affairs all complete applications, any pertinent records or information, and the Director's recommendation after evaluating whether:

(1) The applicant has demonstrated that there is an immediate need to inscribe the emblem on a new, first, Government-furnished headstone or marker for a deceased eligible individual, unless good cause is shown for an exception;

(2) The applicant has submitted a certification concerning the emblem that meets the requirements of paragraph (e)(1) of this section.

(i) In the absence of evidence to the contrary, VA will accept as genuine an applicant's statement regarding the sincerity of the religious or functionally equivalent belief system of a deceased eligible individual. If a factual dispute arises concerning whether the requested emblem represents the sincerely held religious or functionally equivalent belief of the decedent, the Director will evaluate whether the decedent gave specific instructions regarding the appropriate emblem during his or her life and the Under Secretary will resolve the dispute on that basis.

(ii) In the absence of such instructions, the Under Secretary will resolve the dispute in accordance with the instructions of the decedent's surviving spouse. If the decedent is not survived by a spouse, the Under Secretary will resolve the dispute in accordance with the agreement and written consent of the decedent's living next-of-kin. For purposes of resolving such disputes, next-of-kin means the living person(s) first listed as follows:

(A) The decedent's children 18 years of age or older, or if the decedent does not have children, then

(B) The decedent's parents, or if the decedent has no surviving parents, then

(C) The decedent's siblings.

(3) The emblem meets the definition of an emblem of belief in paragraph (b)(2);

(4) The emblem would not have an adverse impact on the dignity and solemnity of cemeteries honoring those who served the Nation—for example, the emblem cannot contain explicit or graphic depictions or descriptions of sexual organs or sexual activities that are shocking, titillating, or pandering in nature, or display coarse or abusive language or images. A determination that an emblem would have an adverse impact on the dignity and solemnity of cemeteries honoring those who served the Nation may not be made based on the content of the religious or functionally equivalent belief that the emblem represents.

(5) The emblem meets the technical requirements for inscription specified in paragraph (e)(2) of this section.

(h) *Decision by the Under Secretary for Memorial Affairs.* (1) A decision will be made on all complete applications. A request to inscribe a new emblem on a Government-furnished headstone or marker shall be granted if the Under Secretary for Memorial Affairs finds that the request meets each of the applicable criteria in paragraph (g) of this section. In making that determination, if there is an approximate balance between the positive and negative evidence concerning any fact material to making that determination, the Under Secretary shall give the benefit of the doubt to the applicant. The Under Secretary shall consider the Director of NCA's Office of Field Programs' recommendation and may consider information from any source.

(2) If the Under Secretary for Memorial Affairs determines that allowing the inscription of a particular proposed emblem would adversely

affect the dignity and solemnity of the cemetery environment or that the emblem does not meet the technical requirements for inscription, the Under Secretary shall notify the applicant in writing and offer to the applicant the option of either:

(i) Omitting the part of the emblem that is problematic while retaining the remainder of the emblem, if this is feasible, or

(ii) Choosing a different emblem to represent the religious or functionally equivalent belief that does not have such an adverse impact.

Applicants will have 60 days from the date of the notice to cure any adverse impact or technical defect identified by the Under Secretary. Only if neither option is acceptable to the applicant, the applicant's requested alternative is also unacceptable, or the applicant does not respond within the 60-day period, will the Under Secretary ultimately deny the application.

(3) If the Under Secretary determines that the request should be denied and that decision is based wholly or partly on information received from a source other than the applicant, then the following procedure will be followed:

(i) A tentative decision denying the request will be prepared;

(ii) Written notice of the tentative decision accompanied by a copy of any information on which the Under Secretary intends to rely will be provided to the applicant;

(iii) The applicant will have 60 days from the date of the written notice specified in subparagraph (ii) to present evidence and/or argument challenging the evidence and/or tentative decision; and

(iv) The Under Secretary will consider the applicant's submission under subparagraph (iii) and will issue a final decision on the request.

(4) The Director, Office of Field Programs, will provide the individual who made the request written notice of the Under Secretary's decision.

Authority: (38 U.S.C. 501, 2404).

[FR Doc. E9–12650 Filed 5–29–09; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

[EPA–HQ–OAR–2003–0062; FRL–8910–6]

RIN 2060–AN86

Implementation of the New Source Review Program for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; notice of grant of reconsideration and administrative stay of regulation.

SUMMARY: The Environmental Protection Agency (EPA or Agency) is providing notice that through a letter signed on April 24, 2009, EPA has granted a petition for reconsideration dated February 10, 2009, submitted by Earthjustice on behalf of the National Resources Defense Council (NRDC) and the Sierra Club, with respect to the final rule titled, ''Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$),'' published on May 16, 2008. In addition, EPA has administratively stayed one of the provisions to which the petitioners objected—a ''grandfathering'' provision for $PM_{2.5}$ contained in the federal prevention of significant deterioration (PSD) program. The EPA will publish notification in the **Federal Register** establishing a comment period and opportunity for a public hearing for the reconsideration proceeding.

The petition for reconsideration and request for administrative stay can be found in the docket for the May 16, 2008 rule. The EPA considered the petition for reconsideration and request for stay, along with information contained in the rulemaking docket, in reaching a decision on both the reconsideration and the stay.

DATES: Effective June 1, 2009, 40 CFR 52.21(i)(1)(xi) is stayed for a period of three months, until September 1, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. Dan deRoeck, Air Quality Policy Division, (C504–03), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541–5593; or e-mail address: *deroeck.dan@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. How Can I Get Copies of This Document and Other Related Information?

This **Federal Register** notice, the petition for reconsideration and the letter granting reconsideration and an administrative stay of the grandfathering provision under the federal PSD program at 40 CFR 52.21(i)(1)(xi) are available in the docket that EPA has established for the final rule titled ''Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$),'' published on May 16, 2008 at 73 FR 28321, under Docket ID No. EPA–HQ–OAR–2003–0062. The table below identifies the petitioner, the date EPA received the petition, the document identification number for the petition, the date of EPA's response, and the document identification number for EPA's response.

Petitioner	Date of petition to EPA	Petition: Document No. in docket	Date of EPA response	EPA response: Document No. in docket
National Resources Defense Council/Sierra Club	2/10/2009	0281	4/24/2009	0282

Note that all document numbers listed in the table are in the form of ''EPA–HQ–OAR–2003–0062–xxxx.''

All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information may not be publicly available, i.e., confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the EPA Docket Center, Docket ID No. EPA–HQ–OAR–2003–0062, EPA West, Room 3334, 1301 Constitution Avenue, Northwest, 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.

In addition to being available in the docket, an electronic copy of this **Federal Register** notice and EPA's response letter to the petitioners are also available on the World Wide Web at *http://www.epa.gov/nsr.*

II. Judicial Review

Under Clean Air Act section 307(b), judicial review of the Agency's decision concerning the stay is available only by

filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit on or before July 31, 2009.

Dated: May 22, 2009.

Lisa P. Jackson,

Administrator.

■ For reasons discussed in the preamble, the EPA amends 40 CFR part 52 as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

§ 52.21 [Amended]

■ 2. Effective June 1, 2009, in § 52.21, paragraph (i)(1)(xi) is administratively stayed until September 1, 2009.

[FR Doc. E9–12572 Filed 5–29–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2008–0797–200824(a); FRL–8911–5]

Approval and Promulgation of Air Quality Implementation Plans: South Carolina; Approval of Section 110(a)(1) Maintenance Plan for the 1997 8-Hour Ozone Standard for Cherokee County

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve a revision to the South Carolina State Implementation Plan (SIP) concerning the maintenance plan addressing the 1997 8-hour ozone standard for Cherokee County, South Carolina. This maintenance plan was submitted for EPA action on December 13, 2007, by the State of South Carolina, and ensures the continued attainment of the 1997 8-hour ozone national ambient air quality standard (NAAQS) through the year 2014. EPA is approving the SIP revision pursuant to section 110 of the Clean Air Act (CAA). The maintenance plan meets all the statutory and regulatory requirements, and is consistent with EPA's guidance. On March 12, 2008, EPA issued a revised ozone standard. Today's action, however, is being taken to address requirements under the 1997 8-hour ozone standard. Requirements for the Cherokee County Area under the 2008 8-hour ozone standard will be addressed in the future.

DATES: This rule is effective on July 31, 2009 without further notice, unless EPA receives relevant adverse comment by July 1, 2009. If EPA receives such comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that this rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2008–0797, by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *E-mail: benjamin.lynorae@epa.gov.*
3. *Fax:* (404) 562–9019.
4. *Mail:* ''EPA–R04–OAR–2008–0797,'' Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960.
5. *Hand Delivery or Courier:* Lynorae Benjamin, Chief, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. ''EPA–R04–OAR–2008–0797.'' EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through *http://www.regulations.gov* or e-mail, information that you consider to be CBI or otherwise protected. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Zuri Farngalo, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Zuri Farngalo may be reached by phone at (404) 562–9152 or by electronic mail address *farngalo.zuri@epa.gov.*

SUPPLEMENTARY INFORMATION:

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I. Background
II. Analysis of the State's Submittals
III. Final Action
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I. Background

In accordance with the CAA, the Cherokee County Area in South Carolina was designated as a nonattainment area effective November 6, 1991 (56 FR 56694) because the area did not meet the 1-hour ozone NAAQS.

On December 15, 1992, the State of South Carolina submitted a request to redesignate the Cherokee County Area

to attainment for the 1-hour ozone standard. Included in the same package along with the redesignation request, South Carolina submitted the required 1-hour ozone monitoring data and maintenance plan ensuring the areas would remain in attainment for the 1-hour ozone standard for a period of 10 years. The maintenance plan submitted by South Carolina followed applicable law and EPA guidance for the required period.

EPA approved South Carolina's request to redesignate the Cherokee County, South Carolina area (67 FR 20647) to attainment for the 1-hour ozone standard. The maintenance plan for Cherokee County was approved on April 26, 2002, with an effective date of June 25, 2002 (67 FR 2647).

On April 30, 2004, EPA designated and classified areas for the 1997 8-hour ozone NAAQS (69 FR 23858), and published the final Phase 1 Rule for implementation of the 1997 8-hour ozone NAAQS (69 FR 23951), also known as the ''Phase 1 Implementation Rule.'' The Cherokee County Area was designated as attainment for the 1997 8-hour ozone standard, effective June 15, 2004. The attainment area consequently was required to submit a 10-year maintenance plan under section 110(a)(1) of the CAA and the Phase 1 Implementation Rule. On May 20, 2005, EPA issued guidance providing information on how a State might fulfill the maintenance plan obligation established by the CAA and the Phase 1 Implementation Rule (Memorandum from Lydia N. Wegman to Air Division Directors, *Maintenance Plan Guidance Document for Certain 8-hour Ozone Areas Under Section 110(a)(1) of Clean Air Act*, May 20, 2005—hereafter referred to as '' Wegman Memorandum''). On December 22, 2006, the United States Court of Appeals for the District of Columbia Circuit issued an opinion that vacated EPA's Phase 1 Implementation Rule for the 1997 8-hour Ozone Standard. (*South Coast Air Quality Management District* v. *EPA*, 472 F.3d 882 (DC Cir. 2006).) The Court vacated those portions of the Phase 1 Implementation Rule that provided for regulation of the 1997 8-hour ozone nonattainment areas designated under Subpart 1 in lieu of Subpart 2 (of part D of the CAA), among other portions. The Court's decision does not alter any requirements under the Phase 1 Rule for this maintenance plan. South Carolina's December 13, 2007, proposed SIP revision satisfies the section 110(a)(1) CAA requirements for a plan that provides for implementation, maintenance, and enforcement of the 1997 8-hour ozone NAAQS in the Cherokee County Area.

II. Analysis of the State's Submittals

On December 13, 2007, the State of South Carolina submitted a SIP revision containing the 1997 8-hour ozone maintenance plan for the Cherokee County Area as required by section 110(a)(1) of the CAA and the provisions of EPA's Phase 1 Implementation Rule (*see* 40 CFR 51.905(a)(4)). The purpose of this plan is to ensure continued attainment and maintenance of the 1997 8-hour ozone NAAQS in the Cherokee County Area until 2014.

As required, this plan provides for continued attainment and maintenance of the 1997 8-hour ozone NAAQS in the area for 10 years from the effective date of the area's designation as attainment for the 1997 8-hour ozone NAAQS, and includes components illustrating how the Cherokee County Area will continue attainment of the 1997 8-hour ozone NAAQS and provides contingency measures. Each of the section 110(a)(1) plan components is discussed below for each area.

(a) *Attainment Inventory*. South Carolina developed comprehensive inventories of volatile organic compounds (VOC) and nitrogen oxide (NO_X) emissions from area, stationary point, stationary area, on-road mobile, biogenic, and non-road mobile sources using 2002 as the base year to demonstrate maintenance of the 1997 8-hour ozone NAAQS for the Cherokee County Area. The year 2002 is an appropriate year for South Carolina to base attainment level emissions because States may select any one of the three years on which the 1997 8-hour attainment designation was based (2001, 2002, and 2003). The State's submittal contains the detailed inventory data and summaries by source category. Using the 2002 inventory as a base year reflects one of the years used for calculating the air quality design values [1] on which the 1997 8-hour ozone designation decisions were based. It also is one of the years in the 2000–2004 period used to establish baseline visibility levels for the regional haze program.

A practical reason for selecting 2002 as the base year emission inventory is that Section 110(a)(2)(B) of the CAA and the Consolidated Emissions Reporting Rule (67 FR 39602, June 10, 2002) require States to submit emissions inventories for all criteria pollutants and their precursors every three years, on a schedule that includes the emissions year 2002. The due date for the 2002 emissions inventory is established in the rule as June 2004. In accordance with these requirements, South Carolina compiles a Statewide emissions inventory for point sources on an annual basis. On-road mobile emissions of VOC and NO_X were estimated using MOBILE 6.2 motor vehicle emissions factor computer model. Non-road mobile emissions data were derived using the U.S. EPA's Non-Road model.

In projecting data for the attainment year 2014 inventory, South Carolina used several methods to project data from the base year 2002 to the years 2010, 2012, and 2014. These projected inventories were developed using EPA-approved technologies and methodologies. EPA's Emissions Growth Analysis System model was used to derive growth factors for area source data. These growth factors were used to estimate projected area source emissions. The 2020 emissions inventory was used to develop projections for stationary point, stationary area and nonroad mobile sources. The projections for stationary point sources and nonroad mobile sources were calculated by applying a one percent per year industrial growth rate, based on forecasted economic indicators listed in University of South Carolina Moore Business School publications.

The following table provides VOC and NO_X emissions data for the 2002 base attainment year inventory, as well as projected VOC and NO_X emissions inventory data for 2010 2012, and, 2014.

[1] The air quality design value at a monitoring site is defined as that concentration that when reduced to the level of the standard ensures that the site meets the standard. For a concentration-based standard, the air quality design value is simply the standard-related test statistic. Thus, for the primary and secondary ozone standards, the 3-year average annual fourth-highest daily maximum 8-hour average ozone concentration is also the air quality design value for the site. 40 CFR Part 50, Appendix I, Section 3.

TABLE 1—CHEROKEE COUNTY VOC AND NO_X EMISSIONS INVENTORY

Emissions	2002	2010	2012	2014
Total VOC (tons per day)	46.61	46.44	46.51	46.63
Total NO_X (tons per day)	11.21	8.84	8.24	7.77

As shown in Table 1 above, the Cherokee County Area is projected to decrease total NO_X emissions from the base year of 2002 to the maintenance year of 2014. Total VOC emissions steadily decreased from the base year of 2002 through 2010, but are then projected to increase by 0.12 tons per day between the years 2012 to the maintenance year of 2014. However, year 2014 emissions are only slightly more than the baseline year emission level. Thus South Carolina demonstrated that the 1997 8-hour ozone standard will continue to be maintained. This small increase of 0.02 tons per day above the base year 2002 inventory is not expected to have an impact on maintenance of the 1997 standard, particularly because the VOC inventory in this area is dominated by biogenic sources. On-road mobile emission projections were calculated by using EPA's MOBILE6.2 emission factor model.

As shown in the table above, South Carolina has demonstrated that the future year emissions will be less than or consistent with the 2002 base attainment year's emissions for the 1997 8-hour ozone NAAQS. The attainment inventory submitted by South Carolina for this area is consistent with the criteria as discussed in the Wegman Memorandum. EPA finds that the future emissions levels in 2010, 2012, and 2014 are expected to be similar to or less than the emissions levels in 2002. In the event that a future 8-hour ozone monitoring reading in this area is found to violate the 1997 ozone standard, the contingency plan section of the maintenance plan includes measures that will be promptly implemented to ensure that this area returns to maintenance of the 1997 ozone standard. Please see section (d) Contingency Plan, below, for additional information related to the contingency measures.

(b) *Maintenance Demonstration.* The primary purpose of a maintenance plan is to demonstrate how an area will continue to remain in attainment with the 1997 8-hour ozone standard for the 10-year period following the effective date of designation as unclassifiable/attainment. The end projection year for the maintenance plan for the Cherokee County Area is 2014. As discussed in section (a) Attainment Inventory above, South Carolina identified the level of ozone-forming emissions that were consistent with attainment of the NAAQS for ozone in 2002. South Carolina projected VOC and NO_X emissions for the years 2010, 2012, and 2014 in the Cherokee County Area; and EPA finds that the future emissions levels in those years are expected to be similar to or below the emissions levels in 2002.

South Carolina's SIP revisions also rely on several air quality measures that will provide for additional 8-hour ozone emissions reductions in the Cherokee County Area. These measures include the implementation of the following, among others: (1) Tier 2 Motor Vehicle Emissions and Fuel Standards, (2) Heavy-Duty Gasoline and Diesel Highway Vehicles Standard, (3) Large Nonroad Diesel Engines Rule, (4) Nonroad Spark Ignition Engines and Recreational Engines Standard, (5) NO_X SIP Call, (6) New Source Review (NSR) program, (7) Reasonably Available Control Measures (RACM) (8), and (9) Clean Air Interstate Rule (CAIR)[2].

(c) *Ambient Air Quality Monitoring.* The table below shows design values for the Cherokee County Area. The ambient ozone monitoring data was collected at sites that were selected with assistance from the U.S. EPA and are considered to be representative of the area of highest concentration.

There is one monitor in the Cherokee County Area. There were no recent design values above the 1997 0.08 ppm standard and it is anticipated that the monitors will remain at current locations, unless otherwise allowed to be removed in consultation with the EPA and in accordance with the 40 CFR part 58.

TABLE 2—DESIGN VALUES FOR 8-HOUR OZONE

Year	Cherokee County (in ppm)
2000–2002	0.087
2001–2003	0.084
2002–2004	0.080
2003–2005	0.075

[2] Despite the legal status of CAIR as remanded, many facilities have already installed or are continuing with plans to install emission controls that may benefit the Cherokee County Area.

TABLE 2—DESIGN VALUES FOR 8-HOUR OZONE—Continued

Year	Cherokee County (in ppm)
2004–2006	0.074
2005–2007	0.073
2006–2008	0.074

Based on the Table above, the most recent design values identified demonstrate attainment with the 1997 8-hour ozone NAAQS. Further, these design values indicate that the Cherokee County Area is expected to continue attainment of the 1997 8-hour ozone NAAQS. The attainment level for the 1997 8-hour ozone standard is effectively 0.084 ppm. However, in the event that a design value at the Cherokee County Area monitor exceeds the 1997 8-hour ozone standard of 84 parts per billion, the Contingency Plan included in South Carolina's maintenance plan submittal includes contingency measures which will be promptly implemented in section (d) Contingency Plan, below.

(d) *Contingency Plan.* The section 110(a)(1) maintenance plans include contingency provisions to promptly correct any violation of the 1997 8-hour ozone NAAQS that occurs. The contingency indicator for the Cherokee County Area maintenance plan is based on updates to the emission inventories. The triggering mechanism for activation of contingency measures is a ten percent or greater increase in emissions of either VOC or NO_X based on the 2002 emissions inventory. In this maintenance plan, if contingency measures are triggered, South Carolina is committing to implement the measures as expeditiously as practicable, but no longer than twenty-four months. Some of the contingency measures include: (1) Reasonably Available Control Technology (RACT) for NO_X and VOC on existing stationary sources; (2) implementation of diesel retrofit programs, including incentives for performing retrofits for fleet vehicle operations[3]; (3) alternative fuel

[3] At this time, there is not an approved method for determining emission reductions from a Diesel Inspection and Maintenance program. Therefore, there is no technical basis to award emission credits

Continued

programs for fleet vehicles[4]; (4) gas can and lawnmower replacement programs; (5) voluntary engine idling reduction programs; (6) implementation of additional control in upwind areas; and (7) other measures deemed appropriate at the time as a result of advances in control technologies.

These contingency measures and schedules for implementation satisfy EPA's long-standing guidance on the requirements of section 110(a)(1) of continued attainment. Continued attainment of the 1997 8-hour ozone NAAQS in the Cherokee County Area will depend, in part, on the air quality measures discussed previously (*see* section II). In addition, South Carolina commits to verify the 1997 8-hour ozone status in each maintenance plan through annual and periodic evaluations of the emissions inventories. In the annual evaluation, South Carolina will review VOC and NOX emission data from stationary point sources. During the periodic evaluations (every three years), South Carolina will update the emissions inventory for all emissions source categories, and compare the updated emissions inventory data to the projected 2010, 2012, and 2014 attainment emissions inventories to verify continued attainment of the 1997 8-hour ozone standard.

III. Final Action

Pursuant to section 110 of the CAA, EPA is approving the maintenance plan addressing the 1997 8-hour ozone standard in Cherokee County, South Carolina which was submitted by South Carolina on December 13, 2007, and ensures continued attainment of the 1997 8-hour ozone NAAQS through the year 2014. EPA has evaluated South Carolina's submittal and has determined that it meets the applicable requirements of the CAA and EPA regulations, and is consistent with EPA policy.

EPA is publishing this rule without prior proposal because the Agency views this as a non-controversial amendment and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision should adverse comment be filed. This rule will be effective on July 31, 2009 without further notice unless the Agency receives adverse comment by July 1, 2009. If EPA receives such comments, then EPA will publish a document withdrawing the final rule and informing the public that the rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. If no such comments are received, the public is advised this rule will be effective on July 31, 2009 and no further action will be taken on the proposed rule.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have Tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on Tribal governments or preempt Tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 31, 2009. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

for a heavy duty diesel inspection and maintenance program in the SIP. However, we do not want to preclude future technical changes that may make awarding such emission credits possible. If it is necessary to implement contingency measures for this area, South Carolina, in coordination with EPA, will evaluate the feasibility of this program as a contingency measure at that time. If a technical basis for emission credits is not available, other contingency measures will need to be implemented.

[4] If this contingency measure is necessary it will be considered and evaluated in accordance with Section 211(4)(A).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Incorporation by reference, Ozone, Nitrogen dioxides, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: May 15, 2009.

Beverly H. Banister,

Acting Regional Administrator, Region 4.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart PP—South Carolina

■ 2. Section 52.2120(e) is amended by adding a new entry for the ''Cherokee County 8-Hour Ozone Section 110(a)(1) Maintenance Plan for the 1997 8-hour ozone standard'' to read as follows:

§ 52.2210 Identification of plan.

* * * * *

(e) * * *

EPA-APPROVED SOUTH CAROLINA NON-REGULATORY PROVISIONS

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	Effective date	EPA approval date	Explanation
*	*	*	*	*
Cherokee County 110(a)(1) Maintenance Plan for the 1997 8-Hour Ozone Standard.	Cherokee County	12/13/2007	July 31, 2009. [Insert citation of publication].	

[FR Doc. E9–12546 Filed 5–29–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2007–0836–200739(f); FRL–8911–6]

Approval and Promulgation of Implementation Plans; Florida; Removal of Gasoline Vapor Recovery From the Southeast Florida Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to approve revisions to the State Implementation Plan (SIP) submitted by the State of Florida on May 31, 2007, for the purpose of removing Stage II vapor control requirements for new and upgraded gasoline dispensing facilities in Dade, Broward, and Palm Beach Counties (hereafter referred to as the ''Southeast Florida Area''), and to phase out Stage II requirements for existing facilities in those counties. In addition, EPA is approving this SIP revision which requires new and upgraded gasoline dispensing facilities and new bulk gasoline plants statewide to employ Stage I vapor control systems, and phases in Stage I vapor control requirements statewide for existing gasoline dispensing facilities. This final rule addresses a comment made on EPA's proposed rulemaking previously published for this action.

DATES: This rule will be effective July 1, 2009.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2007–0836. All documents in the electronic docket are listed in the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *i.e.*, Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. EPA requests that, if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Twunjala Bradley, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9352. Ms. Bradley can also be reached via electronic mail at *bradley.twunjala@epa.gov.*

SUPPLEMENTARY INFORMATION:

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I. Background

On January 6, 1992, EPA designated the Southeast Florida Area as a ''moderate'' ozone nonattainment area for the 1-hour ozone standard (56 FR 56694). As a result of the designation, the State of Florida was required to implement Stage II vapor recovery. Pursuant to the requirements of section 182(b)(3) of the CAA, Florida developed Florida Administrative Code (F.A.C.) Rule 62–252.400, ''Gasoline Dispensing Facilities-Stage II Vapor Recovery.'' The rule established that new gasoline dispensing facilities built after November 15, 1992, were required to employ Stage II systems upon start-up; and existing facilities were required to install Stage II systems by specific dates ranging from June 30, 1993, to November 15, 1994. This State rule was submitted as part of Florida's SIP and approved by EPA effective April 25, 1994 (59 FR 13883).

On November 8, 1993, Florida submitted to EPA an ozone redesignation request and maintenance plan for the Southeast Florida Area for attainment status for the 1-hour ozone standard. This request was due to the State implementing all measures required for moderate ozone

nonattainment areas under the CAA and exhibiting three years of clean data (1990–1992) for the 1-hour ozone standard. The maintenance plan, demonstrated that nitrogen oxides (NO_X) and volatile organic compound (VOC) emissions in the area would remain below the 1990 ''attainment year'' levels throughout the ten-year period from 1995 to 2005. In making these projections, Florida factored in the emissions benefit (primarily VOCs) of the area's Stage II program, thereby maintaining this program as part of its 1-hour ozone SIP. EPA approved the maintenance plan and redesignation request effective April 25, 1995 (60 FR 10325). Subsequently, the maintenance plan was extended by Florida to 2015 and approved by EPA, effective April 13, 2004 (69 FR 7127).

On May 31, 2007, Florida submitted a SIP revision requesting the removal of Stage II vapor control requirements for new and upgraded gasoline dispensing facilities in the Southeast Florida Area, and to phase out Stage II requirements for existing facilities in those counties. In addition to removing Stage II requirements for the Southeast Florida Area, Florida's SIP revision requires Stage I vapor recovery at new and upgraded gasoline dispensing facilities statewide; phase in Stage I vapor recovery statewide for existing gasoline dispensing facilities not previously required to have Stage I; and tanker trucks and trailers to ensure connection of the vapor return line at facilities equipped for Stage I vapor recovery statewide. Currently, Florida's Stage I vapor recovery is required for gasoline dispensing facilities in seven counties designated as maintenance areas for 8-hour ozone (including Duval, Orange, Hillsborough, Pinellas, Palm Beach, Broward, and Miami-Dade Counties).

On September 16, 2008, EPA simultaneously published a proposed rule (73 FR 53404) and a direct final rule (73 FR 53378) approving the aforementioned revisions to Florida's SIP. The proposed and direct final rules stated that if EPA received adverse comment by October 16, 2008, the direct final rule would be withdrawn and would not take effect. EPA subsequently received an adverse comment regarding the approval of the submittal on September 16, 2008, and thus withdrew the direct final rulemaking on October 27, 2008 (73 FR 63639).

II. EPA Guidance and CAA Requirements

On April 6, 1994, EPA promulgated the regulations requiring the phase-in of on-board refueling vapor recovery (ORVR) systems on new motor vehicles. Under CAA section 202(a)(6) areas classified under section 181 as moderate ozone nonattainment areas were not required to implement Stage II vapor recovery programs after promulgation of the ORVR standards. The CAA no longer required moderate areas to impose Stage II controls under section 182(b)(3) and such areas could implement SIP revisions to remove the requirements. However, at the time of ORVR promulgation, the Southeast Florida Area Stage II program was already in place and had been included in the State's November 8, 1993, redesignation request and 1-hour ozone maintenance plan for the area; therefore Florida elected not to remove the program from the SIP at that time.

As mentioned above, the Southeast Florida Area is currently designated as attainment for the 1997 8-hour (0.08 parts per million (ppm)) ozone standard and has had an approved attainment and maintenance plan for the 1-hour ozone standard since April 25, 1995 (60 FR 10325). On March 12, 2008, EPA strengthened its National Ambient Air Quality Standard (NAAQS) for the 8-hour primary ground-level ozone standard from 0.08 ppm (previously set in 1997) to 0.075 ppm. The Southeast Florida Area's 8-hour ozone standard design values for the years 2005–2007 were 0.074 ppm for Dade County, 0.067 ppm for Broward County and 0.066 ppm for Palm Beach County. These levels were below both the 1997 8-hour ozone standard and the 2008 8-hour ozone standard. Preliminary data through 2008 indicates that the Southeast Florida Area is in compliance of both the 1997 and 2008 8-hour ozone standards.

On January 5, 2005, EPA published nonattainment and attainment designations for the $PM_{2.5}$ standard (70 FR 944). The Southeast Florida Area was designated as attainment for the $PM_{2.5}$ standard and has remained in attainment through 2008. The level of the current $PM_{2.5}$ annual standard is 15 micrograms per cubic meter ($\mu g/m^3$). The annual $PM_{2.5}$ design value for Southeast Florida Area for the period of 2005–2007 was 8.6 $\mu g/m^3$. On October 17, 2006, EPA promulgated a revised NAAQS for $PM_{2.5}$ retaining the annual $PM_{2.5}$ standard of 15 $\mu g/m^3$ and revising the 24-hour $PM_{2.5}$ standard from 65 $\mu g/m^3$ to 35 $\mu g/m^3$. The effective date for the new standard was December 18, 2006.[1] Florida submitted a letter dated December 12, 2007, which recommended that the entire State of Florida be designated as attainment for the $PM_{2.5}$ standard. On December 22, 2008, in accordance with the CAA, EPA designated the State of Florida (including Southeast Florida Area) as attainment of the 2006, 24-hour $PM_{2.5}$ standard. The daily $PM_{2.5}$ design value for Southeast Florida Area for the period of 2005–2007 was 24.3 $\mu g/m^3$. Preliminary data through 2008 indicates that the Southeast Florida Area is in compliance of both the 1997 and 2006 particulate matter standards.

EPA's primary consideration for determining the approvability of Florida's request to remove Stage II vapor control requirements for new and upgraded gasoline dispensing facilities in the Southeast Florida Area, and for the phase out of Stage II requirements for existing facilities in those counties, is contingent on whether this requested action complies with section 110(l) of the CAA. Section 110(l) of the CAA states that:

> Each revision to an implementation plan submitted by a State under this Chapter shall be adopted by such State after reasonable notice and public hearing. The administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in Section 7501 of this title), or any other applicable requirement of this chapter.

III. Today's Action

EPA is taking final action to approve the SIP revision submitted by Florida for the purpose of removing Stage II vapor control requirements for new and upgraded gasoline dispensing facilities in Miami-Dade, Broward, and Palm Beach Counties, and phasing out Stage II requirements for existing facilities in those counties. Additionally, EPA is approving rule changes which would require new and upgraded gasoline dispensing facilities and new bulk gasoline plants statewide to employ Stage I vapor control systems, and would phase in Stage I vapor control requirements statewide for existing gasoline dispensing facilities. EPA is also responding to the adverse comment received on the September 16, 2008, rulemaking proposing to approve the aforementioned revisions (*see* 73 FR 53378). These approval actions are based on EPA's analyses of whether these requests comply with section 110(l) of the CAA. EPA's analyses for the State of Florida's submittal are described in detail in the proposed and direct final rules published September 16, 2008 (73 FR 53404 and 73 FR 53378, respectively).

[1] On February 24, 2009, the U.S. Court of Appeals for the DC Circuit granted a petition for review of EPA's decision to retain the annual $PM_{2.5}$ standard of 15 $\mu g/m^3$ and remanded the matter to EPA for further proceedings but did not vacate the standard. *American Farm Bureau Federation* v. *EPA* (D.C. Cir., No. 06–1410).

IV. Comment and Response

The following is a summary of the adverse comment received on the direct final and proposed rules published, September 16, 2008, and EPA's response to the comment.

Comment: The commenter alleges that removal of the Stage II vapor recovery requirement with sole reliance on ORVR canisters to reduce vehicle refueling emissions violates the EPA rules for such emissions to be less than or equal to 0.2 grams/gallon. The commenter provided data from a study that the commenter believes supports his claim.

Response: The commenter provided three sets of test data that he alleges shows that existing ORVR systems emit in excess of 0.2 grams/gallon. The results of the three sets of test data presented claim that actual emissions range from 0.481 to 1.002 grams/gallon. The commenter does not explain why he believes this is relevant to the removal of Stage II requirements in the Southeast Florida Area.

In this rulemaking, EPA is making no finding on the validity of the test data or the commenter's interpretation of the results presented. Rather, EPA assessed whether excess emissions of the magnitude alleged to occur by the commenter could impact the noninterference demonstration prepared by Florida.

Removing the Stage II vapor recovery requirement from the Southeast Florida Area's portion of the Florida SIP may result in a small, temporary increase in VOC emissions within the three Southeast Florida counties. In the May 31, 2007, SIP revision, Florida estimated anthropogenic VOC emissions in the Southeast Florida Area to be 512.6 tons/day in 2005, falling to 494.6 tons/day in 2010 and 467.2 tons/day in 2015. By comparison, 1990 VOC emission rates were 867.8 tons/day. Florida has projected a continued decrease in VOC emissions from 2005 to 2010 and 2015 even with the removal of Stage II vapor recovery systems. Specifically, Florida projects reductions from 2005 VOC emission rates of 18 tons/day in 2010 and 45.4 tons/day in 2015. The following table shows the expected emission changes in comparison with the emissions that would occur if the Stage II vapor recovery requirement were to remain in force.

TABLE 1—TOTAL VOC[2] EMISSIONS FROM SOUTHEAST FLORIDA AREA WITH & WITHOUT VEHICLE REFUELING (STAGE II)

[Tons per day]

	1990	2005	2010		2015	
	without Stage II	with Stage II	with Stage II	without Stage II	with Stage II	without Stage II
Miami-Dade	399.8	208.3	200.0	202.1	191.6	192.8
Broward	239.6	154.6	145.3	147.2	135.9	136.9
Palm Beach	228.4	149.7	143.2	144.7	136.7	137.5
SE Florida Total	867.8	512.6	488.4	494.0	464.2	467.2

Using 2007 gasoline and gasohol sales data, if the commenter's data are accurate, the Southeast Florida Area emission inventories projections for 2010 and 2015 would only increase by 1.98 to 5.64 tons/day. This is significantly less than the expected reductions projected to occur from 2005 to 2010 (18 tons/day) and 2015 (45 tons/day). Hence, EPA concludes that even if the commenter's data are accurate, emissions of VOCs in the Southeast Florida Area would still continue to decrease from 2005 emission levels. Since the Southeast Florida Area was in attainment in 2005 for the ozone NAAQS, and continues to be in attainment, EPA has determined that removal of Stage II vapor recovery systems in the Southeast Florida Area would not result in interference with attainment or maintenance of the ozone NAAQS. Similarly, the Southeast Florida area is in attainment for the particulate matter NAAQS and, for the reasons stated in the proposal and previous direct final rule, EPA has determined that removal of Stage II vapor recovery systems in the Southeast Florida Area would not result in interference with attainment or maintenance of the ozone and particulate matter NAAQS, or any other Clean Air Act applicable requirement.

Based on the factors mentioned above, EPA believes that Florida's demonstration to remove the Stage II requirement from the Florida SIP for the Southeast Florida Area is consistent with section 110(l) of the CAA.

V. Final Action

EPA is taking final action to approve the revisions to the Florida SIP for the purpose of removing Stage II vapor control requirements for new and upgraded gasoline dispensing facilities in Miami-Dade, Broward, and Palm Beach Counties, and phasing out Stage II requirements for existing facilities in those counties. Additionally, EPA is approving rule changes that would require new and upgraded gasoline dispensing facilities and new bulk gasoline plants statewide to employ Stage I vapor control systems, and would phase in Stage I vapor control requirements statewide for existing gasoline dispensing facilities. This SIP revision includes changes to F.A.C. Chapters 62–210.200 Definitions, 62–210.310 Air General Permits, 62–210.920 Air General Permit Forms, 62–252.200 Definitions, 62–252.300 Gasoline Dispensing Facilities—Stage I Vapor Recovery, 62–252.400 Gasoline Dispensing Facilities—Stage II Vapor Recovery, 62–252.500 Gasoline Tanker Trucks, 62–296–418 Bulk Gasoline Plants, and 62–296.509 Bulk Gasoline Plants (Repealed). These revisions are consistent with EPA guidance and the CAA, as amended in 1990.

VI. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office

[2] The total VOC emissions in this area also include a biogenic component that is assumed constant over time. The biogenic VOC emissions for the individual counties are estimated at 211.3 tpd for Miami-Dade, 174.5 tpd for Broward, and 399.6 tpd for Palm Beach. These amounts can be added to the man-made emissions to get the total VOC emissions.

of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);

• Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

• Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

• Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

• Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

• Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have Tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on Tribal governments or preempt Tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 31, 2009. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: May 11, 2009.

Beverly H. Banister,

Acting Regional Administrator, Region 4.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart K—Florida

■ 2. Section 52.520(c) is amended by:

■ a. Under Chapter 62–210 revising entries for ''62–210.200'' and ''62–210.300'' and

■ b. Under Chapter 62–252 revising entries for ''62–252.200'', ''62–252.300'', ''62–252.400'' and ''62–252.500'' and

■ c. Under Chapter 62–296, revising entry for ''62–296–509'' and

■ d. Under Chapter 62–210, adding entries for ''62–210.310'' and ''62–210.920'' and

■ e. Under Chapter 62–296, adding the entry for ''62–296.418'' to read as follows:

§ 52.520 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED FLORIDA REGULATIONS

State citation	Title/subject	State effective date	EPA approval date	Explanation
*	*	*	*	*
Chapter 62–210 Stationary Sources—General Requirements				
*	*	*	*	*
62–210.200	Definitions	9/4/2006	June 1, 2009. [Insert citation of publication].	
*	*	*	*	*
62–210.300	Permits Required	9/4/2006	June 1, 2009. [Insert citation of publication].	
62–210.310	Air General Permits	9/4/2006	June 1, 2009. [Insert citation of publication].	
*	*	*	*	*
62–210.920	Air General Permit Forms	9/4/2006	June 1, 2009. [Insert citation of publication].	

EPA-APPROVED FLORIDA REGULATIONS—Continued

State citation	Title/subject	State effective date	EPA approval date	Explanation
*	*	*	*	*
Chapter 62–252 Gasoline Vapor Control				
*	*	*	*	*
62–252.200	Definitions	9/4/2006	June 1, 2009.	[Insert citation of publication].
62–252.300	Gasoline Dispensing Facilities-Stage I Vapor Recovery.	9/4/2006	June 1, 2009.	[Insert citation of publication].
62–252.400	Gasoline Dispensing Facilities-Stage II Vapor Recovery.	9/4/2006	June 1, 2009.	[Insert citation of publication].
62–252.500	Gasoline Tanker Trucks	9/4/2006	June 1, 2009.	[Insert citation of publication].
*	*	*	*	*
Chapter 62–296 Stationary Sources—Emission Standards				
*	*	*	*	*
62–296.418	Bulk Gasoline Plants	9/4/2006	June 1, 2009.	[Insert citation of publication].
*	*	*	*	*
62–296.509	Bulk Gasoline Plants		June 1, 2009.	[Insert citation of publication]. Repealed.
*	*	*	*	*

* * * * *

[FR Doc. E9–12575 Filed 5–29–09; 8:45 am]

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GENERAL SERVICES ADMINISTRATION

48 CFR Parts 546 and 552

[GSAR Amendment 2009–08; GSAR Case 2008–G514 (Change 36); Docket 2008–0007; Sequence 7]

RIN 3090–AI69

General Services Administration Acquisition Regulation; GSAR Case 2008–G514; Rewrite of Part 546, Quality Assurance

AGENCIES: General Services Administration (GSA), Office of the Chief Acquisition Officer.

ACTION: Final rule.

SUMMARY: The General Services Administration (GSA) is amending the General Services Administration Acquisition Regulation (GSAR) by revising sections of GSAR Part 546 and 552 that provides requirements for quality assurance.

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

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Jeritta Parnell, Procurement Analyst, at (202) 501–4082. For information pertaining to status or publication schedules, contact the Regulatory Secretariat (VPR), 1800 F Street, NW, Room 4041, Washington, DC, 20405, (202) 501–4755. Please cite Amendment 2009–08, GSAR case 2008–G514 (Change 36).

SUPPLEMENTARY INFORMATION:

A. Background

The GSA is amending the General Services Administration Acquisition Regulation (GSAR) to revise GSAR Parts 546 and 552 as follows:

The GSAR section 546.302–70, Source Inspection by Quality Approved Manufacturer for fixed-price supply contracts, is revised to include applicability to certain programs, *i.e.,* stock, special order program, wildfire. The subsection is revised to include reference to FAR 52.246–2, Inspection of Supplies—Fixed Price.

The GSAR section 546.302–71, Source inspection, is retained with no revisions to the clause except for the replacement of Federal Supply Service (FSS) with Federal Acquisition Service (FAS).

The GSAR section 546.302–72, Destination inspection, is added to prescribe the clause at 552.246–78, Inspection at Destination.

The language in GSAR 546.312, Construction contracts, that prescribes the clause at 552.246–72, Final Inspection and Tests, is retained.

The language in GSAR 546.470–2, Certification Testing, is deleted.

The language in GSAR 546.708, Warranties of data, is revised to place emphasis on the role of the contracting officer.

The language in GSAR 546.710, Contract clause, is revised to add the clause at 552.246–77, Additional Contract Warranty Provisions for Supplies of a Noncomplex Nature. This clause is used when the FAR clause at 52.246–17, Warranty of Supplies of a Noncomplex Nature, is included in solicitations and contracts. The prescriptive language in paragraphs (b), (c), and (d) is deleted. The clauses prescribed in paragraphs (b), (c), and (d) are being deleted.

The clause at GSAR 552.246–17, Warranty of Supplies of a Noncomplex Nature, is being deleted as it unnecessarily repeats, paraphrases, or otherwise restates material contained in the FAR. A new clause GSAR 552.246–77, Additional Contract Warranty Provisions for Supplies of a Noncomplex Nature, is added to provide for GSA unique rights and remedies.

The clause at GSAR 552.246.70, Source Inspection by Quality Approved Manufacturer, is revised to edit and clarify existing clause language.

The clause at GSAR 552.246–71, Source Inspection by Government, is retained.

The clause at GSAR 552.246–72, Final Inspection and Tests, is being retained.

The clause at GSAR 552.246–73, Warranty—Multiple Award Schedule, is being relocated to GSAR Part 538.

The clause at GSAR 552.246–75, Guarantees, is being deleted. The FAR provides sufficient guidance.

The clause at GSAR 552.246–76, Warranty of Pesticides, is being deleted. This clause was determined to be unnecessary for inclusion in the GSAR.

The clause at GSAR 552.246–78, Inspection at Destination, is being added to provide for inspection by Government personnel at destination.

The GSA published a proposed rule with request for comments in the **Federal Register** at 73 FR 45379 on August 5, 2008. There was one public comment from one respondent. The respondent recommended retaining the clause at GSAR 552.246–72, Final Inspection and Tests. The GSA agrees and the clause is retained.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The General Services Administration certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule is not considered substantive. It clarifies existing language, deletes obsolete coverage, and edits existing language.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the GSAR do not impose recordkeeping or information collection requirements, or otherwise collect information from offerors, contractors, or members of the public that require approval of the Office of Management and Budget under 44 U.S.C. Chapter 35, *et seq.*

List of Subjects in 48 CFR Parts 546 and 552

Government procurement.

Dated: May 14, 2009.

David A. Drabkin,

Acting Chief Acquisition Officer, Office of the Chief Acquisition Officer, General Services Administration.

■ Therefore, GSA amends 48 CFR parts 546 and 552 as set forth below:

■ 1. The authority citation for 48 CFR parts 546 and 552 continues to read as follows:

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

PART 546—QUALITY ASSURANCE

■ 2. Revise section 546.302–70 to read as follows:

546.302–70 Source inspection by Quality Approved Manufacturer for fixed-price supply contracts.

(a) For solicitations issued and contracts awarded by FAS that will exceed the simplified acquisition threshold and include the clause at 52.246–2, Inspection of Supplies—Fixed-Price:

(1) The contracting officer shall insert the clause at 552.246–70, Source Inspection by Quality Approved Manufacturer, in solicitations and contracts that provide for source inspection for the Stock and Special Order Programs.

(2) The contracting officer may authorize inspection and testing at manufacturing plants or other facilities located outside the United States, Puerto Rico, or the U.S. Virgin Islands, under paragraph (a)(1) of the clause at 552.246–70 under any of the circumstances listed below after coordinating the authorization with QVOC and documenting the authorization in the file.

(i) Inspection services are available from another Federal agency with primary inspection responsibility in the geographic area.

(ii) An inspection interchange agreement exists with another agency for inspection at a contractor's plant.

(iii) Other considerations will ensure more economical and effective inspection consistent with the Government's interest.

(b) When the estimated value of the acquisition is below the simplified acquisition threshold and will include the clause at 52.246–2, Inspection of Supplies—Fixed-Price, insert the clause at 552.246–70, Source Inspection by Quality Approved Manufacturer only:

(1) In solicitations and contracts that support the Wildfire program.

(2) In contracts when a pattern of acquisitions demonstrates an ongoing relationship with the contractor.

546.302–71 [Amended]

■ 3. Amend section 546.302–71 by removing ''FSS'' and adding ''FAS'' in its place.

■ 4. Add section 546.302–72 to read as follows:

546.302–72 Destination Inspection.

The contracting officer shall include the clause at 552.246–78, Inspection at Destination (JUL 09)in supply contracts that require inspection at destination.

Subpart 546.4 [Removed]

■ 5. Remove Subpart 546.4 consisting of section 546.470–2.

■ 6. Revise section 546.708 to read as follows:

546.708 Warranties of data.

(a) The contracting officer shall use warranties of data only when both of the following conditions are applicable:

(1) Use of a warranty is in the Government's interest and is documented; and

(2) The contracting director concurs with the decision.

(b) The contracting officer shall consult with the technical or specification manager responsible for developing any warranties of data.

■ 7. Revise section 546.710 to read as follows:

546.710 Contract clause.

The Contracting officer shall insert the clause at 552.246–77, Additional Contract Warranty Provisions for Supplies of a Noncomplex Nature, when using the clause at 52.246–17 in solicitations and contracts.

PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

552.246–17 [Removed]

■ 8. Remove section 552.246–17.

■ 9. Revise section 552.246–70 to read as follows:

552.246–70 Source Inspection by Quality Approved Manufacturer.

As prescribed in 546.302–70, insert the following clause:

SOURCE INSPECTION BY QUALITY APPROVED MANUFACTURER (JUL 09)

(a) *Inspection system and inspection of facilities.* (1) The inspection system maintained by the Contractor under the Inspection of Supplies—Fixed Price clause (FAR 52.246–2) of this contract shall be maintained throughout the contract period. Unless otherwise authorized in writing by the Contracting Officer, the Contractor shall comply with all requirements of editions in effect on the date of the solicitation of either Federal Standard 368 or the International Organization for Standardization (ISO) Standard 9001:2000 (Quality Management Systems—Requirements). A documented description of the

inspection system shall be made available to the Government before contract award. At the sole discretion of the Contracting Officer, he/she may authorize in writing exceptions to the quality assurance standards identified above. The Contractor shall immediately notify the Administrative Contracting Officer (ACO) of any changes made in the inspection system during the contract period. As used herein, the term ''inspection system'' means the Contractor's own facility or any other facility acceptable to the Government that will be used to perform inspections or tests of materials and components before incorporation into end articles and for inspection of such end articles before shipment. When the manufacturing plant is located outside of the United States, the Contractor shall arrange delivery of the items from a plant or warehouse located in the United States (including Puerto Rico and the U.S. Virgin Islands) equipped to perform all inspections and tests required by the contract or specifications to evidence conformance therewith, or shall arrange with a testing laboratory or other facility in the United States, acceptable to the Government, to perform the required inspections and tests.

(2) In addition to the requirements in Federal Standard 368, ISO 9001:2000 or as otherwise approved by the Government, records shall include the date inspection and testing were performed. These records shall be available for (i) 3 years after final payment; or (ii) 4 years from the end of the Contractor's fiscal year in which the record was created, whichever period expires first.

(3) Offerors are required to specify, in the space provided elsewhere in this solicitation, the name and address of each manufacturing plant or other facility where supplies will be available for inspection, indicating the item number(s) to which each applies.

(4) The Contractor shall provide the Administrative Contracting Officer ACO with the name(s) of the individual and an alternate responsible for the inspection system. In the event that the designated individual(s) becomes unavailable to oversee the inspection system, the Contractor, within 10 calendar days of such event, shall provide the ACO with the names of the replacement individual(s).

(b) *Inspection by the Contractor.* The Contractor is required to demonstrate that the supplies in the shipment have been subject to and have passed all inspections and tests required by the contract and meet the requirements of the contract.

(c) *Inspection by Government personnel.* (1) Although the Government will normally rely upon the Contractor's representation as to the quality of supplies shipped, it reserves the right under the Inspection of Supplies—Fixed Price clause to inspect and test all supplies called for by this contract, before acceptance, at all times and places, including the point of manufacture. When the Government notifies the Contractor of its intent to inspect supplies before shipment, the Contractor shall notify or arrange for subcontractors to notify the designated GSA quality assurance office 7 workdays before the date when supplies will be ready for inspection. Shipment shall not be made until inspection by the Government is completed and shipment is authorized by the Government.

(2) The offeror shall indicate, in the spaces provided below, the location(s) at which the supplies will be inspected or made available for inspection.

INSPECTION POINT

ITEM NO(S).	NAME OF MANUFACTURER	NAME, ADDRESS (Including County), and	TELEPHONE NUMBER

NOTE: If additional space is needed, the offeror may furnish the requested information by an attachment to the offer.

(3) During the contract period, a Government representative may periodically select samples of supplies produced under this contract for Government verification, inspection, and testing. Samples selected for testing will be disposed of as follows: Samples from an accepted lot, not damaged in the testing process, will be returned promptly to the Contractor after completion of tests. Samples damaged in the testing process will be disposed of as requested by the Contractor. Samples from a rejected lot will be returned to the Contractor or disposed of in a time and manner agreeable to both the Contractor and the Government.

(d) *Quality deficiencies.* (1) Notwithstanding any other clause of this contract concerning the conclusiveness of acceptance by the Government, any supplies or production lots shipped under this contract found to be defective in material or workmanship, or otherwise not in conformity with the requirements of this contract within a period of _____*_____ months after acceptance shall, at the Government's option, be replaced, repaired, or otherwise corrected by the Contractor at no cost to the Government within 30 calendar days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice to replace or correct. The Contractor shall remove, at its own expense, supplies rejected or required to be replaced, repaired, or corrected. When the nature of the defect affects an entire batch or lot of supplies, and the Contracting Officer determines that correction can best be accomplished by retaining the nonconforming supplies, and reducing the contract price by an equitable amount under the circumstances, then the equitable price adjustment shall apply to the entire batch or lot of supplies from which the nonconforming item was taken.

(2) The Contractor may be issued a Quality Deficiency Notice (QDN) if:

(i) Supplies in process, shipped, or awaiting shipment to fill Government orders are found not to comply with contract requirements, or (ii) deficiencies in either plant quality or process controls are found. Upon receipt of a QDN, the Contractor shall take immediate corrective action and shall suspend shipment of the supplies covered by the QDN until such time as corrective action has been completed. The Contractor shall notify the Government representative, within 5 workdays, of the action plan or the corrective action taken. The Government may elect to verify the corrective action at the Contractor location(s). Shipments of nonconforming supplies will be returned at the Contractor's expense and may constitute cause for termination of the contract. Delays due to the

insurance of a QDN do not constitute excusable delay under the default clause of this contract. Failure to complete corrective action in a timely manner may result in termination of the contract.

(3) This contract may be terminated for default if subsequent Government inspection discloses that plant quality or process controls are not being maintained, supplies that do not meet the requirements of the contract are being shipped, or if the contractor fails to comply with any other requirement of this clause.

(e) *Additional cost for inspection and testing.* The Contractor shall be charged for any additional cost of inspection/testing or reinspecting/retesting supplies for the reasons stated in paragraph (e) of FAR 52.246–2, Inspection of Supplies—Fixed Price. When inspection or testing is performed by or under the direction of GSA, charges will be at the rate of $_____**_____ per man-hour or fraction thereof if the inspection is at a GSA distribution center; $_____**_____ per man-hour or fraction thereof, plus travel costs incurred, if the inspection is at any other location; and $_____**_____ per man-hour or fraction thereof for laboratory testing, except that when a testing facility other than a GSA laboratory performs all or part of the required tests, the Contractor shall be assessed the actual cost incurred by the Government as a result of testing at such facility. When inspection is performed by or under the direction of any agency other than GSA, the charges indicated above may be used, or the agency may assess the actual cost of performing the inspection and testing.

(f) *Responsibility for rejected supplies.* When the Contractor fails to remove or provide instructions for the removal of rejected supplies under paragraph (d) of this clause, pursuant to the Contracting Officer's instructions, the Contractor shall be liable for all costs incurred by the Government in taking such measures as are expedient to avoid unnecessary loss to the Contractor. In addition to the remedies provided in FAR 52.246–2, supplies may be—

(1) Stored and charged against the Contractor's account;

(2) Reshipped to the Contractor at its expense (any additional expense incurred by the Government or the freight carrier caused by the refusal of the Contractor to accept their return shall also be charged against the Contractor's account);

(3) Sold to the highest bidder on the open market and the proceeds applied against the accumulated storage and other costs, including the cost of the sale; or

(4) Otherwise disposed of by the Government.

(g) *Subcontracting requirements.* The Contractor shall insert in any subcontracts the inspection or testing provisions set forth in paragraphs (a) through (d) of this clause and the Inspection of Supplies—Fixed Price clause of this contract. The Contractor shall be responsible for compliance by any subcontractor with the provisions set forth in paragraphs (a) through (d) of this clause and the Inspection of Supplies—Fixed Price clause.

(End of clause)

*Normally insert 12 months as the period during which defective or otherwise nonconforming supplies must be replaced. However, when the supplies being bought have a shelf life of less than 1 year, you should use the shelf-life period, or in the instance where you reasonably expect a longer period to be available, you should use the longer period.

**The rates to be inserted are established by the Commissioner of the Federal Acquisition Service or a designee.

552.246–71 [Amended]

■ 10. Amend section 552.246–71 by—

■ a. Revising the date of the clause (June 1, 2009);

■ b. Removing from paragraph (c)(3) the words ''the Virgin Islands'' and adding the words ''the U.S. Virgin Islands'' in its place; and

■ c. Removing from the undesignated paragraph after ''(End of clause)'' the words ''Federal Supply Service'' and adding the words ''Federal Acquisition Service'' in its place.

552.246–73 [Removed]

■ 11. Remove section 552.246–73.

552.246–74 [Removed]

■ 12. Remove section 552.246–74.

552.246–75 [Removed]

■ 13. Remove section 552.246–75.

552.246–76 [Removed]

■ 14. Remove section 552.246–76.

■ 15. Add section 552.246–77 to read as follows:

552.246–77 Additional Contract Warranty Provisions for Supplies of a Noncomplex Nature.

As prescribed in 546.710(a), insert the following clause in solicitations and contracts that include FAR 52.246–17, Warranty of Supplies of a Noncomplex Nature.

ADDITIONAL CONTRACT WARRANTY PROVISIONS FOR SUPPLIES OF A NONCOMPLEX NATURE (JUL 09)

(a) *Definitions. Correction*, as used in this clause, means the elimination of a defect.

(b) *Contractor's obligations.* When return, correction, or replacement is required, the Contractor shall be responsible for all costs attendant to the return, correction, or replacement of the nonconforming supplies. Any removal in connection with the above shall be done by the Contractor at its expense.

(c) *Remedies available to the Government.* When the nature of the defect in the nonconforming item is such that the defect affects an entire batch or lot of material, then the equitable price adjustment shall apply to the entire batch or lot of material from which the nonconforming item was taken.

(End of clause)

■ 16. Add section 552.246–78 to read as follows:

552.246–78 Inspection at Destination.

As prescribed in 546.302–72 insert the following clause:

INSPECTION AT DESTINATION (JUL 09)

Inspection of all purchases under this contract will be made at destination by an authorized Government representative.

(End of clause)

[FR Doc. E9–12587 Filed 5–29–09; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 080728943–9716–02]

RIN 0648–AX12

Atlantic Highly Migratory Species; 2009 Atlantic Bluefin Tuna Quota Specifications and Effort Controls

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

ACTION: Final rule.

SUMMARY: NMFS announces the final rule to establish 2009 fishing year specifications for the Atlantic bluefin tuna (BFT) fishery, including quotas for each of the established domestic fishing categories and effort controls for the General category and Angling category. This action is necessary to implement recommendations of the International Commission for the Conservation of Atlantic Tunas (ICCAT), as required by

the Atlantic Tunas Convention Act (ATCA), and to achieve domestic management objectives under the Magnuson–Stevens Fishery Conservation and Management Act (Magnuson–Stevens Act).

DATES: The rule is effective June 1, 2009, except that the General category retention limit found under the heading General Category Effort Controls is effective June 1, 2009 through August 31, 2009, and the Angling category retention limit found under the heading Angling Category Effort Controls is effective June 1, 2009, through December 31, 2009.

ADDRESSES: Supporting documents, including the 2009 Environmental Assessment (EA), Regulatory Impact Review (RIR), and Final Regulatory Flexibility Analysis (FRFA) and the 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan (Consolidated HMS FMP), are available from Sarah McLaughlin, Highly Migratory Species Management Division, Office of Sustainable Fisheries (F/SF1), NMFS, 55 Great Republic Drive, Gloucester, MA 01930. These documents are also available from the HMS Management Division website at *http://www.nmfs.noaa.gov/sfa/hms/* or at the Federal e–Rulemaking Portal: *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Sarah McLaughlin, 978–281–9260.

SUPPLEMENTARY INFORMATION: Atlantic tunas are managed under the dual authority of the Magnuson–Stevens Act and ATCA. ATCA authorizes the Secretary of Commerce (Secretary) to promulgate regulations, as may be necessary and appropriate, to implement ICCAT recommendations. The authority to issue regulations under the Magnuson–Stevens Act and ATCA has been delegated from the Secretary to the Assistant Administrator for Fisheries, NOAA (AA). The implementing regulations for Atlantic HMS are at 50 CFR part 635.

I. Background

Background information about the need for the BFT quota specifications and effort controls for the 2009 fishing year (January 1 through December 31, 2009) was provided in the preamble to the proposed rule (74 FR 7577, February 18, 2009) and is not repeated here.

II. Changes from the Proposed Rule

The proposed Angling category daily retention limit, for the entire season and for both the charter/headboat and private sectors of the fishery, was one school, large school, or small medium BFT (measuring 27 inches (68.6 cm) to less than 73 inches (185.4 cm)) per vessel. Since publication of the proposed rule, NMFS has decided to change the recreational daily retention limit to one school BFT (measuring 27 inches to less than 47 inches (119.4 cm)) and one large school/small medium BFT (measuring 47 inches to less than 73 inches) per vessel after taking additional information and several issues into consideration.

First, NMFS has held internal and public discussions about the expected availability of school BFT to the fishery in 2009. After hearing from fishermen and reviewing catch size frequency data, NMFS predicts that 2009 landings will be similar to those in 2008 (which were 54.6 mt out of an adjusted 2008 quota of 119 mt). Thus, there is less concern than at the proposed rule stage that the school BFT subquota for 2009 would be exceeded with a daily retention limit of one school BFT and one large school/small medium BFT per vessel.

Second, NMFS has examined a daily retention limit of one school BFT and one large school/small medium BFT per vessel in the context of stock rebuilding and has determined that, due to low availability of school BFT, it is likely to result in a pattern of fishing mortality (e.g., fish caught at each age) consistent with the one used in the last stock assessment. Thus, this recreational fishery retention limit would be consistent with the assumptions used in the latest BFT stock status projections, and would not be expected to affect the rebuilding timeframe.

Third, NMFS has received extensive public comment (at the February 2009 HMS Advisory Panel meeting, public hearings, and written comments) indicating that a one–fish daily retention limit would have negative socio–economic impacts, particularly for the charter sector (see Comments and Responses section).

Lastly, landings over the last several years have been far below the total U.S. quota, and NMFS has not needed to make use of the Reserve, which is available for a variety of quota management purposes, including transfer to any quota category inseason or at the end of a fishing year. For 2009, there are over 180 mt available in the Reserve and NMFS does not currently intend or plan to make use of the ICCAT transfer provision to transfer BFT quota to another ICCAT Contracting Party in 2009. Therefore, NMFS has the flexibility to allocate some or all of the Reserve quota to the Angling category quota at the end of the year, if needed and as available, to cover potential overharvest of the Angling category quota.

For these reasons, the final rule implements an Angling category daily retention limit, for the entire season and for both the charter/headboat and private sectors of the fishery, of one school BFT, plus one large school/small medium BFT per vessel. This recreational daily retention limit is the same as implemented for the 2008 fishing season.

III. 2009 Final Quota Specifications

In accordance with the 2008 ICCAT recommendation (Recommendation 08–04), the Consolidated HMS FMP percentage shares for each of the domestic categories, and regulations regarding annual adjustments at § 635.27(a)(10), NMFS establishes final quota specifications for the 2009 fishing year as follows: General category — 623.1 mt; Harpoon category — 51.6 mt; Purse Seine category — 246.0 mt; Angling category — 260.6 mt; Longline category — 74.3 mt; and Trap category — 1.3 mt. Additionally, 180.4 mt are allocated to the Reserve category for inseason adjustments, scientific research collection, potential overharvest in any category except the Purse Seine category, and potential quota transfers.

The General category quota of 623.1 mt is subdivided as follows: 33.0 mt for the period beginning January 1, 2009, and ending January 31, 2009; 311.5 mt for the period beginning June 1, 2009, and ending August 31, 2009; 165.1 mt for the period beginning September 1, 2009, and ending September 30, 2009; 81.0 mt for the period beginning October 1, 2009, and ending November 30, 2009; and 32.4 mt for the period beginning December 1, 2009, and ending December 31, 2009.

The Angling category quota of 260.6 mt is subdivided as follows: School BFT — 103.5 mt, with 39.8 mt to the northern area (north of 39°18' N. latitude), 44.5 mt to the southern area (south of 39°18' N. latitude), plus 19.1 mt held in reserve; large school/small medium BFT — 151.1 mt, with 71.3 mt to the northern area and 79.8 mt to the southern area; and large medium/giant BFT — 6.0 mt, with 2.0 mt to the northern area and 4.0 mt to the southern area.

The 25–mt Northeast Distant gear restricted area (NED) set–aside quota is in addition to the overall incidental longline quota to be subdivided in accordance with the North/South allocation percentages (i.e., no more than 60 percent to the south of 31° N. latitude). Thus, the Longline category quota of 74.3 mt is subdivided as follows: 29.7 mt to pelagic longline vessels landing BFT north of 31° N.

latitude and 44.6 mt to pelagic longline vessels landing BFT south of 31° N. latitude, with 25 mt set–aside for bycatch of BFT related to directed pelagic longline fisheries in the NED. NMFS accounts for landings under the 25–mt NED allocation separately from other Longline category landings.

IV. General Category Effort Controls

Because of the large quota available for the General category, NMFS increases the daily retention limit of BFT for the June–August subperiod from the default one–fish retention limit to a three–fish limit. Therefore, persons aboard vessels permitted in the General category may retain three large medium or giant BFT (measuring 73 inches or greater) per vessel per day/trip from July 1, 2009 through August 31, 2009. The BFT retention limit may be adjusted via inseason action, if warranted, under § 635.23(a)(4).

V. Angling Category Effort Controls

This final rule establishes an Angling category retention limit of one school BFT (27 inches to less than 47 inches), and one large school/small medium BFT (47 inches to less than 73 inches) per vessel per day/trip. This retention limit is effective for persons aboard vessels permitted in the Angling category from July 1, 2009 through December 31, 2009. This retention limit may be adjusted via inseason action, if warranted, under § 635.23(b)(3).

VI. Comments and Responses

Below, NMFS summarizes and responds to all comments made specifically on the proposed quota specifications and effort controls for the General and Angling categories. In addition, NMFS received comments on issues that were not considered part of this rulemaking. At the February 2009 HMS Advisory Panel meeting and throughout the comment period for this action, numerous commenters requested that NMFS change or eliminate what they perceive as unnecessarily restrictive BFT fishing restrictions (given the low rate of landings in the past few years) so that 2009 BFT landings can be maximized. Many of these comments reflect concerns about potential future reductions in U.S. BFT quota due to low landings. These comments state that maximizing landings in 2009 will help show that the United States is capable of landing its quota, and that this is the only way to prevent loss of U.S. quota when BFT allocations are renegotiated at the 2010 ICCAT meeting. However, some of these comments also reflect a misunderstanding of the ICCAT quota allocation process, i.e., western Atlantic BFT quota cannot be transferred to eastern Atlantic BFT ICCAT Contracting Parties. These comments are summarized under ''Other Issues'' below.

A. BFT Quotas

Comment 1: NMFS received few comments specifically on the quota specifications. Some commenters support the action as proposed because it is consistent with the BFT rebuilding program, and some continue to express concern that halfway through the rebuilding period, spawning biomass is below what it was at the beginning of the rebuilding period. Two environmental groups state that the proposed rule is inconsistent with the regulations regarding application of overharvest and underharvest (e.g., the amounts applied to the quota categories for 2009 are not equal to the amounts underharvested by those categories in 2008) and deductions are not made for the quota categories that exceeded their subquotas. One specifies that the Longline category quota should be zero after accounting for dead discards.

Response: The specifications included in this rule reflect appropriate distribution of the underharvest allowed to be carried forward for the 2009 fishing year. Deductions are not made and are not required to be made for subquota categories that are exceeded where quota is available to cover such overharvest. Flexibility in quota distribution provides for several existing and potential management needs, namely: (1) ensuring that the Longline category has sufficient quota to operate during the 2009 fishing year while also accounting for BFT discards as required by ICCAT; (2) setting 15 percent of the 2009 U.S. quota in reserve for potential transfer to other ICCAT Contracting Parties, if warranted; and (3) providing the non–Longline quota categories a share of the remainder of the underharvest consistent with the Consolidated HMS FMP allocation scheme. Further, the regulations regarding determination criteria and annual adjustment of the BFT quota at § 635.27(a)(8) and (a)(10) allow NMFS to transfer quotas among categories based on several criteria (such as a review of landing trends, the projected ability of the vessels fishing under a particular category quota to harvest the additional amount of BFT before the end of the fishing year, the estimated amounts by which quotas for other categories might be exceeded, the effects of the adjustment on accomplishing the objectives of the fishery management plan, etc.). This provides NMFS the flexibility to apply the underharvest to the overall quota for the following fishing year, and distribute the underharvest as needed, provided that the total of the adjusted category quotas and the Reserve is consistent with the ICCAT recommendation.

Comment 2: Many commenters, including fishermen, academics, and environmental organizations, oppose the concept of a U.S. quota transfer to another ICCAT–contracting party for two main reasons. The first reason given by these commenters is that such action could set the stage for future permanent quota allocation reductions at ICCAT. The second reason suggested is that loss of U.S. quota could have negative stock impacts because other Contracting Parties implement less restrictive fishing measures, tend to catch the larger sized BFT, and/or take a high proportion of western origin BFT in their fisheries. Thus, it would be better for the stock if the quota were caught by U.S. vessels than vessels from less restrictive Contracting Parties. Some commenters misunderstood that the proposed rule actually proposed such a transfer as part of the proposed action. An industry representative suggests that NMFS fully allocate the underharvest carried forward from 2008 to the quota categories rather than holding a portion in the Reserve for potential transfer. Some commenters suggest that NMFS maintain the 155.2 mt that NMFS proposed to be held in Reserve for ICCAT transfer purposes and other domestic management purposes and instead use it specifically for covering potential Angling category overharvest (i.e., potential overharvest of the large school/small medium BFT subquota).

Response: NMFS did not propose any specific quota transfer in the proposed rule, but proposed setting aside 155.2 mt of 2008 underharvest in the Reserve category for potential transfer to other ICCAT contracting parties, if warranted, and for other domestic management objectives.

NMFS does not currently intend or plan to make use of the ICCAT transfer provision to transfer BFT quota to another ICCAT Contracting Party in 2009. As indicated in the proposed rule, the 2008 ICCAT recommendation allows the United States to transfer up to 15 percent of the total U.S. quota, consistent with domestic obligations and conservation considerations. Before considering a possible quota transfer, the United States, through NMFS, would evaluate several factors, including the amount of quota proposed to be transferred, the projected ability of U.S. vessels to harvest the total U.S. BFT quota before the end of the fishing

year, the potential benefits of the transfer to U.S. fishing participants (such as access to the EEZ of the receiving Contracting Party for the harvest of a designated amount of BFT), potential ecological impacts, and the Contracting Party's ICCAT compliance status. The United States would need to explore and analyze these factors prior to transferring quota through a separate action. In the proposed rule, NMFS proposed placing 155.2 mt (15 percent of the total U.S. quota) in the Reserve so that, if the United States were to approve a transfer, the quota could be from the Reserve and not from category–specific quotas.

Because of the ICCAT–recommended limit on quota carryover and given the recent trend of substantial U.S. quota underharvest, distribution of 155.2 mt of carryover to individual quota categories in the final action would not result in substantially greater future fishing opportunities or effects on the fishery than holding that amount in Reserve. Further, as indicated above, the regulations allow NMFS to transfer quotas among categories based on the determination criteria. Under the final action, there would be over 180 mt available in the Reserve. Therefore, should a situation arise in which a BFT domestic quota transfer from the Reserve to a quota category is needed to avoid exceeding that category's quota, NMFS could take action as appropriate (e.g., allocate some or all of the 180 mt of Reserve quota to the Angling category quota at the end of the year, if needed and as available, to cover potential overharvest of the Angling category quota).

NMFS understands the concerns regarding the potential impact of other ICCAT Contracting Parties' fishing activities on the BFT stock, specifically the concern that a greater proportion of those fish targeted and caught by other western Atlantic BFT Contracting Parties would be western origin (spawned) BFT than would result from U.S. fishing activities, given research showing a greater degree of mixed–origin (western Atlantic and eastern Atlantic/Mediterranean) BFT off the U.S. mid–Atlantic coast. Thus, as it is neither to the U.S. fishery's nor the BFT stock's benefit to transfer quota to another ICCAT Contracting Party, the United States currently has no plans to do so.

B. General Category Effort Controls

Comment 1: The specific comments NMFS received on the proposed General category daily retention limit included support for the proposed three–fish limit and request for a reduction to a two–fish limit to speed stock recovery. As summarized below, NMFS received numerous comments seeking that NMFS help maximize commercial landings within the commercial quota, particularly the General category quota. Many commenters stated that it is not necessary for NMFS to maintain a maximum daily retention limit (3 fish under current regulations), but to instead use inseason authority to set the daily retention limit as appropriate given available quota. Several commenters felt that NMFS should not loosen any restrictions because that could slow stock recovery.

Response: The existing regulations allow NMFS to adjust the General category retention limit of large medium and giant BFT over a range of zero (on restricted–fishing days, which are not applicable for 2009) to three. Given the low early season harvest rate in recent years, NMFS is setting the June through August retention limit at three BFT to allow General category fishermen the maximum harvest of BFT possible under current regulations while keeping within the quota of the first General category subperiod. Stock recovery would be unaffected by this action.

C. Angling Category Effort Controls

Comment 1: Some commenters, including several environmental organizations, support the proposed Angling category daily retention limit of one school, large school, or small medium BFT (i.e., one fish measuring 27 to less than 73 inches) per vessel (the current default limit) so that the ICCAT–recommended limit on school BFT is not exceeded and the Angling category quota overall is not exceeded, as it was in 2007 and 2008. However, the majority of commenters oppose this limit in the proposed action and request that NMFS maintain the 2008 daily retention limit of one school BFT (27 inches to less than 47 inches) plus one large school/small medium BFT (47 inches to less than 73 inches). Many commenters participate in the HMS Charter/Headboat fishery and maintain that it is extremely difficult to attract customers with a daily limit of only one BFT and that loss of charter bookings would have a negative economic impact on their business and other shoreside businesses in coastal communities. As above, some suggest using the Reserve to cover any recreational overharvests.

Response: Since publication of the proposed rule, NMFS has reconsidered the recreational daily retention limit, taking several issues into consideration, including the extensive public comment received at the February 2009 HMS Advisory Panel meeting, public hearings, and in writing. NMFS understands the concern of captains that it is extremely difficult for captains to book charter trips when clients feel that only one person per vessel per day/trip would be able to retain a BFT, and that a reduction in charter trips would economically impact not only the charter business but also potentially the support businesses in the surrounding coastal communities.

Following recent NMFS consideration of the public comment and the issues described in the Changes from the Proposed Rule section, including consistency with the BFT rebuilding Program, NMFS is establishing an Angling category daily retention limit of one school BFT (27 inches to less than 47 inches) and one large school/small medium BFT (47 inches to less than 73 inches).

NMFS will need to consider closely the results of the 2009 fishing year (i.e., available landings information and the retention limits implemented for the 2009 recreational fishery) when selecting the 2010 daily retention limit. The school BFT daily retention limit for 2010 will need to be set such that the United States is consistent with the ICCAT–recommended 2-year tolerance limit for BFT less than 115 cm over the 2009–2010 period.

Comment 2: One commenter suggested that NMFS eliminate the large medium and giant (''trophy'') BFT fishery, i.e., the annual Angling category limit per vessel of one BFT measuring greater than 73 inches per year.

Response: NMFS does not believe that elimination of the trophy BFT fishery as part of the final action to set 2009 BFT quota specifications and effort controls is warranted. The subquota for recreational large medium and giant BFT has not been met in recent years. NMFS believes this comment was made in the spirit of sacrificing the ability to retain an annual trophy fish to gain a second fish on a daily basis. As above, the preferred alternative for the final action is a two–fish daily recreational retention limit.

D. Other Issues

Comment 1: The majority of comments NMFS received during the comment period requested that NMFS modify the existing regulations to improve the chances that the U.S. BFT quota can be achieved. Many comments stated it is critical to increase 2009 BFT landings because 2009 landings information will be considered at the ICCAT meeting in 2010, when BFT quotas are scheduled to be renegotiated. Similar to the concerns regarding any direct transfer from the United States to

other ICCAT Contracting Parties, some comments asserted that loss of U.S. quota would have negative stock impacts, due to how and where these other Parties may fish. Specific suggestions for regulatory changes made at the HMS Advisory Panel meeting, at the public hearings, and in written comments include:

1. General Category

• Increase the General category maximum daily retention limit (currently three BFT measuring greater than 73 inches) or eliminate it and instead manage the General category fishery through daily retention limits set by inseason action. A related comment was to allow the daily retention limit to apply for each day of a multi-day trip.

• Extend the General category season. Some commenters specify that the General category season should be closed when the January subquota (adjusted with underharvest from the prior year) is filled, and some indicate it should remain open year–round.

2. Harpoon Category

• Eliminate the two large medium BFT restriction on Harpoon category vessels.

3. General and Harpoon Category

• Decrease the commercial minimum size for BFT. Most comments requested a reduction from the current 73–inch minimum size to a 65–inch (165–cm) minimum size, although others suggest a size between 65 and 73 inches, e.g., 66 inches (167.6 cm) or 68 inches (172.7 cm). Some also specify that only one of these smaller than 73–inch BFT be allowed per day in addition to some amount of BFT greater than 73 inches. For instance, one fish 65 to less than 73 inches plus unlimited (or maximum allowed under inseason daily retention limit) BFT greater than 73 inches per day.

• In combination with the decrease in commercial minimum size, reallocate quota within the applicable category in a ''conservation neutral'' way so as not to impact stock rebuilding.

4. Longline Category

• Increase the Longline incidental BFT retention trip limits. Those requesting this change indicated the action would reduce regulatory discard of commercial–sized BFT (greater than 73 inches) and would provide greater economic incentive for Longline vessel operators to make pelagic longline trips for swordfish or other tunas, specifically contributing to the revitalization of the swordfish fishery. The specific limits suggested are: two BFT landed provided that at least 3,000 lb (1,360 kg) of non–BFT species are caught, retained, and offloaded on the same trip; 3 BFT for at least 6,000 lb (2,722 kg); 4 BFT for at least 9,000 lb (4,082 kg); and 5 BFT for at least 12,000 lb (5,443 kg).

5. Charter/Headboat Category

• Allow HMS Charter/Headboats to fish both commercially and recreationally on the same day.

• Allow harpoon use on HMS Charter/Headboat vessels.

6. Angling Category

• Implement a census program in which every recreational fish is tagged so that NMFS does not have to depend on a statistical survey landings estimate.

7. BFT Quotas

• If the Purse Seine category quota is not obtained by September 15 and effort is not current, reallocate that quota to the Angling, General, and Harpoon categories.

• Reallocate the quotas to allow a separate Charter/Headboat category quota.

In response, some commenters urge NMFS not to relax the regulations in these manners, particularly reduction of the minimum size, as these actions could have detrimental impacts on stock rebuilding. Some commenters urge NMFS to adopt more stringent regulations in order to provide more conservative protections for the fishery. Several environmental groups caution against loosening restrictions on the pelagic longline fishery. One comment in particular requested that NMFS reinstate target catch requirements in the NED. There was also a suggestion to increase the Atlantic Tunas and HMS permit fees to increase funds available for enforcement of the regulations.

Response: The suggestions listed above are beyond the scope of the rulemaking for this action. However, NMFS plans to publish an Advanced Notice of Proposed Rulemaking (ANPR) simultaneous with publication of this final rule or shortly thereafter in the **Federal Register**. The ANPR would be intended to analyze potential approaches to addressing concerns voiced by constituents during this comment period, consistent with the rulemaking process, Magnuson–Stevens Act requirements to end overfishing by the end of 2010 and rebuild the stock by 2019, ATCA, and other applicable law.

VII. Classification

NMFS publishes these final specifications and effort controls under the authority of the Magnuson–Stevens Act and ATCA. The Assistant Administrator for Fisheries (AA) has determined that the regulations contained in this final rule are necessary to implement the recommendations of ICCAT and to manage the domestic Atlantic HMS fisheries, and are consistent with the Magnuson–Stevens Act and its National Standards.

Because this a substantive rule that relieves a restriction by increasing the General category daily retention limit to three large medium or giant BFT per vessel and by increasing the Angling category daily retention limit to one school BFT and one large school/small medium BFT per vessel, it is not subject to a 30-day delay in effectiveness pursuant to 5 U.S.C. 553(d)(1). The default General category daily retention limit which would become effective when the season opens on June 1, 2009, without this action, is one large medium or giant BFT per vessel per day (§ 635.23(a)(2)). The default Angling category daily retention limit currently in effect is one school, large school, or small medium BFT per vessel per day (§ 635.23(b)(2)(ii)). Although the 2009 Angling category season officially began January 1, recreational effort historically picks up in the month of June. Therefore, this action allows General category and Angling category permit holders to harvest more BFT than they could under existing regulations. The AA also finds good cause under U.S.C. 553(d)(3) to waive the 30-day delayed effectiveness period for the BFT quota specifications in this action. Without the waiver for the 30-day delayed effectiveness period, the codified U.S. BFT quota of 1,165.1 mt and related subquotas (allocated per quota allocations established in the Consolidated HMS FMP) would remain in effect. The 2008 ICCAT Recommendation concerning the ICCAT Rebuilding Program (ICCAT Recommendation 08–04) will enter into force on June 17, 2009. In order for the United States to be in compliance with this ICCAT Recommendation, which the United States agreed to at the November 2008 meeting of ICCAT, a total U.S. quota of 1,034.9 mt must be established by June 17, 2009.

This final rule been determined to be not significant for purposes of Executive Order 12866.

In compliance with Section 604 of the Regulatory Flexibility Act, a Final Regulatory Flexibility Analysis (FRFA) was prepared for this rule. The FRFA analyzes the anticipated economic impacts of the preferred actions and any significant alternatives that could minimize economic impacts on small entities. Each of the statutory requirements of Section 604 of the Regulatory Flexibility Act has been

addressed and a summary of the FRFA is below. The full FRFA and analysis of economic and ecological impacts, are available from NMFS (see **ADDRESSES**).

Section 604(a)(1) of the Regulatory Flexibility Act requires the Agency to state the objective and need for the rule. As stated earlier, the objective of this rule is to establish BFT quotas and effort controls for the General and Angling categories for the 2009 fishing year consistent with the Consolidated HMS FMP. This rule is needed to implement ICCAT recommendations as necessary and appropriate pursuant to ATCA and to achieve domestic management objectives under the Magnuson–Stevens Act.

Section 604(a)(2) of the Regulatory Flexibility Act requires the Agency to summarize significant issues raised by the public comment in response to the Initial Regulatory Flexibility Analysis (IRFA), a summary of the Agency's assessment of such issues, and a statement of any changes made as a result of the comments. NMFS received one comment specifically on the IRFA. The commenter wrote that NMFS should establish a separate quota allocation for the charter sector and suggested that NMFS should better quantify the positive economic impact of the charter sector in the BFT fishery. Establishment of a new quota category would involve an FMP amendment and is therefore outside the scope of this rulemaking.

Section 604(a)(3) of the Regulatory Flexibility Act requires the Agency to describe and provide an estimate of the number of small entities to which the rule will apply. The final action could directly affect the approximately 43,000 vessel owners permitted in the HMS Angling category, the HMS Charter/Headboat category, or the Atlantic tunas commercial permit categories (General, Harpoon, Purse Seine, Longline, and Trap categories). Of these, 9,871 permit holders (the combined number of commercial category permit holders, including charter/headboat vessels) are considered small business entities according to the Small Business Administration's standard for defining a small entity.

Section 604(a)(4) of the Regulatory Flexibility Act requires the Agency to describe the projected reporting, recordkeeping, and other compliance requirements of the final rule, including an estimate of the classes of small entities which would be subject to the requirements of the report or record. None of the alternatives considered for this final rule would result in additional reporting, recordkeeping, and compliance requirements.

Section 604(a)(5) of the Regulatory Flexibility Act requires the Agency to describe the steps taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes. Additionally, the Regulatory Flexibility Act (5 U.S.C. 603(c)(1) – (4)) lists four general categories of ''significant'' alternatives that would assist an agency in the development of significant alternatives. These categories of alternatives are: (1) establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) use of performance rather than design standards; and (4) exemptions from coverage of the rule for small entities.

In order to meet the objectives of this final rule, consistent with the Magnuson–Stevens Act, NMFS cannot exempt small entities or change the reporting requirements only for small entities, because all of the affected businesses (commercial vessel permit holders) are considered small entities. Thus, there are no alternatives discussed that fall under the first and fourth categories described above. In addition, none of the alternatives considered would result in additional reporting or compliance requirements (category two above). NMFS does not know of any performance or design standards that would satisfy the aforementioned objectives of this rulemaking while, concurrently, complying with the Magnuson–Stevens Act.

As described below, NMFS analyzed several alternatives in this final rulemaking and provides justification for selection of the preferred alternatives to achieve the desired objective.

NMFS has estimated the average impact that the alternative to establish the 2009 BFT quota for all domestic fishing categories would have on individual categories and the vessels within those categories. As mentioned above, the 2008 ICCAT recommendation reduced the U.S. BFT quota to 1,034.9 mt. This quota allocation includes 25 mt to account for incidental catch of BFT related to directed longline fisheries in the NED. This action would distribute the adjusted (baseline) quota of 1,009.9 mt to the domestic fishing categories based on the allocation percentages established in the Consolidated HMS FMP.

In 2008, the annual gross revenues from the commercial BFT fishery were approximately $5.0 million. Approximately 9,871 vessels are permitted to land and sell BFT under four commercial BFT quota categories (including charter/headboat vessels). The commercial categories and their 2008 gross revenues are General ($4.0 million), Harpoon ($313,781), Purse Seine ($0), and Longline ($722,016). The FRFA assumes that each vessel within a category will have similar catch and gross revenues to show the relative impact of the proposed action on vessels.

For the allocation of BFT quota among domestic fishing categories, NMFS analyzed a no action alternative and Alternative A2 (preferred alternative) which would implement the 2008 ICCAT recommendation. NMFS considered a third alternative (A3) that would have allocated the 2008 ICCAT recommendation in a manner other than that designated in the Consolidated HMS FMP. Alternative A3 would result in a de facto quota reallocation among categories, and an FMP amendment would be necessary for its implementation. Per the Consolidated HMS FMP, NMFS prepares quota specifications annually for the upcoming fishing year. Preparation of an FMP amendment would not be possible in the brief period of time between receipt of the ICCAT recommendation, which occurred in late November 2008, and the start of the 2009 fishing year on January 1, 2009. Therefore, analysis of the impacts of Alternative A3 is not available. But, if an FMP amendment was feasible, positive economic impacts would be expected to result on average for vessels in permit categories that would receive a greater share than established in the FMP, and negative economic impacts would be expected to result on average for vessels in permit categories that would receive a lesser share than established in the FMP. Impacts per vessel would depend on the temporal and spatial availability of BFT to participants.

As noted above, Alternative A2 would implement the 2008 ICCAT recommendation in accordance with the Consolidated HMS FMP and consistent with ATCA, under which the United States is obligated to implement ICCAT–approved quota recommendations, as necessary and appropriate. The preferred alternative would implement this quota and have slightly positive impacts for fishermen. The no action alternative would keep the quota at pre–2008 ICCAT recommendation levels (approximately 155 mt more) and would not be consistent with the purpose and need for this action and the Consolidated HMS FMP. It would

maintain economic impacts to the United States and to local economies at a distribution and scale similar to 2008 or recent prior years, and would provide fishermen additional fishing opportunities, subject to the availability of BFT to the fishery, in the short term. In the long term, however, as stock rebuilding is delayed, negative impacts would result.

The preferred alternative also would implement the provision of the 2008 ICCAT recommendation that limits school BFT landings to 10 percent of the total U.S. quota, calculated on a two-year average, over 2009 and 2010. This is expected to have neutral impacts to fishermen who fish for school BFT, particularly those who rely exclusively on the school size class for BFT harvest, as NMFS has successfully managed the school BFT fishery since the 2006 recommendation so as to not exceed the school BFT tolerance on an annual basis.

The proposed three fish daily retention limit (measuring 73 inches or greater) per vessel is the preferred alternative for the opening retention limit for the General category, which would be in effect June 1–August 31, 2009. It is expected to result in the most positive socio–economic impacts by providing the best opportunity to harvest the quota while avoiding oversupplying the market, thus maximizing gross revenues. Other considered alternatives were the no action alternative (one BFT 73 inches or greater) per vessel and a retention limit of two BFT (73 inches or greater) per vessel. Both of these alternatives are expected to be too restrictive given the large amount of quota available for the General category during the 2009 fishing year and could result in the negative economic impact of lower gross revenues. Although early season landings seldom occur at a rate that could oversupply the market, NMFS will monitor landings closely to ensure that the increased retention limit does not contribute to an oversupply.

Three alternatives were considered for Angling category retention limits for the 2009 fishing year. Alternative C1, which was preferred in the draft EA/RIR/IRFA and is the no action alternative (C1) is a daily retention limit of one fish measuring 27 inches to less than 73 inches per vessel for all sectors of the Angling category for the entire 2009 fishing year. The other alternative that would provide a constant daily retention limit is Alternative C2 (one fish measuring 27 inches to less than 47 inches and one fish measuring 47 inches to less than 73 inches per vessel). This alternative was not preferred in the draft EA/RIR/IRFA as it was then anticipated to result in overharvest of the quota (specifically the large school/small medium BFT subquota), based on the results of the 2008 season and the apparent trend in increasing fish weight in the large school/small medium BFT size range. Additional information has helped NMFS develop more specific analyses showing that the Angling category did not have to be as restricted as originally assumed. Alternative C3 (one fish measuring 27 inches to less than 47 inches and, for certain periods, one fish measuring 47 inches to less than 73 inches per vessel) would be designed to constrain large school/small medium BFT landings to the available subquota and would be more restrictive with regard to retention of this size class than Alternative C2. However, this was not the preferred alternative in the draft EA/RIR/IRFA as it was not then considered to be sufficiently restrictive to constrain the recreational landings to the adjusted large school/small medium BFT subquota and as it may not provide consistent and equitable fishing opportunities to all users. Although NMFS requested specific public comments on Alternative C3, none were submitted.

After considering additional fishery information, public comment, and other management objectives, NMFS has selected Alternative C2 as the preferred alternative. NMFS has the flexibility to allocate some or all of the Reserve quota to the Angling category quota at the end of the year, if needed and as available, to cover potential overharvest of the Angling category quota. Such use of the Reserve would minimize the likelihood that future Angling category quotas (specifically the large school/small medium BFT subquota) would need to be reduced due to 2009 recreational fishery overharvest. Based on current projections and analyses, NMFS does not anticipate an overharvest of the school BFT subquota.

List of Subjects in 50 CFR Part 635

Fisheries, Fishing, Fishing vessels, Foreign relations, Management, Treaties.

Dated: May 26, 2009.

John Oliver

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR part 635 is amended as follows:

PART 635—ATLANTIC HIGHLY MIGRATORY SPECIES

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

Authority: 16 U.S.C. 971 *et seq.*; 16 U.S.C. 1801 *et seq.*

■ 2. In § 635.27, paragraphs (a) introductory text, (a)(1)(i), (a)(2), (a)(3), (a)(4)(i), (a)(5), (a)(6), (a)(7)(i), (a)(7)(ii), and (a)(10)(iii) are revised to read as follows:

§ 635.27 Quotas.

(a) *BFT.* Consistent with ICCAT recommendations, and with paragraph (a)(10)(iv) of this section, NMFS may subtract the most recent, complete, and available estimate of dead discards from the annual U.S. BFT quota, and make the remainder available to be retained, possessed, or landed by persons and vessels subject to U.S. jurisdiction. The remaining baseline annual U.S. BFT quota will be allocated among the General, Angling, Harpoon, Purse Seine, Longline, Trap, and Reserve categories. BFT may be taken by persons aboard vessels issued Atlantic Tunas permits, HMS Angling permits, or HMS Charter/Headboat permits. The baseline annual U.S. BFT quota is 1,009.9 mt, not including an additional annual 25 mt allocation provided in paragraph (a)(3) of this section. Allocations of the baseline annual U.S. BFT quota are: General – 47.1 percent (475.7 mt); Angling – 19.7 percent (199.0 mt), which includes the school BFT held in reserve as described under paragraph (a)(7)(ii) of this section; Harpoon – 3.9 percent (39.4 mt); Purse Seine – 18.6 percent (187.8 mt); Longline – 8.1 percent (81.8 mt), which does not include the additional annual 25 mt allocation provided in paragraph (a)(3) of this section; and Trap – 0.1 percent (1.0 mt). The remaining 2.5 percent (25.2 mt) of the baseline annual U.S. BFT quota will be held in reserve for inseason or annual adjustments based on the criteria in paragraph (a)(8) of this section. NMFS may apportion a quota allocated to any category to specified fishing periods or to geographic areas and will make annual adjustments to quotas, as specified in paragraph (a)(10) of this section. BFT quotas are specified in whole weight.

(1) * * *

(i) Catches from vessels for which General category Atlantic Tunas permits have been issued and certain catches from vessels for which an HMS Charter/Headboat permit has been issued are counted against the General category quota in accordance with § 635.23(c)(3). The amount of large medium and giant BFT that may be caught, retained,

possessed, landed, or sold under the General category quota is 47.1 percent (475.7 mt) of the baseline annual U.S. BFT quota, and is apportioned as follows:

(A) January 1 through January 31 – 5.3 percent (25.2 mt);

(B) June 1 through August 31 – 50 percent (237.8 mt);

(C) September 1 through September 30 – 26.5 percent (126.1 mt);

(D) October 1 through November 30 – 13 percent (61.8 mt); and

(E) December 1 through December 31 – 5.2 percent (24.7 mt).

* * * * *

(2) *Angling category quota.* In accordance with the framework procedures of the HMS FMP, prior to each fishing year or as early as feasible, NMFS will establish the Angling category daily retention limits. The total amount of BFT that may be caught, retained, possessed, and landed by anglers aboard vessels for which an HMS Angling permit or an HMS Charter/Headboat permit has been issued is 19.7 percent (199.0 mt) of the baseline annual U.S. BFT quota. No more than 2.3 percent (4.6 mt) of the annual Angling category quota may be large medium or giant BFT. In addition, over each 2–consecutive–year period (starting in 2009, inclusive), no more than 10 percent of the annual U.S. BFT quota, inclusive of the allocation specified in paragraph (a)(3) of this section, may be school BFT. The Angling category quota includes the amount of school BFT held in reserve under paragraph (a)(7)(ii) of this section. The size class subquotas for BFT are further subdivided as follows:

(i) After adjustment for the school BFT quota held in reserve (under paragraph (a)(7)(ii) of this section), 52.8 percent (44.5 mt) of the school BFT Angling category quota may be caught, retained, possessed, or landed south of 39°18′ N. lat. The remaining school BFT Angling category quota (39.8 mt) may be caught, retained, possessed or landed north of 39°18′ N. lat.

(ii) An amount equal to 52.8 percent (48 mt) of the large school/small medium BFT Angling category quota may be caught, retained, possessed, or landed south of 39°18′ N. lat. The remaining large school/small medium BFT Angling category quota (42.9 mt) may be caught, retained, possessed or landed north of 39°18′ N. lat.

(iii) An amount equal to 66.7 percent (3.1 mt) of the large medium and giant BFT Angling category quota may be caught, retained, possessed, or landed south of 39°18′ N. lat. The remaining large medium and giant BFT Angling category quota (1.5 mt) may be caught, retained, possessed or landed north of 39°18′ N. lat.

(3) *Longline category quota.* The total amount of large medium and giant BFT that may be caught incidentally and retained, possessed, or landed by vessels that possess Longline category Atlantic Tunas permits is 8.1 percent (81.8 mt) of the baseline annual U.S. BFT quota. No more than 60.0 percent (49.1 mt) of the Longline category quota may be allocated for landing in the area south of 31°00′ N. lat. In addition, 25 mt shall be allocated for incidental catch by pelagic longline vessels fishing in the Northeast Distant gear restricted area as specified at § 635.23(f)(3).

(4) * * *

(i) The total amount of large medium and giant BFT that may be caught, retained, possessed, or landed by vessels that possess Purse Seine category Atlantic Tunas permits is 18.6 percent (187.8 mt) of the baseline annual U.S. BFT quota. The directed purse seine fishery for BFT commences on July 15 of each year unless NMFS takes action to delay the season start date. Based on cumulative and projected landings in other commercial fishing categories, and the potential for gear conflicts on the fishing grounds or market impacts due to oversupply, NMFS may delay the BFT purse seine season start date from July 15 to no later than August 15 by filing an adjustment with the Office of the Federal Register prior to July 1.

* * * * *

(5) *Harpoon category quota.* The total amount of large medium and giant BFT that may be caught, retained, possessed, landed, or sold by vessels that possess Harpoon category Atlantic Tunas permits is 3.9 percent (39.4 mt) of the baseline annual U.S. BFT quota. The Harpoon category fishery closes on November 15 each year.

(6) *Trap category quota.* The total amount of large medium and giant BFT that may be caught, retained, possessed, or landed by vessels that possess Trap category Atlantic Tunas permits is 0.1 percent (1.0 mt) of the baseline annual U.S. BFT quota.

(7) * * *

(i) The total amount of BFT that is held in reserve for inseason or annual adjustments and fishery–independent research using quotas or subquotas is 2.5 percent (25.2 mt) of the baseline annual U.S. BFT quota. Consistent with paragraph (a)(8) of this section, NMFS may allocate any portion of this reserve for inseason or annual adjustments to any category quota in the fishery.

(ii) The total amount of school BFT that is held in reserve for inseason or annual adjustments and fishery–independent research is 18.5 percent (19.1 mt) of the total school BFT Angling category quota as described under paragraph (a)(2) of this section. This is in addition to the amounts specified in paragraph (a)(7)(i) of this section. Consistent with paragraph (a)(8) of this section, NMFS may allocate any portion of the school BFT Angling category quota held in reserve for inseason or annual adjustments to the Angling category.

* * * * *

(10) * * *

(iii) Regardless of the estimated landings in any year, NMFS may adjust the annual school BFT quota to ensure that the average take of school BFT over each 2–consecutive–year period beginning in the 2009 fishing year does not exceed 10 percent by weight of the total annual U.S. BFT quota, inclusive of the allocation specified in paragraph (a)(3) of this section, for that period.

* * * * *

[FR Doc. E9–12654 Filed 5–29–09; 8:45 am]

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Proposed Rules

Federal Register
Vol. 74, No. 103
Monday, June 1, 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.

FEDERAL TRADE COMMISSION

16 CFR Parts 321 and 322

[RIN 3084-AB18]

Advance Notice of Proposed Rulemaking: Mortgage Acts and Practices

AGENCY: Federal Trade Commission (FTC or Commission).

ACTION: Advance Notice of Proposed Rulemaking; request for comment.

SUMMARY: President Obama signed the 2009 Omnibus Appropriations Act on March 11, 2009. Section 626 of the Act directed the Commission to initiate, within 90 days of the date of enactment, a rulemaking proceeding with respect to mortgage loans. To implement the Act, the Commission has commenced a rulemaking proceeding in two parts. This Advance Notice of Proposed Rulemaking (ANPR), the Mortgage Acts and Practices Rulemaking, addresses activities that occur throughout the life-cycle of a mortgage loan, *i.e.*, practices with regard to mortgage loan advertising and marketing, origination, appraisals, and servicing. Another ANPR, the Mortgage Assistance Relief Services Rulemaking, addresses the practices of entities (other than mortgage servicers) who offer assistance to consumers in dealing with owners or servicers of their loans to modify them or avoid foreclosure. The Commission is seeking public comment with regard to the unfair and deceptive acts and practices that should be prohibited or restricted pursuant to any rules adopted in these proceedings. Any rules adopted will apply to entities, other than banks, thrifts, federal credit unions, and non-profits, that are engaged in such unfair and deceptive acts and practices.

DATES: Comments must be received by July 30, 2009.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to ''Mortgage Acts and Practices Rulemaking, Rule No. R911004'' to facilitate the organization of comments. Please note that comments 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*)—and therefore should not include any sensitive or confidential information. In particular, comments 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 secrets and commercial or financial information obtained from a person and privileged or confidential . . .,'' as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and Commission 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-mortgageactsandpractices*) (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-mortgageactsandpractices*). 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 forwarded to it by regulations.gov. 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 ''Mortgage Acts and Practices Rulemaking, Rule No. R911004'' both in the text of the comment 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 T), 600 Pennsylvania Avenue, NW, Washington, DC 20580. The FTC requests 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.

The FTC Act and other laws administered by the Commission 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 received, 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 from comments filed by individuals 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 Johnson, Attorney, 202-326-3224, Division of Financial Practices, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Background

A. FTC Rulemaking Authority Pursuant to the Omnibus Appropriations Act of 2009

Section 626 of the Omnibus Appropriations Act of 2009[2] requires that, within 90 days of enactment, the FTC initiate a rulemaking proceeding

[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] Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, § 626, 123 Stat. 524 (Mar. 11, 2009).

with respect to mortgage loans. Pursuant to the Act, the rulemaking proceeding will be conducted in accordance with the requirements of Section 553 of the Administrative Procedure Act.[3] To implement the Omnibus Appropriations Act of 2009, the Commission has commenced a rulemaking proceeding in two parts.

This ANPR, the Mortgage Acts and Practices (MAP) Rulemaking, addresses activities that occur throughout the life-cycle of a mortgage loan, *i.e.*, practices with regard to mortgage loan advertising and marketing, origination, appraisals, and servicing. Another ANPR, the Mortgage Assistance Relief Services (MARS) Rulemaking, addresses the practices of entities (other than mortgage servicers) who offer assistance to consumers in dealing with owners or servicers of their loans to modify them or avoid foreclosure. Although the Omnibus Appropriations Act of 2009 specifies neither the types of conduct nor the types of entities any proposed rules should address, the Commission has used its organic statute, the FTC Act, in establishing the parameters for this rulemaking.[4] In particular, the types of conduct that the FTC proposes to cover include acts and practices that meet the FTC's standards for unfairness or deception under Section 5 of the FTC Act.[5] In addition, the entities that the FTC intends to cover are those over which the FTC has jurisdiction under the FTC Act—specifically, entities other than banks, thrifts, federal credit unions,[6] and non-profits [7] that engage in the conduct the rules would cover.

Based on its law enforcement experience and the limited scope of current federal regulation, the Commission believes that the servicing of mortgage loans is a topic on which proposed rules may be needed. The FTC, however, also recognizes that proposed rules also may be needed to address acts and practices related to mortgage loan advertising and marketing, origination, and appraisals. The Commission therefore is seeking public comment on whether proposed rules are needed concerning acts and practices throughout the life-cycle of mortgage loans.

The Commission is seeking comments to determine whether certain acts and practices of non-bank financial companies related to mortgage loans are unfair or deceptive under Section 5 of the FTC Act and should be incorporated into a proposed rule. These acts and practices include conduct that the FTC currently could challenge in a law enforcement action as violating Section 5 of the FTC Act. However, the Commission is not seeking comments on statutes that have been enacted and rules that have been issued on these topics. The FTC also specifically is not seeking comments on the Federal Reserve Board's (Board) new rules concerning mortgage loans.[8]

Pursuant to Section 626 of the Omnibus Appropriations Act of 2009, any violation of a rule adopted under that section will be treated as a violation of a rule promulgated pursuant to Section 18 of the FTC Act.[9] Therefore, pursuant to Section 5(m)(1)(A) of the FTC Act,[10] the Commission may seek civil penalties as a remedy for such rule violations. In addition, pursuant to Section 626(b) of the Omnibus Appropriations Act of 2009, a state may bring a civil action, in either state or federal court, to enforce the FTC mortgage loan rules and obtain civil penalties and other relief for violations. Before initiating an enforcement action, the state must notify the FTC, at least 60 days in advance, and the Commission may intervene in the action.

B. FTC Authority Over Mortgage Loans and Other Financial Services

The Commission protects consumers from harmful acts and practices at every stage of the mortgage life-cycle—from the advertisement of mortgages to the collection of mortgage debts. At the early stages of the cycle, the FTC protects consumers from unfair, deceptive, or otherwise unlawful acts and practices of brokers, lenders, and others that advertise or offer mortgages, including entities that market loans on behalf of lenders. At the middle and later stages of the cycle, the agency protects consumers from the unlawful conduct of creditors, mortgage servicing agents, and debt collectors that collect payments from consumers. The Commission also protects consumers from the unlawful acts and practices of those that market credit repair or debt relief services, including entities (other than mortgage servicers) who offer assistance to consumers struggling with mortgage debt in dealing with the owners or servicers of their loans to modify their loans or avoid foreclosure.

The Commission has law enforcement authority over a wide range of acts and practices throughout the consumer credit life-cycle. The agency enforces Section 5 of the Federal Trade Commission Act, which prohibits ''unfair or deceptive acts or practices in or affecting commerce.'' [11] The Commission also enforces other consumer protection statutes that govern financial services providers. These include the Truth in Lending Act (TILA),[12] the Home Ownership and Equity Protection Act (HOEPA),[13] the Consumer Leasing Act,[14] the Fair Debt Collection Practices Act (FDCPA),[15] the Fair Credit Reporting Act (FCRA),[16] the Equal Credit Opportunity Act (ECOA),[17] the Credit Repair Organizations Act,[18] the Electronic Funds Transfer Act,[19] the Telemarketing and Consumer Fraud and Abuse Prevention Act,[20] and the privacy

[3] 5 U.S.C. 553. Section 626 of the Omnibus Appropriations Act of 2009 authorizes use of these procedures in lieu of the procedures set forth in Section 18 of the FTC Act, 15 U.S.C. 57a. Note that, because this rulemaking is not undertaken pursuant to Section 18, 15 U.S.C. 57a(f), federal banking agencies are not required to promulgate substantially similar regulations for entities within their jurisdiction. Nonetheless, the Commission plans to consult with the federal banking agencies in this proceeding.

[4] The available legislative history is consistent with the Commission's determination as to the scope of the FTC's rulemaking. *See* 155 Cong. Rec. S2816-S2817 (2009).

[5] 15 U.S.C. 45(a)(1). For a comprehensive description of the FTC's application of its unfairness and deception authority in the context of financial services, see Letter from the FTC staff to John E. Bowman, Chief Counsel of the Office of Thrift Supervision (Dec. 12, 2007), available at (*http://www.ftc.gov/os/2007/12/P084800anpr.pdf*).

[6] 15 U.S.C. 45(a)(2).

[7] 15 U.S.C. 44. Bona fide non-profit entities are exempt from the jurisdiction of the FTC Act. Sections 4 and 5 of the FTC Act confer on the Commission jurisdiction only over persons, partnerships, or corporations organized to carry on business for their profit or that of their members. *See* 15 U.S.C. 44, 45(a)(2).

[8] *See infra* Part I.D.

[9] 15 U.S.C. 57a.

[10] 15 U.S.C. 45(m)(1)(A).

[11] 15 U.S.C. 45(a)(1).

[12] 15 U.S.C. 1601-1666j (mandates disclosures and other requirements in connection with consumer credit transactions).

[13] 15 U.S.C. 1639 (provides protections for consumers entering into certain high-cost mortgage refinance loans).

[14] 15 U.S.C. 1667-1667f (requires disclosures, limits balloon payments, and regulates advertising in connection with consumer lease transactions).

[15] 15 U.S.C. 1692-1692p (prohibits abusive, deceptive, and unfair debt collection practices by third-party debt collectors).

[16] 15 U.S.C. 1681-1681x (imposes standards for consumer reporting agencies and information furnishers; places restrictions on the use of consumer report information). The Fair and Accurate Credit Transactions Act of 2003 amended the FCRA. Pub. L. No. 108-159, 117 Stat. 1952 (2003).

[17] 15 U.S.C. 1691-1691f (prohibits creditor practices that discriminate on the basis of race, religion, national origin, sex, marital status, age, receipt of public assistance, or the exercise of certain legal rights).

[18] 15 U.S.C. 1679-1679j (mandates disclosures and other requirements in connection with credit repair organizations, including a prohibition against charging fees until services are completed).

[19] 15 U.S.C. 1693-1693r (establishes rights and responsibilities of institutions and consumers in connection with electronic fund transfer services).

[20] 15 U.S.C. 6101-6108 (provides consumer protection from telemarketing deception and abuse

Continued

provisions of the Gramm-Leach-Bliley (GLB) Act.[21]

Notwithstanding the Commission's broad authority over acts and practices related to financial services, the FTC does not have jurisdiction over all providers of these services. The FTC Act specifically excludes banks, thrifts, and federal credit unions from the agency's jurisdiction.[22] However, non-bank affiliates of banks, such as parent companies or subsidiaries, are subject to the Commission's jurisdiction.[23] Likewise, the FTC has jurisdiction over entities that have contracted with banks to perform certain services on behalf of banks, such as credit card marketing and other services, but which are not themselves banks.[24] As a result, non-bank entities that provide financial services to consumers are subject to Commission jurisdiction, even if they are affiliated with, or are contracted to perform services for, banking entities.

As discussed above, the Commission intends that any rules that it issues in this proceeding would apply only to the same types of entities over which the Commission has jurisdiction under the FTC Act.

C. Deceptive and Unfair Acts and Practices

1. Deceptive Acts and Practices

Section 5 of the FTC Act broadly proscribes deceptive or unfair acts or practices in or affecting commerce. An act or practice is deceptive if there is a representation, omission of information, or practice that is likely to mislead consumers, who are acting reasonably under the circumstances, and the representation, omission, or practice is one that is material.[25] Injury is likely if the misleading or omitted information is material to consumers, *i.e.*, likely to affect a decision to purchase or use a product or service.

To determine that an act or practice is deceptive, the Commission first must conclude that there is a representation, omission of information, or a practice that is likely to mislead consumers. A claim about a product or service may be either express or implied. An express claim generally is established by the representation itself. An implied claim, on the other hand, is an indirect representation, which must be examined within the context of other information that is either presented or omitted. Deception may occur based on what is stated or because of the omission of information that would be important to the consumer. In determining that an advertisement is deceptive, for example, the Commission considers whether the overall net impression of the ad (including language and graphics) is likely to mislead consumers.[26]

Second, the Commission considers the act or practice from the perspective of a consumer acting reasonably under the circumstances.[27] Reasonableness is evaluated based on the sophistication and understanding of consumers in the group to whom the representation or sales practice is directed. If a specific audience is targeted, the Commission will consider the effect on a reasonable member of that target group. A representation may be susceptible to more than one reasonable interpretation, and if one such interpretation is misleading, the advertisement is deceptive, even if other non-deceptive interpretations are possible.[28]

Third, to conclude that deception has occurred, the Commission must determine that the representation, omission, or practice is material, *i.e.*, one that is likely to affect a consumer's decision to purchase or use a product or service. A deceptive representation, omission, or practice that is material is likely to cause consumer injury—that is, but for the deception, the consumer may have made a different choice.[29] Express claims about a product or service, such as statements about cost, are presumed to be material. Claims about purpose and efficacy of a product or service are also presumed to be material.[30]

2. Unfair Acts and Practices

Section 5(n) of the FTC Act also sets forth a three-part test to determine whether an act or practice is unfair.[31] First, the practice must be one that causes or is likely to cause substantial injury to consumers. Second, the injury must not be outweighed by countervailing benefits to consumers or to competition. Third, the injury must be one that consumers could not reasonably have avoided.

In analyzing whether injury is substantial, the Commission is not concerned with trivial, speculative, or more subjective types of harm. The substantial injury test may be met by small harm to a large number of consumers. In most cases, substantial injury involves monetary harm. Once it determines that there is substantial consumer injury, the Commission considers whether the harm is offset by any countervailing benefits to consumers or to competition. Thus, the Commission considers both the costs of imposing a remedy and any benefits that consumers enjoy as a result of the practice at issue. Finally, the injury must be one that consumers cannot reasonably avoid. If consumers reasonably could have made a different choice that would have avoided the injury, but did not do so, the practice is not deemed to be unfair under the FTC Act.

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and requires the Commission to promulgate implementing rules).

[21] 15 U.S.C. 6801-6809 (requires financial institutions to provide annual privacy notices; provides consumers the means to opt out from having certain information shared with non-affiliated third parties; and safeguards customers' personally identifiable information).

[22] 15 U.S.C. 45(a)(2). The FTC Act defines ''banks'' by reference to a listing of certain distinct types of legal entities. *See* 15 U.S.C. 44, 57a(f)(2). That list includes: national banks, federal branches of foreign banks, member banks of the Federal Reserve System, branches and agencies of foreign banks, commercial lending companies owned or controlled by foreign banks, banks insured by the Federal Deposit Insurance Corporation, and insured state branches of foreign banks.

[23] Congress clarified FTC jurisdiction when it enacted the GLB Act. Section 133(a) of the GLB Act states that an entity that is affiliated with a bank, but which is not itself a bank, is not a bank for purposes of the FTC Act. Section 133(a) of the GLB Act specifically provides:

CLARIFICATION OF FEDERAL TRADE COMMISSION JURISDICTION. Any person that directly or indirectly controls, is controlled directly or indirectly by, or is directly or indirectly under common control with, any bank or savings association . . . and is not itself a bank or savings association shall not be deemed to be a bank or savings association for purposes of any provisions applied by the Federal Trade Commission under the Federal Trade Commission Act.

Pub. L. No. 106-102, § 133(a), 113 Stat. 1383; 15 U.S.C. 41 note (a). This section has been interpreted to apply to subsidiaries of banks that are not themselves banks. *Minnesota v. Fleet Mortgage Corp.*, 181 F. Supp. 2d 995 (D. Minn. 2001).

[24] *See, e.g., FTC v. CompuCredit Corp.*, Civil Action No. 1:08-CV-01976-BBM-RGV (N.D. Ga. 2008) (approving stipulated final order involving FTC action against entity that contracted to perform credit card marketing services for a bank); *FTC v. Am. Standard Credit Sys.*, 874 F. Supp. 1080, 1086 (C.D. Cal. 1994) (dismissing argument that entity that contracted to perform credit card marketing and other services for a bank is not subject to FTC Act).

[25] Federal Trade Commission Policy Statement on Deception, *appended to In re Cliffdale Assocs.*, 103 F.T.C. 110, 174-84 (1984) (Deception Policy Statement).

[26] Disclaimers or qualifying statements are important to consider for deception analysis. Such disclaimers must be sufficiently clear, prominent, and understandable to convey the qualifying information effectively to consumers. The Commission recognizes that often ''reasonable consumers do not read the entirety of an ad or are directed away from the importance of the qualifying phrase by the acts or statements of the seller.'' Deception Policy Statement at 181. Thus, fine print disclosures at the bottom of a print ad or television screen are unlikely to cure an otherwise deceptive representation.

[27] Deception Policy Statement at 177-81.

[28] *Id.* at 178.

[29] *Id.* at 182-83.

[30] *Novartis Corp. v. FTC*, 223 F.3d 783, 786-87 (D.C. Cir. 2000).

[31] 15 U.S.C. 45(n). Section 5(n) of the FTC Act also provides that ''[i]n determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence.''

In applying its unfairness standard, the Commission takes the approach that well-informed consumers are capable of making choices for themselves. The agency therefore may prohibit or restrict acts and practices if they unreasonably create, or take advantage of, an obstacle to the ability of consumers to make informed choices, thus causing, or being likely to cause, consumer injury.[32]

D. Federal Reserve Board's Rules Concerning Mortgage Loans

In determining the restrictions on mortgage loans that should be included in an FTC proposed rule, it is important to consider the rules related to mortgage loans that the Board issued last year. On July 14, 2008, the Board announced new rules amending several aspects of Regulation Z, which implements TILA and HOEPA.[33] TILA generally requires that creditors and certain advertisers make disclosures to consumers so that they can make better informed credit decisions, including decisions related to mortgages. HOEPA, which amended TILA, imposes substantive restrictions on certain high-priced loans, all of which are subprime loans.[34] Section 105(a) of TILA gives the Board the authority to promulgate rules necessary or proper to carry out TILA's purposes.[35] Section 129(l)(2) of TILA gives the Board the authority to promulgate rules to prohibit ''unfair'' or ''deceptive'' acts and practices in connection with mortgage loans generally. It also gives the Board the authority to promulgate rules to prohibit practices that are ''abusive'' or ''not in the interest of the borrower'' in connection with the refinancing of mortgage loans.[36] The Board used its general authority under Section 105(a) to promulgate some of its new rules and its HOEPA authority under Section 129(l)(2) to promulgate other new rules.[37]

The federal banking agencies and the FTC enforce TILA (including HOEPA) and Regulation Z. TILA specifically provides enforcement authority to the Board (for state member banks of the Federal Reserve System), the Office of the Comptroller of the Currency (OCC) (for national banks), the Federal Deposit Insurance Corporation (FDIC) (for other insured banks), the Office of Thrift Supervision (OTS) (for savings associations), and the National Credit Union Administration (NCUA) (for federal credit unions).[38] TILA provides the FTC with enforcement authority as to all entities that are not specifically committed to another government agency.[39] Thus, the FTC enforces TILA (including HOEPA) and Regulation Z for non-bank financial companies, such as non-bank mortgage companies, mortgage brokers, and finance companies.[40]

The Board's final rules make changes to Regulation Z in what the FTC describes as essentially four parts of the mortgage life-cycle. The rules address acts and practices related to: (1) advertising and marketing; (2) origination (including underwriting, loan terms, and disclosures); (3) appraisals; and (4) servicing. Most of the new rules will take effect on October 1, 2009, although the rules related to escrows do not take effect until 2010.

II. Mortgage Advertising and Marketing

A. Overview

The mortgage life-cycle begins when a consumer initially shops for a mortgage. The consumer may seek out mortgage loan information on his or her own, whether on the Internet or through oral or written contacts with a real estate broker, mortgage lender, mortgage broker, or other source. The consumer also may see or hear more widely disseminated mortgage advertisements through various sources, whether in print (including billboards, direct mailings, emails, and faxes), or through television, radio, the Internet, or other electronic media. The advertiser or marketer may be the creditor itself, or a mortgage broker, real estate broker, lead generator, rate aggregator, or another person or entity.

B. Mortgage Advertising and Marketing Laws the FTC Enforces

The FTC Act requires that claims in advertising and marketing, including claims about mortgage loans, be truthful and non-misleading.[41] Mortgage advertisers are also subject to TILA (including HOEPA) and its implementing Regulation Z, among other laws.[42] In general, TILA and Regulation Z contain four basic requirements for mortgage advertisements.[43] First, an advertisement must reflect terms actually available to the consumer. Second, required disclosures must be made clearly and conspicuously in the advertisement. Third, any advertisement that includes any credit rate must state the annual percentage rate, or ''APR.'' The APR must be stated at least as conspicuously as any other stated rates. Fourth, if any major triggering loan term (*e.g.*, a monthly payment amount) is advertised, other major terms, including the APR, must also be advertised.

In July 2008, the Board issued rules under Regulation Z addressing mortgage advertising issues.[44] Some of these rules apply to closed-end credit, and others apply to open-end home equity plans. The Board's rules take effect on October 1, 2009.

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[32] *See* Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (December 17, 1980), *reprinted in In re Int'l Harvester Co.*, 104 F.T.C. 949, 1070, 1073 (1984) (Unfairness Policy Statement). *See also* Trade Regulation Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 CFR 429 (making it an unfair and deceptive practice for anyone engaged in ''door-to-door'' sales of consumer goods or services with a purchase price of $25 or more to fail to provide buyer with certain oral and written disclosures regarding buyer's right to cancel within three business days); *Holland Furnace Co. v. FTC*, 295 F.2d 302 (7th Cir. 1961) (seller's servicemen dismantled home furnaces then refused to reassemble them until consumers agreed to buy services or replacement parts).

[33] Truth in Lending, 73 FR 44522 (July 30, 2008). This ANPR summarizes the Board's rules, *infra*, but does not provide a full analysis because they are explained in detail in the supplementary information portion of the July 2008 final rule. *See id.*

[34] HOEPA applies to loans that are closed-end, non-purchase money mortgages (such as refinancings or home equity loans) secured by a consumer's principal dwelling (other than a reverse mortgage) where either: (a) the APR at consummation will exceed the yield on Treasury securities of comparable maturity by more than 8 percentage points for first-lien loans, or 10 percentage points for subordinate-lien loans; or (b) the total points and fees payable by the consumer at or before closing exceed the greater of 8 percent of the total loan amount, or $583. *See* 12 CFR 226.32; FRB Regulation Z Official Staff Commentary, 12 CFR 226.32(a), Supp. I (2008); *see also* definition of ''closed-end credit,'' *infra* note 45.

[35] 15 U.S.C. 1604(a).

[36] 15 U.S.C. 1639(l)(2).

[37] The FTC has the authority to obtain civil penalties for violations of the rules that the Board promulgates under its Section 129(l)(2) authority. *See infra* notes 53, 70, 97, and 101 and accompanying text; Omnibus Appropriations Act of 2009 § 626(c); 15 U.S.C. 45(l), 45(m), 1607(c). The FTC does not have the authority to obtain civil penalties for violations of rules the Board promulgates under its Section 105(a) authority. *See infra* notes 46, 48, 55, 57, 81, and 84 and accompanying text. In contrast, the federal banking regulatory agencies may obtain civil penalties from entities under their jurisdiction for any violation of TILA, HOEPA, or Regulation Z. *See* 15 U.S.C. 1607(a); 12 U.S.C. 1786(k), 1818(I).

[38] 15 U.S.C. 1607(a).

[39] 15 U.S.C. 1607(c).

[40] *See* Part I.B, *supra*, for discussion of FTC jurisdiction.

[41] *See* 15 U.S.C. 45; *see also* Part I.C.1, *supra*.

[42] This discussion is not intended as a comprehensive list of all potentially applicable mortgage advertising and marketing laws. Marketers of credit products also may be subject to requirements under laws such as the FCRA—for example, regarding firm offers of credit. The Commission is not seeking comment on FCRA issues in response to this ANPR.

[43] *See, e.g.*, 15 U.S.C. 1661-1665b; 12 CFR 226.16, 226.24.

[44] *See* 73 FR at 44599-602 (to be codified at 12 CFR 226.16, 226.24).

1. Closed-End Credit

Closed-end credit includes a standard mortgage loan in which the proceeds are paid out in full at loan closing.[45] Regarding closed-end credit, the Board made three significant changes to the advertising provisions in Regulation Z. First, the Board strengthened the ''clear and conspicuous'' Regulation Z standards for disclosures of information.[46] The standards vary greatly depending on the type of media used for the advertisement, but generally disclosures about promotional rates and payments must be prominent and appear close to triggering terms.[47]

Second, the Board addressed a variety of practices regarding advertising mortgage rates and payments.[48] For example, mortgage advertisements must not state any rate other than the APR, except that the simple annual rate applied to an unpaid balance may be stated in conjunction with, but not more conspicuous than, the APR.[49] If mortgage advertisements contain limited duration ''teaser'' rates or payment amounts, then the advertisements must also clearly and conspicuously disclose the duration of these rates or payment amounts.[50] The rules prohibit advertisement of rates that are lower than the rate at which interest is accruing (referred to as ''payment rates,'' ''effective rates,'' or ''qualifying rates'') because consumers may not understand these rates.[51] The rules also revise the requirements regarding the disclosures that must be made when any one of certain triggering terms is advertised by clarifying the meaning of the ''terms of repayment'' and adding a new disclosure requirement if a mortgage advertisement states the amount of any payment.[52]

Third, the Board prohibited the following seven specific mortgage advertising claims based on its conclusion that the claims are per se ''misleading or deceptive:'' [53]

1. advertising as ''fixed'' a rate or payment that will change after a period of time unless the advertisement meets certain criteria, such as having an equally prominent and closely proximate disclosure that the rate or payment is ''fixed'' for only a limited period of time;

2. comparing actual or hypothetical rates or payments to the rates or payments on an advertised loan unless the advertisement discloses the rates or payments that will apply over the full term of the advertised loan;

3. misrepresenting an advertised loan as being part of a ''government loan program'' or otherwise endorsed or sponsored by a government entity;

4. using the name of the consumer's current lender unless the advertisement has an equally prominent disclosure of the person actually making the advertisement and includes a clear and conspicuous statement that the advertiser is not associated with the consumer's current lender;

5. making any misleading claim that an advertised loan will eliminate debt or result in a waiver or forgiveness of a consumer's existing loan terms with, or obligations to, another creditor;

6. using the term ''counselor'' in an advertisement to refer to a for-profit mortgage broker or mortgage lender; and

7. advertising mortgages in a language other than English while giving critical disclosures only in English.

2. Open-End Home Equity Plans

The Board's new mortgage rules also addressed the advertising of open-end home equity plans,[54] such as home equity lines of credit (HELOCs). Regarding open-end home equity plans, the Board made two significant changes. First, the rules modify Regulation Z's ''clear and conspicuous'' standard.[55] The standards vary greatly depending on the type of media used for the advertisement, but generally disclosures about promotional rates and payments must be prominent and appear close to triggering terms.[56] Second, the rules address a variety of practices regarding advertising rates and payments.[57] Most significantly, the rules add new disclosure requirements for the advertisement of promotional rates and payments.[58] The standards vary greatly depending on the type of media used for the advertisement.[59]

C. FTC Mortgage Advertising and Marketing Law Enforcement

The FTC has brought numerous enforcement actions challenging the conduct of lenders, brokers, and other advertisers of mortgage loans in violation of the FTC Act or the TILA.[60] In most of its mortgage lending cases, the Commission has challenged alleged deception in the advertising or marketing of mortgage loans, with a focus on subprime and non-traditional loans. For example, the Commission has brought actions against mortgage lenders or brokers for alleged deceptive marketing of loan costs[61] or other key loan terms, such as misrepresenting the absence of or failing to adequately disclose the existence of a prepayment penalty [62] or a large balloon payment due at the end of the loan.[63] Most

[45] TILA Section 144 and Regulation Z Section 226.24 govern advertising of ''closed-end credit,'' which is defined as consumer credit other than open-end credit. 15 U.S.C. 144; 12 CFR 226.2(10), 226.24. Open-end credit is credit extended to a consumer under a plan in which: (1) the creditor reasonably contemplates repeated transactions; (2) the creditor may impose a finance charge from time to time on the outstanding unpaid balance; and (3) the amount of credit that may be extended to the consumer during the plan's term is generally made available to the extent that any unpaid balance is repaid. 12 CFR 226.2(20).

[46] *See* 73 FR at 44579-85, 44601-602, 44608-610. The Board promulgated these rules using its authority under TILA Section 105(a).

[47] For example, disclosures in the context of visual text advertisements on the Internet must not be obscured by graphic displays, shading, or coloring. *See id.* at 44581, 44608.

[48] *See id.* at 44581-585, 44601-602, 44608-610. The Board promulgated these rules using its authority under TILA Section 105(a).

[49] *See id.* at 44581, 44601, 44608. The rules prohibit advertisement of a periodic rate, other than the simple annual rate of interest, for credit secured by a dwelling. *Id.*

[50] *See id.* at 44583, 44601-602, 44609-610.

[51] *See id.* at 44581. Payment rates are often featured in option adjustable rate mortgages and various other non-traditional mortgages. A payment rate is used to calculate the consumer's monthly payment amount and is not necessarily the same as the interest rate. If the payment rate is less than the interest rate, the consumer's monthly payment amount does not include the full interest owed each month; the difference between the amount the consumer pays and the amount the consumer owes is added to the total amount due from the consumer. After a specified number of years, or if the loan reaches a negative amortization cap, the required monthly payment amount is recast to require payments that will fully amortize the balance over the remaining loan term, leading to sharply increased payments by the consumer.

[52] *See, e.g., id.* at 44582-585, 44601-602, 44608-610.

[53] *See id.* at 44586-590, 44602, 44610. The Board promulgated these rules using its authority under TILA Section 129(l)(2).

[54] Open-end home equity plans are open-end credit secured by a consumer's dwelling. *See* 12 CFR 226.5b; *see also* definition of ''open-end credit,'' *supra* note 45.

[55] *See* 73 FR at 44574-79, 44599-600, 44605-606. The Board promulgated these rules using its authority under TILA Section 105(a).

[56] For example, disclosures in the context of visual text advertisements on the Internet must not be obscured by graphic displays, shading, or coloring. *See id.* at 44575, 44605.

[57] *See id.* at 44575-579, 44599-600, 44606. The Board promulgated these rules using its authority under TILA Section 105(a).

[58] *See id.* at 44576-579, 44600, 44606.

[59] *See id.*

[60] *See, e.g., FTC v. Mortgages Para Hispanos.Com Corp.*, No. 06-00019 (E.D. Tex. 2006); *FTC v. Ranney*, No. 04-1065 (D. Colo. 2004); *FTC v. Chase Fin. Funding*, No. 04-549 (C.D. Cal. 2004); *FTC v. OSI Fin. Svcs., Inc.*, No. 02-C-5078 (N.D. Ill. 2002); *United States v. Mercantile Mortgage Co.*, No. 02-5079 (N.D. Ill. 2002); *FTC v. Associates First Capital Corp.*, No. 01-00606 (N.D. Ga. 2001); *FTC v. First Alliance Mortgage Co.*, No. 00-964 (C.D. Cal. 2000).

[61] *See, e.g., FTC v. Associates First Capital Corp.*, No. 01-00606 (N.D. Ga. 2001); *FTC v. First Alliance Mortgage Co.*, No. 00-964 (C.D. Cal. 2000).

[62] *FTC v. Chase Fin. Funding*, No. 04-549 (C.D. Cal. 2004); *FTC v. OSI Fin. Svcs., Inc.*, No. 02-C-5078 (N.D. Ill. 2002).

[63] *E.g., FTC v. OSI Fin. Svcs., Inc.*, No. 02-C-5078 (N.D. Ill. 2002); *FTC v. Associates First Capital Corp.*, No. 1:01-CV-00606 (N.D. Ga. 2001).

recently, in February 2009, the Commission announced settlements with three mortgage companies charged with advertising low interest rates and low monthly payments, but allegedly failing to disclose adequately that the low rates and payment amounts would increase substantially after a limited period of time.[64]

III. Mortgage Origination—Underwriting, Loan Terms, and Disclosure Issues

A. Underwriting and Loan Terms

1. Overview

For many years, consumers purchased homes with traditional, fully documented, 30-year, amortizing, fixed-rate or adjustable rate mortgages (ARMs), under which the borrower pays principal and interest each month for the life of the loan. However, over the past decade, there has been an increase in the use of increasingly complex non-traditional, or alternative, mortgage products.[65] Several of these products offer consumers the option of making lower initial monthly payments in the early years of the loan, which makes it easier for some consumers to purchase homes, or to purchase more expensive homes than they might otherwise buy at the time. After the introductory period ends, however, the monthly payments can increase significantly, and some consumers can no longer afford their loans. For example, payment option ARMs do not require that the consumer's initial payments cover the accruing interest. The remaining interest is added to the loan balance, resulting in negative amortization and larger subsequent payments. Interest-only loans require the borrower to pay only the monthly interest due during an initial period, causing the principal balance to remain unchanged. When the initial period expires, the consumer's payments increase to include both principal and interest. In addition, some consumers who use these products are subject to prohibitive prepayment penalties if they refinance their loans.

The growth of these products coincided with the rise of independent brokers originating loans and the ''originate-to-distribute'' model under which lenders immediately sell loans to the secondary market instead of holding them in their portfolios. Because these brokers and lenders are compensated early on in the loan transaction, the incentives do not facilitate diligent underwriting or interest in the long-term performance of loans.[66]

2. Mortgage Origination Laws the FTC Enforces

Mortgage loan originators are subject to numerous federal laws that the FTC enforces.[67] Section 5 of the FTC Act prohibits unfair or deceptive acts or practices in or affecting commerce, including unfair or deceptive mortgage loan origination activities. In addition, mortgage loan originators are subject to disclosure, and other requirements under the TILA (including HOEPA) and its implementing Regulation Z. In July 2008, the Board issued rules under Regulation Z addressing certain mortgage origination issues, including substantive restrictions on underwriting and loan terms.[68] Most of the Board's rules take effect on October 1, 2009, although the rules concerning escrows do not take effect until 2010.

The Board's rules establish a new category of ''higher-priced mortgage loans,'' which effectively includes HOEPA loans and virtually all subprime loans.[69] The Board added four new provisions to Regulation Z that apply to these higher-priced loans, three of which also specifically apply to HOEPA loans.[70] First, creditors are prohibited from making higher-priced loans or HOEPA loans without regard to the borrower's ability to repay the loans.[71] Second, for higher-priced loans or HOEPA loans, creditors must verify the income and assets of borrowers using reliable third-party documents.[72] Third, prepayment penalties are restricted on higher-priced loans and HOEPA loans. If mortgage payments can change during the first four years of the loan, creditors cannot impose a prepayment penalty. If mortgage payments will not change during the first four years of the loan, creditors can charge a prepayment penalty only if borrowers prepay during the first two years of the loan.[73] Finally, creditors must establish an escrow account for property taxes and homeowner's insurance for first-lien higher-priced mortgage loans.[74]

3. FTC Mortgage Origination Law Enforcement

The FTC's law enforcement program protects consumers in connection with various aspects of their mortgage origination, including those related to mortgage underwriting requirements and loan terms that are restricted or prohibited for HOEPA loans. Some lenders against whom the FTC has taken action[75] allegedly violated HOEPA by engaging in one or more of the following prohibited acts and practices: extending

[64] *See, e.g., In the Matter of American Nationwide Mortgage Company, Inc.*, FTC Dkt. No. C-4249 (Feb.17, 2009); *In the Matter of Shiva Venture Group, Inc.*, FTC Dkt. No. C-4250 (Feb. 17, 2009); *In the Matter of Michael Gendrolis*, FTC Dkt. No. C-4248 (Feb. 17, 2009).

[65] These products include 2/28 and 2/27 ARMs, fixed- and adjustable-rate interest-only loans, payment option ARMs, 40-year fixed-rate mortgages, and 50-year hybrid ARMs. In May 2006, to explore the financial benefits and risks of several alternative mortgage products, the Commission sponsored a day-long public workshop, ''Protecting Consumers in the New Mortgage Marketplace.'' *See* 71 FR 15417 (Mar. 28, 2006) and (*http://www.ftc.gov/bcp/workshops/mortgage/index.html*).

[66] *See* Ben Bernanke, Chairman, Board of Governors of the Federal Reserve System, ''Housing, Housing Finance, and Monetary Policy,'' Remarks at Federal Reserve Bank of Kansas City's Economic Symposium, Jackson Hole, Wyo. (Aug. 31, 2007) *available at* (*http://www.federalreserve.gov/newsevents/speech/bernanke20070831a.htm*).

[67] This discussion is not intended as a comprehensive list of all potentially applicable mortgage origination laws. Mortgage originators also are subject to requirements under laws such as ECOA. *See, e.g., FTC v. Gateway Funding Diversified Mortgage Servs. L.P.*, No. 08-5805 (E.D. Pa. 2008). The Commission is not seeking comments on discrimination and fair lending issues in response to this ANPR.

[68] 73 FR at 44602-604 (to be codified at 12 CFR 226.32, 226.34, 226.35). *See* note 34, *supra*, for definition of HOEPA loans.

[69] ''Higher-priced mortgage loans'' are consumer-purpose, closed-end loans secured by a consumer's principal dwelling and having an APR that exceeds the average prime offer rates for a comparable transaction published by the Federal Reserve Board by at least 1.5 percentage points for first-lien loans, or 3.5 percentage points for subordinate-lien loans. The term excludes initial construction loans, bridge loans for 12 months or less, reverse mortgages, and home equity lines of credit. *See* 73 FR at 44603.

[70] The Board promulgated these rules using its authority under TILA Section 129(l)(2).

[71] The final rules provide that creditors are presumed to have adequately considered ability to pay if they have: (1) verified repayment ability based on reliable third-party documents; (2) determined repayment ability using the ''largest scheduled payment'' of principal and interest in the first seven years of the loan (in the case of variable-rate loans, the applicable rate is the fully-indexed rate as of the date of consummation, not the maximum note rate); and (3) assessed the borrower's repayment ability using a ratio of the borrower's total debt obligations to income, and/or a borrower's residual income (income after paying debt obligations). *See* 73 FR at 44539-551, 44603, 44611-613.

[72] *See id.* at 44546-548, 44603, 44611-612.

[73] *See id.* at 44551-557, 44603-604, 44610-611, 44613.

[74] Borrowers may cancel their escrow accounts 12 months after loan consummation. The requirement for a creditor to establish an escrow account for loans secured by site-built homes becomes effective April 1, 2010; for loans secured by manufactured housing, it becomes effective October 1, 2010. *See id.* at 44557-562, 44604, 44613.

[75] *See, e.g., FTC v. Safe Harbour Found. of Fl., Inc.*, No. 08-1185 (N.D. Ill. 2008); *United States v. Delta Funding Corp.*, No. 00-1872 (E.D.N.Y. 2000) (brought in conjunction with Department of Justice and Department of Housing and Urban Development); *FTC v. NuWest, Inc.*, No. 00-1197 (W.D. Wash. 2000); *FTC v. Capitol Mortgage Corp.*, No. 2-99-CV580G (D. Utah 1999); *FTC v. Cooper*, No. CV 99-07782 WDK (C.D.Cal. 1999); *FTC v. CLS Fin. Servs., Inc.*, No. C99-1215 Z (W.D. Wash. 1999); *FTC v. Granite Mortgage, LLC*, No. 99-289 (E.D. Ky. 1999); *FTC Interstate Resource Corp.*, No. 99 Civ. 5988 (S.D. N.Y. 1999); *FTC v. LAP Fin. Servs., Inc.*, No. 3:99 CV-496-H (W.D. Ky. 1999); *FTC v. Wasatch Credit Corp.*, No. 2-99CV579G (D. Utah 1999).

credit based on the value of consumers' collateral without regard to their repayment ability, charging prepayment penalties, requiring balloon payments, providing negatively amortized loans (causing the loan balance to increase), including provisions to increase the interest rate after default, making direct payments to home improvement contractors, or failing to make required HOEPA disclosures.

B. Mortgage Disclosures

1. Overview, Relevant Federal Laws, and FTC Law Enforcement

Consumers are faced with numerous factors to take into consideration when comparing the terms of various mortgage loans, such as the duration of the loan, the interest rate, whether that rate is fixed or adjustable, the amount of closing costs, and other characteristics such as prepayment penalties and balloon payments. As consumers shop for a mortgage, it is important that they receive timely and understandable information about the terms and costs of the particular products they are trying to analyze and compare. Moreover, for many alternative mortgage products—where the payment schedule may increase substantially in future years, or prepayment penalties may apply—it is important that consumers receive information about their payments and other important loan terms at a time when they can use that material in selecting their preferred loan and terms.

Federal agencies other than the Commission currently have the specific authority to promulgate rules specifying mortgage disclosure requirements. These disclosures are intended to provide consumers with the opportunity to review, understand, and agree to the offered loan terms. The Department of Housing and Urban Development (HUD) has responsibility for disclosure of settlement costs under the Real Estate Settlement Procedures Act (RESPA).[76] The Board also has responsibility for disclosure of certain loan costs under TILA.[77]

Under RESPA, a lender or broker must provide consumers of ''federally related mortgage loans'' [78] with a Good Faith Estimate of Settlement Costs (GFE) within three days of receiving a written application and with a HUD-1 Settlement Statement at closing. The GFE currently is not a standardized form, but it must include an itemization of the estimated costs and services the borrower is likely to incur in connection with the settlement. The HUD-1 shows the actual costs of settlement services for the loan. HUD recently amended RESPA's implementing rules to require new standardized GFE and HUD-1 forms. These new rules take effect on January 1, 2010.[79] The FTC does not have authority to enforce RESPA or its implementing regulations.

In general, under TILA and the Board's implementing Regulation Z, creditors currently must provide disclosures within three days of receiving a consumer's written application for a purchase-money mortgage loan. For non-purchase (*e.g.*, refinance) mortgage loans, the creditor must provide the disclosures prior to loan consummation. The FTC has the authority to enforce TILA's mortgage disclosure requirements for non-bank financial companies. Many of the FTC's law enforcement cases regarding mortgage loans allege that companies have failed to provide, or to provide timely, specific TILA disclosures,[80] including one or more of the following: the amount financed, the finance charge, the APR, the payment schedule, the total of payments, and the fact that the creditor has or will acquire a security interest in the consumer's principal dwelling.

In July 2008, the Board issued new rules under Regulation Z that require transaction-specific, earlier mortgage loan disclosures for closed-end loans secured by a consumer's principal dwelling (including non-purchase money mortgages, such as refinancings, but excluding HELOCs).[81] On the same day, Congress enacted the Mortgage Disclosure Improvement Act of 2008 (MDIA), which amended TILA.[82] The MDIA broadened and added to the Board's new disclosure requirements. The MDIA requirements apply to any closed-end, dwelling-secured loan (including refinancings and loans secured by a dwelling other than the consumer's principal dwelling).[83] Among other things, they require that disclosures include new language, which varies depending on the type of loan (*e.g.*, fixed- or variable-rate). The TILA disclosures must be given to the consumer no later than three business days after the creditor receives the written application and at least seven business days before closing and before the consumer pays a fee to any person (other than for obtaining the consumer's credit history). In addition, if the originally disclosed APR is incorrect, the creditor must provide a corrected disclosure at least three business days before closing. The consumer can waive this waiting period for a ''bona fide personal financial emergency.'' Nevertheless, final disclosures are still required no later than the time of the waiver. Certain aspects of the MDIA's requirements, including the early disclosure changes, take effect on July 30, 2009; other MDIA requirements for variable-rate transactions become effective contingent on the Board's actions. The Board has issued final rules implementing those aspects of the MDIA that become effective on July 30, 2009 and conforming the Board's July 2008 rules regarding disclosures to the requirements of the MDIA.[84]

2. FTC Empirical Testing Regarding Mortgage Disclosures

The Commission has a long history of conducting empirical tests of the efficacy of disclosures relating to financial services.[85] Most recently, in 2007, the FTC's Bureau of Economics published a research report concluding that the current mortgage disclosure requirements do not work and that alternative disclosures should be

[76] 12 U.S.C. 2603-04.

[77] 15 U.S.C. 1604.

[78] This term includes the vast majority of residential purchase money, refinance, and home equity mortgage transactions. *See* 12 U.S.C. 2601 *et seq*.

[79] *See* Real Estate Settlement Procedures Act (RESPA): Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Settlement Costs, 73 FR 68204 (Nov. 17, 2008) (to be codified at 24 CFR parts 203 and 3500).

[80] *See, e.g.*, *FTC v. Safe Harbour Found. of Fl., Inc.*, No. 08-1185 (N.D. Ill. 2008); *United States v. Mercantile Mortgage Co.*, No. 02-5079 (N.D. Ill. 2002); *FTC v. Associates First Capital Corp.*, No. 1:01-CV-00606 (N.D. Ga. 2001); *FTC v. First Alliance Mortgage Co.*, No. SA CV 00-694 (C.D. Cal. 2000); *FTC v. NuWest, Inc.*, No. 00-1197 (W.D. Wash. 2000); *FTC v. Capitol Mortgage Corp.*, No. 2-99-CV580G (D. Utah 1999); *FTC v. Granite Mortgage, LLC*, No. 99-289 (E.D. Ky. 1999); *FTC v. LAP Fin. Servs., Inc.*, No. 3:99 CV-496-H (W.D. Ky. 1999); *FTC v. Wasatch Credit Corp.*, No. 2-99CV579G (D. Utah 1999).

[81] *See* 73 FR at 44600-601 (to be codified at 12 CFR 226.17, 226.19). The Board promulgated these rules using its authority under TILA Section 105(a).

[82] Mortgage Disclosure Improvement Act of 2008, Pub. L. 110-289, 122 Stat. 2654 §§ 2501-2503 (July 30, 2008) (enacted in Housing and Economic Recovery Act of 2008); *amended by* Emergency Economic Stabilization Act of 2008, Pub. L. 110-343, 122 Stat. 3765 § 130 (Oct. 3, 2008).

[83] Timeshare plans are subject to some, but not all, of these requirements. *See* MDIA § 2502 (to be codified at 15 U.S.C. 1638(b)(2)(E)); *see also* 11 U.S.C. 101(53D).

[84] *See* Federal Reserve Board, Press Release, Board Approves Final Rules Revising Disclosure Requirements for Mortgage Loans Under Regulation Z (May 8, 2009), (*http://www.federalreserve.gov/newsevents/press/bcreg/20090508a.htm*). For example, the disclosure rules will become effective on July 30, 2009, instead of October 1, 2009. The Board promulgated these rules using its authority under TILA Section 105(a).

[85] *See, e.g.*, Federal Trade Commission, Bureau of Economics Staff Report, ''The Effect of Mortgage Broker Compensation Disclosures on Consumers and Competition: A Controlled Experiment'' (February 2004); Federal Trade Commission, Bureau of Economics Staff Report, ''Survey of Rent-to-Own Customers'' (April 2000).

considered and tested.[86] The study, based on in-depth interviews with several dozen recent mortgage customers and quantitative testing with over 800 mortgage customers, found that: (1) the current federally required disclosures fail to convey key mortgage costs to many consumers, even for relatively simple, fixed-rate, fully-amortizing loans; (2) better disclosures can significantly improve consumer recognition of mortgage costs; (3) both prime and subprime borrowers failed to understand key loan terms when viewing the current disclosures, and both benefitted from improved disclosures; and (4) improved disclosures provided the greatest benefit for more complex loans, for which both prime and subprime borrowers had the most difficulty understanding loan terms.

The results of the FTC staff study indicate that consumers in both the prime and subprime markets would benefit substantially from comprehensive reform of mortgage disclosures that would create a single, comprehensive disclosure of all key costs and terms of a loan, presented in language consumers can easily understand and in a form they can easily use, and provided early in the transaction to aid consumers shopping for the best loans.

IV. Mortgage Appraisals

A. The Role of Appraisals in Mortgage Loans

Mortgage lenders and brokers compete with each other to offer loan products to consumers. Regardless of which entity the consumer initially contacts, during the purchase money or refinance mortgage loan shopping process one of the parties seeks an appraisal[87] to obtain an estimate of the market value of a specific property.[88] Lenders rely on the appraisal to evaluate the collateral that will secure the loan. Brokers obtain an appraisal to shop a complete loan package (including the appraisal) to multiple lenders. Accurate appraisals therefore are important to the integrity of the mortgage lending process.

Several parties to the loan transaction may have an incentive to influence the appraisal valuation process. Borrowers want an appraisal valuation high enough that they can obtain a loan to purchase the property at the sales price. Mortgage brokers want an appraisal valuation high enough for the transaction to occur because they get paid only if the loan is made, and their commissions usually are based on the loan amount. Individual loan officers also want an appraisal valuation high enough for the transaction to occur, particularly if their compensation is tied to overall loan volume or the amount of the loan. Although lenders may have some interest in obtaining an appraisal valuation high enough so that the loan is made (particularly if they immediately sell the loan),[89] they also have a very strong interest in the property being accurately valued to ensure that it provides adequate security for the loan (particularly if they hold the loan in their portfolio).

Appraisers are paid to value property for their customers, who primarily are lenders or mortgage brokers.[90] Some lenders and mortgage brokers may use coercion or pressure appraisers to obtain the valuations they want. To satisfy and retain customers, appraisers have some incentive to provide an appraisal at or above the amount sought. In the face of these incentives, industry self-regulatory and government restrictions have been imposed to protect the independence of appraisers and the integrity of the mortgage lending process.

B. Laws and Standards for Appraisals

Typically, the conduct of appraisers is governed through the Appraisal Foundation and its Uniform Standards of Professional Appraisal Practice (USPAP) guidelines,[91] as well as through various state appraiser licensing and certification laws. These laws primarily address the conduct of appraisers and preparation of appraisals, not the entities that order appraisals, such as mortgage lenders and brokers. The federal bank regulatory agencies have issued appraisal guidance that applies to the entities under their jurisdiction,[92] but there is no equivalent federal guidance for non-bank entities under the FTC's jurisdiction. Nevertheless, the FTC Act prohibits unfair or deceptive acts or practices in or affecting commerce, including unfair or deceptive appraisal activities, whether by non-bank financial companies that order appraisals, or by appraisers under the FTC's jurisdiction. In addition, the FTC enforces TILA, HOEPA, and Regulation Z, among other laws, with regard to non-bank mortgage lenders and brokers that order appraisals.[93]

1. Home Valuation Code of Conduct

On March 3, 2008, the New York Attorney General (NYAG) announced settlement agreements with the Federal Home Loan Mortgage Corporation (Freddie Mac), Federal National Mortgage Association (Fannie Mae), and the Office of Federal Housing Enterprise Oversight (OFHEO).[94] The settlement agreements and corresponding Home

[86] *See* Federal Trade Commission, Bureau of Economics Staff Report, ''Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms'' (June 2007), *available at* (*http://www2.ftc.gov/os/2007/06/P025505MortgageDisclosureReport.pdf*). Following up on this research, in 2008 the FTC's Bureau of Economics convened a conference to evaluate how mortgage disclosures could be improved. *See* Federal Trade Commission, ''May 15, 2008 Mortgage Disclosure Conference,'' *available at* (*http://www2.ftc.gov/opa/2008/05/mortgage.shtm*).

[87] This summary does not address automated valuation models, in which computers generate the estimated property value by performing a data analysis using an automated process.

[88] *See* 12 CFR 34.42(a), 225.62(a), 323.2(a), 564.2(a), 722.2(a); Uniform Standards of Professional Appraisal Practice, Definitions, *available at* (*http://commerce.appraisalfoundation.org/html/USPAP2008/USPAP_folder/uspap_foreword/DEFINITIONS.htm*).

[89] *See, e.g.*, Prepared Statement of the Appraisal Institute, American Society of Appraisers, American Society of Farm Managers and Rural Appraisers, and National Association of Independent Fee Appraisers on H.R. 1728 The Mortgage Reform and Anti-Predatory Lending Act Before the H. Comm. on Financial Services, 111th Cong. 5-6 (Apr. 23, 2009), *available at* (*http://www.appraisalinstitute.org/newsadvocacy/downloads/ltrs_tstmny/2009/AI-ASA-ASFMRA-NAIFATestimonyonMortgageReform042309final.pdf*); Joe Eaton, ''The Appraisal Bubble: In Run Up to Real Estate Bust, Lenders Pushed Appraisers to Inflate Values,'' The Center for Public Integrity, Apr. 14, 2009, *available at* (*http://www.publicintegrity.org/investigations/luap/articles/entry/1264*).

[90] Appraisers also are paid to value property for appraisal management companies (AMCs). Typically, AMCs are hired by lenders to provide appraisal and, in some cases, other settlement services. AMCs, in turn, typically develop, and purchase appraisals from, a network of independently contracted appraisers.

[91] The Financial Institutions Reform, Recovery, and Enforcement Act, Pub. L. 101-73, 103 Stat. 183 (1989), requires that real estate appraisals used in conjunction with federally-related transactions be performed in accordance with USPAP.

[92] *See, e.g.*, Proposed Interagency Appraisal and Evaluation Guidelines, 73 FR 69647 (Nov. 19, 2008) (issued jointly by OCC, Board, FDIC, OTS, and NCUA, proposing revisions to Interagency Appraisal and Evaluation Guidelines issued jointly on Oct. 27, 1994); Independent Appraisal and Evaluation Functions (Oct. 28, 2003) (issued jointly by OCC, Board, FDIC, OTS, and NCUA).

[93] This discussion is not intended as a comprehensive list of all potentially applicable mortgage appraisal laws.

[94] *See* New York Attorney General Cuomo Announces Agreement with Fannie Mae, Freddie Mac, and OFHEO (Mar. 3, 2008), (*http://www.oag.state.ny.us/media_center/2008/mar/mar3a_08.html*) (last visited May 18, 2009). At the time of the settlement, OFHEO was the agency within HUD with oversight of Freddie Mac and Fannie Mae. On July 30, 2008, OFHEO staff and other federal agency staff combined to become the Federal Housing Finance Agency (FHFA), a new agency that is no longer part of HUD. *See* About FHFA, (*http://www.fhfa.gov/Default.aspx?Page=4*) (last visited May 18, 2009).

Valuation Code of Conduct (Code) impose various restrictions, prohibitions, and requirements to promote independent appraisals.[95] The primary provisions of the Code address: (1) general appraiser independence safeguards, such as prohibiting specific parties from influencing the appraisal process;[96] (2) timing and cost for the borrower to receive a copy of the appraisal; (3) hiring of appraisers, such as prohibiting third parties (*e.g.*, mortgage brokers) from selecting, retaining, or compensating appraisers; (4) prevention of improper influences on appraisers, such as prohibiting lenders from using an appraisal prepared by an employee of the lender (with certain exceptions) or by an entity that is an affiliate of another entity the lender retained to provide other settlement services in the same transaction (with certain exceptions); (5) establishment of the Independent Valuation Protection Institute to take and review complaints about non-compliance with the Code; and (6) other compliance issues, such as required quality control testing, referrals of appraiser misconduct, and certification that appraisals are obtained in compliance with the Code. As of May 1, 2009, Freddie Mac and Fannie Mae do not purchase single-family home mortgage loans (except government-insured loans) from lenders that do not adopt the Code. Because Freddie Mac and Fannie Mae purchase a significant number of single-family home mortgage loans in the United States, the Code may have a substantial impact on the conduct of appraisers in the mortgage market. The FTC cannot enforce the settlement agreements or Code provisions.

2. Board's Regulation Z Amendments

As discussed above, in July 2008, the Board issued rules under Regulation Z addressing appraisal issues.[97] In connection with any covered closed-end loan secured by a consumer's principal dwelling, creditors and mortgage brokers, and their affiliates, cannot directly or indirectly coerce, influence, or otherwise encourage an appraiser[98] to misstate or misrepresent the home's value.[99] If a creditor knows or has reason to know, at or before loan consummation, of a violation of the above requirement, the creditor must not extend credit based on that appraisal unless the creditor documents that it acted with reasonable diligence to determine that the appraisal does not materially misstate or misrepresent the home's value. The Board's rules take effect on October 1, 2009.

V. Mortgage Servicing

A. The Role of Mortgage Loan Servicers

Mortgage servicers handle day-to-day duties for those who own mortgage loans. They collect mortgage payments, provide customer service, handle delinquencies (including bankruptcies and foreclosures), and otherwise protect the interests of the loans' owners. The loans' owners may be the original lenders or other investors in the future proceeds of the loans (and can include servicers themselves).

The relationship between mortgage servicers and consumers is vulnerable to abuse. Mortgage servicers typically do not have a customer relationship with homeowners; rather, they work for the loans' owners. Moreover, borrowers cannot shop for a loan based on the quality of servicing, and they have virtually no ability to change servicers if they are dissatisfied. Mortgage servicing rights can be transferred frequently, causing consumers confusion about who owns their loan and where to send their payments.

In addition, servicers have financial incentives to impose fees on consumers. Servicers are compensated in three main ways. First, they receive a fixed fee for each loan, such as a fee based on the unpaid principal balance of the loan. Second, servicers earn ''float'' income from accrued interest between when consumers pay and when those funds are sent to investors. Third, servicers derive ancillary income from charges imposed on consumers, such as late fees or other delinquency-related fees. Thus, a borrower's default can increase a servicer's revenues.

For these reasons, it is important that servicers take appropriate care in acquiring and handling consumers' mortgages, including providing consumers with complete and accurate information about fees and other account information. However, the process of acquiring, securitizing, and transferring large volumes of loans on the secondary market has raised concerns about the integrity of consumers' loan information and the mistakes that can occur due to mishandling or lack of documentation. For example, courts have dismissed foreclosure cases against borrowers because the companies failed to show proof of ownership, and the United States Trustee Program has announced an effort to move against mortgage servicers that file false and inaccurate claims in consumer bankruptcy cases. The FTC is also concerned about the servicing of consumers' loans in bankruptcy.

Because of these concerns and because mortgage servicers are the day-to-day contact for many homeowners, the FTC has been active in monitoring the servicing industry for potential abuses. The FTC's experience in this area suggests that there is a need for comprehensive rules with respect to mortgage servicing.

B. Federal Mortgage Servicing Laws

The FTC Act prohibits unfair or deceptive acts or practices in or affecting commerce, including unfair or deceptive mortgage servicing activities. In addition, servicers may be subject to a patchwork of other laws.[100] In July 2008, the Board issued rules under Regulation Z addressing certain mortgage servicing issues.[101] These rules apply to all consumer-purpose, closed-end loans secured by a consumer's principal dwelling. They prohibit mortgage servicers from the

[95] The parties to the settlement requested public comment on the original Code that was proposed in March 2008. The FTC staff submitted a comment to Freddie Mac to convey its concerns about aspects of the proposed Code. Letter from FTC Staff to Senior Vice President, Credit Risk Oversight, Freddie Mac (Apr. 30, 2008), *available at* (*http://www.ftc.gov/opa/2008/05/freddiemac.shtm*) (prepared by the staff of the Office of Policy Planning and the Bureau of Economics). On December 23, 2008, the FHFA (*see supra* note 94) announced that Freddie Mac and Fannie Mae would implement a revised Code, which includes modifications reflecting many comments received, including those of the FTC staff.

[96] Specifically, the Code prohibits any employee, director, officer, or agent of the lender, or other party affiliated in any way with the lender from influencing or attempting to influence the development, reporting, result or review of an appraisal through coercion, extortion, collusion, compensation, inducement, intimidation, bribery, or in any other manner, including but not limited to the several examples provided in the Code.

[97] *See* 73 FR at 44604 (to be codified at 12 CFR 226.36). The Board promulgated its appraisal rules using its authority under TILA Section 129(l)(2).

[98] Under the Board's rules, an ''appraiser'' refers to a person who engages in the business of providing assessments of the value of dwellings. It includes persons that employ, refer, or manage appraisers, and affiliates of such persons. *See* 73 FR at 44604. Thus, it includes appraisal management companies.

[99] *See id.* at 44565-568, 44604, 44614. Note that this language used in the Board's rules is similar in concept to, but not the same as, the appraiser independence safeguard language in the NYAG settlement's Code. *See* note 96, *supra* for the Code's language.

[100] This discussion is not intended as a comprehensive list of all potentially applicable mortgage servicing laws. Mortgage servicers also may be subject to requirements under other laws the FTC enforces, such as the FDCPA and FCRA. The Commission is not seeking comment on FDCPA or FCRA issues in response to this ANPR.

[101] *See* 73 FR at 44604 (to be codified at 12 CFR 226.36). The Board promulgated its servicing rules using its authority under TILA Section 129(l)(2).

following abusive servicing practices: (1) failing to credit a consumer's payment as of the date received (except under specified circumstances); (2) imposing a late fee or delinquency charge when the delinquency is due only to the consumer's failure to include in the current payment a late fee or delinquency charge that was imposed on an earlier payment;[102] and (3) failing to provide an accurate payoff statement to borrowers within a reasonable period of time after it is requested.[103] The Board's rules take effect on October 1, 2009.

In addition, HUD imposes disclosure and other requirements related to servicing under RESPA and its implementing Regulation X.[104] The person who makes the mortgage loan must provide consumers with a servicing disclosure statement, which discloses whether the person intends to transfer the servicing of the loan to another entity at any time and also includes complaint resolution information. Both the transferor servicer and the transferee servicer have disclosure obligations to the consumer about the transfer. Servicers have a duty to respond in a timely manner to qualified written consumer inquiries with a written explanation or clarification that includes specified information. RESPA and Regulation X also regulate servicers regarding escrow accounts, such as requiring annual escrow statements and prohibiting fees for the preparation of escrow account statements. The FTC does not have authority to enforce RESPA or its implementing regulations.

C. FTC Mortgage Servicing Law Enforcement

The FTC has challenged deceptive and unfair practices in the servicing of mortgage loans, addressing core issues such as failing to post payments upon receipt, charging unauthorized fees, and engaging in deceptive or abusive debt collection tactics.[105] For example, in November 2003, the Commission, along with HUD, announced settlements with one of the country's largest third-party subprime loan servicers at that time, its parent company, and its founder and former chief executive officer.[106] The Commission alleged that the defendants violated several federal laws, including the FTC Act, FDCPA, and FCRA, by: (1) failing to post consumers' payments upon receipt; (2) charging consumers for unnecessary casualty insurance; (3) assessing illegal late fees and other unauthorized fees in connection with alleged defaults; (4) using dishonest or abusive tactics to collect debts; and (5) reporting consumer payment information that the defendants knew to be inaccurate to credit bureaus.

In addition to requiring the defendants to pay over $40 million to redress consumer injury, the settlements enjoin the defendants from future law violations and impose new restrictions on their business practices. Among other things, the settlements:

1. require the defendants to accept partial payments from most consumers and to apply most consumers' mortgage payments first to interest and principal;
2. prohibit the defendants from forcing consumers to buy insurance when they know the consumer has insurance or fail to take reasonable actions to determine whether the consumer has insurance;
3. enjoin the defendants from charging unauthorized fees, and place limits on specific fees;
4. require the defendants to acknowledge, investigate, and resolve consumer disputes in a timely manner;
5. require the defendants to provide timely billing information, including an itemization of fees charged;
6. prohibit the defendants from taking any action toward foreclosure unless they have reviewed the consumer's loan records to verify that the consumer failed to make three full monthly payments, confirmed that the consumer has not been the subject of any illegal practices, and investigated and resolved any consumer disputes;
7. prohibit the defendants from piling on late fees in certain situations;
8. prohibit the defendants from enforcing certain waiver provisions in forbearance agreements that consumers had to sign to prevent foreclosure; and
9. prohibit the defendants from violating the FDCPA, the FCRA, or the RESPA.

The FTC conducted a review of the defendants' compliance with certain aspects of the 2003 settlement.[107] The FTC and defendants negotiated and agreed to several modifications of the settlement.[108] HUD also agreed to these changes, which, among other things, include:

1. a five-year prohibition on marketing optional products, which are products or services that are not required by the consumer's loan (such as home warranties);
2. refunds of optional product fees paid by consumers in certain circumstances;
3. revised limitations on charging attorney fees in a foreclosure or bankruptcy to ensure that consumers receive full disclosures, including the actual amount due if consumers receive estimated attorney fees;[109]
4. refunds for consumers who may have paid foreclosure attorney fees for services that were not actually performed since November 2003;
5. a permanent requirement that consumers be provided with monthly mortgage statements containing important information about their loans; and
6. a requirement that the company revise its monthly mortgage statements based on consumer testing performed by a qualified, independent third party.

In September 2008, the FTC settled charges that another mortgage servicer and its parent violated Section 5 of the FTC Act, the FDCPA, and the FCRA in servicing mortgage loans.[110] Among other practices, the complaint alleged that the defendants: (1) misrepresented the amounts consumers owed; (2) assessed and collected unauthorized fees, such as late fees, property inspection fees, and loan modification fees; and (3) misrepresented that they had a reasonable basis to substantiate their representations about consumers' mortgage loan debts. The complaint further alleged the defendants made harassing collection calls; falsely represented the character, amount, or legal status of consumers' debts; and used false representations and deceptive means to collect on mortgage loans.

In addition to requiring the defendants to pay $28 million to redress consumer injury, the settlement bars the

[102] This practice is commonly referred to as fee ''pyramiding.'' *See* 73 FR 44568-574, 44614.

[103] *See* 73 FR 44568-574, 44604, 44613-44614.

[104] *See* 12 U.S.C. 2605, 2609, 2610; 24 CFR 3500.17, 3500.21.

[105] *See, e.g., FTC v. Capital City Mortgage Corp.*, No. 98-00237 (D.D.C. 1998) (settled in 2005; FTC alleged that defendant mortgage lender and servicer deceptively induced consumers into taking mortgage loans, included false charges in monthly statements, added charges to loan balances, forced consumers to make monthly payments for the entire loan amount while withholding some loan proceeds, and failed to release liens on homes after loans were paid off).

[106] *U.S. v. Fairbanks Capital Corp.*, No. 03-12219 (D. Mass. 2003).

[107] In early 2004, the defendants changed their names to Select Portfolio Servicing, Inc. and SPS Holding Corp.

[108] *FTC v. Select Portfolio Servicing, Inc. (formerly Fairbanks Capital Corp.)*, Civ. No. 03-12219-DPW (D. Mass. 2007) (modified stipulated final order).

[109] The defendant servicer also agreed to conduct reconciliations after payoff or foreclosure and reimburse consumers who may have paid for services that were not actually performed.

[110] *See FTC v. EMC Mortgage Corp.*, No. 4:08-cv-338 (E.D. Tex. Sept. 9, 2008); *see also* Press Release, Federal Trade Commission, Bear Stearns and EMC Mortgage to Pay $28 Million to Settle FTC Charges of Unlawful Mortgage Servicing and Debt Collection Practices (Sept. 9, 2008), available at (*http://www2.ftc.gov/opa/2008/09/emc.shtm*).

defendants from future law violations and imposes new restrictions and requirements on their business practices. Among other things, the settlement:

1. bars the defendants from misrepresenting amounts due or any other loan terms;

2. requires them to possess and rely upon competent and reliable evidence to support claims made to consumers about their loans;

3. bars them from charging unauthorized fees, and places specific limits on property inspection fees even if they are authorized by the contract;

4. prohibits them from initiating a foreclosure action, or charging any foreclosure fees, unless they have reviewed all available records to verify that the consumer is in material default, confirmed that the defendants have not subjected the consumer to any illegal practices, and investigated and resolved any consumer disputes; and

5. prohibits the defendants from violating the FDCPA, FCRA, or TILA.

The settlement further requires defendants to establish and maintain a comprehensive data integrity program to ensure the accuracy and completeness of data and other information that they obtain about consumers' loan accounts, before servicing those accounts. The defendants also are required to obtain periodic assessments over an eight-year period from a qualified, independent, third-party professional, to assure that their data integrity program meets the standards of the order.

VI. Request for Comments

The Commission is seeking comments on a wide range of topics related to mortgage loans, but it is not soliciting views on the merits of current statutory and regulatory schemes applicable to these topics.

The Commission has broad authority over acts and practices related to financial services, but the FTC Act specifically excludes banks, thrifts, and federal credit unions from the agency's jurisdiction. However, non-bank subsidiaries or affiliates of banks are subject to the Commission's jurisdiction. Likewise, the FTC has jurisdiction over entities that perform services on behalf of banks, but which are not themselves banks. As discussed above, the Commission intends that any rules it issues in this proceeding would apply only to the same types of entities over which the Commission has jurisdiction under the FTC Act.

The Commission is seeking comments to determine whether certain acts and practices of non-bank financial companies (such as non-bank mortgage lenders, brokers, appraisers, or servicers) related to mortgage loans are unfair or deceptive under Section 5 of the FTC Act and should be incorporated into a proposed rule. These acts and practices include conduct that the FTC currently could challenge in a law enforcement action as violating Section 5 of the FTC Act. However, the Commission is not otherwise seeking comments on statutes that have been enacted and rules that have been issued. The FTC also specifically is not seeking comments on the Board's new rules.

The FTC invites interested persons to submit written comments on any issue of fact, law, or policy that may bear upon these issues. After examining the comments, the Commission will determine whether and how to incorporate them into a possible proposed rule. The Commission encourages commenters to respond to the specific questions asked. However, commenters do not need to respond to all questions. Please provide explanations for your answers and detailed, factual supporting evidence.

The Commission is particularly interested in receiving comments on the following questions and issues:

A. Mortgage Advertising

1. What types of unfair or deceptive acts and practices, if any, do non-bank financial companies engage in related to advertising and marketing mortgages? For any such act or practice, please answer the following questions:

a. Why is it unfair or deceptive under Section 5 of the FTC Act?

b. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?

c. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?

2. Is there any specific information that non-bank financial companies should be required to disclose to prevent unfairness or deception in advertising and marketing mortgages? Identify any such type of information, and for each, please answer the following questions:

a. Why is the failure to disclose the information unfair or deceptive under Section 5 of the FTC Act?

b. Should disclosure be required for all loans or only certain types of loans? What are the costs and benefits of mandating its disclosure?

c. What would be the effect on competition and consumers if the Commission were to require non-bank financial companies to disclose this information, but banks, thrifts, and federal credit unions were not similarly required to do so?

3. What types of unfair or deceptive acts and practices, if any, do non-bank financial companies engage in regarding Internet financial services related to mortgage loans, including but not limited to acts and practices of mortgage rate aggregators that post rate and points charts? For any such act or practice, please answer the following questions:

a. Why is it unfair or deceptive under Section 5 of the FTC Act?

b. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?

c. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?

4. Should the FTC incorporate into a proposed rule any of the requirements or prohibitions on acts or practices related to mortgage advertising that the Board promulgated under its TILA Section 105(a) authority, thereby allowing the FTC to obtain civil penalties for any violation of TILA, HOEPA, or Regulation Z, consistent with the authority conferred on federal banking regulatory agencies? [111]

5. Do any recent reports, studies, or research provide data relevant to mortgage advertising rulemaking? If so, please provide or identify such reports, studies, or research.

B. Mortgage Origination—Underwriting, Loan Terms, and Disclosure Issues

6. What types of unfair or deceptive acts and practices, if any, do non-bank financial companies engage in related to mortgage origination? For any such act or practice, please answer the following questions:

a. Why is it unfair or deceptive under Section 5 of the FTC Act?

b. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?

c. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks,

[111] *See* note 37, *supra*.

thrifts, and federal credit unions were not similarly prohibited or restricted?

7. Are there features of any non-traditional, or alternative, mortgage loans that are unfair or deceptive? Identify any such feature, and for each, please answer the following questions:

a. Why is it unfair or deceptive under Section 5 of the FTC Act?

b. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?

c. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the feature, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?

8. Is there any specific information that non-bank financial companies should be required to disclose to prevent unfairness or deception related to the origination of mortgage loans? Identify any such type of information, and for each, please answer the following questions:

a. Why is the failure to disclose the information unfair or deceptive under Section 5 of the FTC Act?

b. Should disclosure be required for all loans or only certain types of loans? What are the costs and benefits of mandating its disclosure?

c. What would be the effect on competition and consumers if the Commission were to require non-bank financial companies to disclose this information, but banks, thrifts, and federal credit unions were not similarly required to do so?

9. Should the FTC incorporate into a proposed rule any of the requirements or prohibitions on acts or practices related to mortgage disclosures that the Board promulgated under its TILA Section 105(a) authority, thereby allowing the FTC to obtain civil penalties for any violation of TILA, HOEPA, or Regulation Z, consistent with the authority conferred on federal banking regulatory agencies? [112]

10. Do any recent reports, studies, or research provide data relevant to mortgage origination rulemaking? If so, please provide or identify such reports, studies, or research.

C. Mortgage Appraisals

11. What types of unfair or deceptive acts and practices, if any, do non-bank financial companies engage in related to mortgage appraisals, including but not limited to engaging or selecting appraisers, ordering appraisals, or performing as appraisers? For any such act or practice, please answer the following questions:

a. Why is it unfair or deceptive under Section 5 of the FTC Act?

b. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?

c. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?

12. Is there any specific information that non-bank financial companies should be required to disclose to prevent unfairness or deception related to mortgage appraisals? Identify any such type of information, and for each, please answer the following questions:

a. Why is the failure to disclose the information unfair or deceptive under Section 5 of the FTC Act?

b. Should disclosure be required for all loans or only certain types of loans? What are the costs and benefits of mandating its disclosure?

c. What would be the effect on competition and consumers if the Commission were to require non-bank financial companies to disclose this information, but banks, thrifts, and federal credit unions were not similarly required to do so?

13. Should the FTC incorporate into a proposed rule any of the prohibitions or restrictions on acts or practices related to mortgage appraisals addressed in the NYAG's settlement and Code? Identify any such prohibited or restricted act or practice, and for each, please answer the following questions:

a. Why is it unfair or deceptive under Section 5 of the FTC Act?

b. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?

c. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?

14. Do any recent reports, studies, or research provide data relevant to mortgage appraisal rulemaking? If so, please provide or identify such reports, studies, or research.

D. Mortgage Servicing

15. What types of unfair or deceptive acts and practices, if any, do non-bank financial companies engage in related to mortgage servicing? For any such act or practice, please answer the following questions:

a. Why is it unfair or deceptive under Section 5 of the FTC Act?

b. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?

c. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?

16. Should the FTC incorporate into a proposed rule any of the prohibitions or restrictions on acts and practices addressed in its settlement orders with mortgage servicers? [113] Identify any such prohibited or restricted act or practice, and for each, please answer the following questions:

a. Why is it unfair or deceptive under Section 5 of the FTC Act?

b. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?

c. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?

17. Is there any specific information that non-bank financial companies should be required to disclose, or to disclose in a particular manner (for example, through uniform or model servicing disclosures), to prevent unfairness or deception related to mortgage servicing, such as:

a. information about fees the servicer is authorized to charge under the mortgage contract over the life of the loan; or

b. information about applicable fees the servicer has charged during a specific monthly statement period.

Identify any such type of information, and for each, please answer the following questions:

i. Why is the failure to disclose the information, or to disclose it in a particular manner, unfair or deceptive under Section 5 of the FTC Act?

ii. Should disclosure be required in a particular manner (for example, through uniform or model servicing disclosures)? Should disclosure be required for all loans or only certain

[112] *See id.*

[113] *See* text discussion in Part V.C, *supra.*

types of loans? What are the costs and benefits of mandating its disclosure?

iii. What would be the effect on competition and consumers if the Commission were to require non-bank financial companies to make these disclosures, but banks, thrifts, and federal credit unions were not similarly required to do so?

18. Should the FTC consider prohibiting or restricting as unfair or deceptive certain acts and practices related to mortgage servicing fees or related charges, such as:

a. charging fees not authorized under the mortgage contract;

b. charging fees not authorized by state law;

c. charging for ''estimated'' attorney fees or other fees for services not rendered;

d. charging late fees that are not permitted under the service agreement or that are otherwise improper (other than ''fee pyramiding,'' which is already prohibited under the Board's Regulation Z amendments[114]);

e. failing to disclose and itemize adequately fees in billing statements or other relevant communications with borrowers; or

f. forcing consumers to buy insurance on their homes when the servicer knows or should know that insurance is already in place?

Identify any such act or practice, and for each, please answer the following questions:

i. Why is it unfair or deceptive under Section 5 of the FTC Act?

ii. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?

iii. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?

19. Should the FTC consider prohibiting or restricting as unfair or deceptive certain acts and practices related to how mortgage servicers handle payments, amounts owed, or consumer disputes, such as:

a. failing to post payments in a timely and proper manner (beyond the new prohibition under the Board's Regulation Z amendments);

b. mishandling of partial payments or suspense accounts;

c. misrepresentation of amounts owed or other account terms or the status of the account;

d. making claims to borrowers about their loan accounts without a reasonable basis (*i.e.*, lack of substantiation);

e. failing to have a adequate procedures to ensure accuracy of information used to service loans; or

f. failing to maintain and provide adequate customer service to handle disputes?

Identify any such act or practice, and for each, please answer the following questions:

i. Why is it unfair or deceptive under Section 5 of the FTC Act?

ii. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?

iii. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?

20. Should the FTC consider prohibiting or restricting as unfair or deceptive certain acts and practices related to how mortgage servicers handle loan performance and loss mitigation issues, such as:

a. taking foreclosure action without first verifying loan information and investigating any disputes;

b. taking foreclosure action without first giving the consumer an opportunity to attend foreclosure counseling or mediation;

c. requiring consumers to release all claims (or other requirements, such as requiring binding arbitration agreements) in connection with loan modifications or other workout agreements/repayment plans; or

d. making loan modifications or other workout agreements/repayment plans without regard to the consumer's ability to repay?

Identify any such act or practice, and for each, please answer the following questions:

i. Why is it unfair or deceptive under Section 5 of the FTC Act?

ii. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?

iii. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?

21. Should the FTC consider prohibiting or restricting as unfair or deceptive certain acts and practices related to servicing of mortgage loans in connection with bankruptcy proceedings, such as:

a. failing to disclose fees incurred during a Chapter 13 bankruptcy case and then seeking to collect them from the consumer after discharge/dismissal?

b. filing of proofs of claim or other bankruptcy filings without a reasonable basis (*i.e.*, impose a substantiation requirement beyond Rule 11 of the Federal Rules of Civil Procedure);

c. failing to apply properly payments in bankruptcy to pre-petition/post-petition categories of the consumer's debts; or

d. charging of specific unnecessary or excessive fees in bankruptcy cases (*e.g.*, duplicative attorneys' fees)?

Identify any such act or practice, and for each, please answer the following questions:

i. Why is it unfair or deceptive under Section 5 of the FTC Act?

ii. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?

iii. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?

22. Do any recent reports, studies, or research provide data relevant to mortgage servicing rulemaking? If so, please provide or identify such reports, studies, or research.

By direction of the Commission.

Donald S. Clark

Secretary

[FR Doc. E9–12595 Filed 5–29–09: 8:45 am]

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[114] *See* note 102, *supra*.

FEDERAL TRADE COMMISSION

16 CFR Parts 321 and 322

[RIN 3084-AB18]

Advance Notice of Proposed Rulemaking: Mortgage Assistance Relief Services

AGENCY: Federal Trade Commission (FTC or Commission)

ACTION: Advance Notice of Proposed Rulemaking; request for comment

SUMMARY: President Obama signed the 2009 Omnibus Appropriations Act on March 11, 2009. Section 626 of the Act directed the Commission to initiate, within 90 days of the date of enactment, a rulemaking proceeding with respect to

mortgage loans. To implement the Act, the Commission has commenced a rulemaking proceeding in two parts. This Advance Notice of Proposed Rulemaking (ANPR), the Mortgage Assistance Relief Services Rulemaking, addresses the practices of entities (other than mortgage servicers) who offer assistance to consumers in dealing with owners or servicers of their loans to modify them or avoid foreclosure. Another ANPR, the Mortgage Acts and Practices Rulemaking, will address more generally activities that occur throughout the life-cycle of a mortgage loan, i.e., practices with regard to mortgage loan advertising and marketing, origination, appraisals, and servicing. The Commission is seeking public comment with regard to the unfair and deceptive acts and practices that should be prohibited or restricted pursuant to any rules adopted in these proceedings. Any rules adopted will apply to entities, other than banks, thrifts, federal credit unions, and non-profits, that are engaged in such unfair and deceptive acts and practices.

DATES: Comments must be received by July 15, 2009.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to ''Mortgage Assistance Relief Services Rulemaking, Rule No. R911003'' to facilitate the organization of comments. Please note that comments 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*)—and therefore should not include any sensitive or confidential information. In particular, comments 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 secrets and commercial or financial information obtained from a person and privileged or confidential . . . .,'' as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and Commission 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-mortgageassistancereliefservices*) (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-mortgage assistancereliefservices*). 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 forwarded to it by regulations.gov. 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 ''Mortgage Assistance Relief Services Rulemaking, Rule No. R911003'' both in the text of the comment 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 W), 600 Pennsylvania Avenue, NW., Washington, DC 20580. The FTC requests 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.

The FTC Act and other laws administered by the Commission 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 received, 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 from comments filed by individuals 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: Evan Zullow or Stephen Shin, Attorneys, (202) 326-3224, Division of Financial Practices, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Background

A. FTC Rulemaking Authority Pursuant to the Omnibus Appropriations Act of 2009

Section 626 of the Omnibus Appropriations Act of 2009[2] requires that, within 90 days of enactment, the FTC initiate a rulemaking proceeding with respect to mortgage loans. Pursuant to the Act, the rulemaking proceeding will be conducted in accordance with the requirements of Section 553 of the Administrative Procedure Act.[3] To implement the Omnibus Appropriations Act of 2009, the Commission has commenced a rulemaking proceeding in two parts.

This ANPR, the Mortgage Assistance Relief Services (MARS) Rulemaking, addresses the practices of entities (other than mortgage servicers) who offer assistance to consumers in dealing with owners or servicers of their loans to modify them or avoid foreclosure. Another ANPR, the Mortgage Acts and Practices (MAP) Rulemaking, addresses more generally activities that occur throughout the life-cycle of a mortgage loan, *i.e.*, practices with regard to mortgage loan advertising and marketing, origination, appraisals, and servicing. Although the Omnibus Appropriations Act of 2009 specifies neither the type of conduct nor the types of entities any proposed rules should address, the Commission has used its organic statute, the FTC Act, in establishing the parameters for this rulemaking.[4] In particular, the types of

[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] Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, § 626, 123 Stat. 524 (Mar. 11, 2009).

[3] 5 U.S.C. 553. Section 626 of the Omnibus Appropriations Act of 2009 authorizes use of these procedures in lieu of the procedures set forth in Section 18 of the FTC Act, 15 U.S.C. 57a. Note that, because this rulemaking is not undertaken pursuant to Section 18, 15 U.S.C. 57a(f), federal banking agencies are not required to promulgate substantially similar regulations for entities within their jurisdiction. Nonetheless, the Commission plans to consult with the federal banking agencies in this proceeding.

[4] The available legislative history is consistent with the Commission's determination as to the

Continued

conduct that the FTC proposes to cover include acts and practices that meet the FTC's standards for unfairness or deception under Section 5 of the FTC Act.[5] In addition, the entities that the FTC intends to cover are those over which the FTC has jurisdiction under the FTC Act—specifically, entities other than banks, thrifts, federal credit unions,[6] and non-profits[7] that engage in the conduct the rules would cover.

The Commission is seeking comments on a series of questions related to loan modification and foreclosure rescue. The FTC is seeking comments to determine whether certain acts and practices of loan modification and foreclosure rescue entities are unfair or deceptive under Section 5 of the FTC Act and should be incorporated into a proposed rule. These acts and practices include conduct that the FTC currently could challenge in a law enforcement action as violating Section 5 of the FTC Act. However, the Commission is not seeking comments on statutes that have been enacted and rules that have been issued on these topics.

Pursuant to Section 626 of the Omnibus Appropriations Act of 2009, any violation of a rule adopted under that section will be treated as a violation of a rule promulgated pursuant to Section 18 of the FTC Act.[8] Therefore, pursuant to Section 5(m)(1)(A) of the FTC Act,[9] the Commission may seek civil penalties as a remedy for such rule violations. In addition, pursuant to Section 626(b) of the Omnibus Appropriations Act of 2009, a state may bring a civil action, in either state or federal court, to enforce the FTC mortgage loan rules and obtain civil penalties and other relief for violations. Before initiating an enforcement action, the state must notify the FTC, at least 60 days in advance, and the Commission may intervene in the action.

B. FTC Authority Over Mortgage Loans and Other Financial Services

The Commission has law enforcement authority over a wide range of acts and practices throughout the consumer credit life-cycle. The agency enforces Section 5 of the Federal Trade Commission Act, which prohibits ''unfair or deceptive acts or practices in or affecting commerce.''[10] The Commission also enforces other consumer protection statutes that govern financial services providers. These include the Truth in Lending Act (TILA),[11] the Home Ownership and Equity Protection Act,[12] the Consumer Leasing Act,[13] the Fair Debt Collection Practices Act,[14] the Fair Credit Reporting Act (FCRA),[15] the Equal Credit Opportunity Act,[16] the Credit Repair Organizations Act,[17] the Electronic Funds Transfer Act,[18] the Telemarketing and Consumer Fraud and Abuse Prevention Act,[19] and the privacy provisions of the Gramm-Leach-Bliley (GLB) Act.[20]

Notwithstanding the Commission's broad authority over acts and practices related to financial services, the FTC does not have jurisdiction over all providers of these services. The FTC Act specifically excludes banks, thrifts, and federal credit unions from the agency's jurisdiction.[21] However, non-bank affiliates of banks, such as parent companies or subsidiaries, are subject to the Commission's jurisdiction.[22] Likewise, the FTC has jurisdiction over entities that have contracted with banks to perform certain services on behalf of banks, such as credit card marketing and other services, but which are not themselves banks.[23] As a result, non-bank entities that provide financial services to consumers are subject to Commission jurisdiction, even if they are affiliated with, or are contracted to perform services for, banking entities.

The Commission also does not have jurisdiction under the FTC Act over non-profit organizations.[24] However, the FTC does have jurisdiction over for-profit entities that provide mortgage-related services as a result of a contractual relationship with a non-profit organization.[25]

As discussed above, the Commission intends that any rules that it issues in this proceeding would apply only to the same types of entities over which the Commission has jurisdiction under the FTC Act.

scope of the FTC's rulemaking. *See* 155 Cong. Rec. S2816-S2817 (2009).

[5] 15 U.S.C. 45(a)(1). For a comprehensive description of the FTC's application of its unfairness and deception authority in the context of financial services, see Letter from the FTC staff to John E. Bowman, Chief Counsel of the Office of Thrift Supervision (Dec. 12, 2007), available at (*http://www.ftc.gov/os/2007/12/P084800anpr.pdf*).

[6] 15 U.S.C. 45(a)(2).

[7] 15 U.S.C. 44. Bona fide non-profit entities are exempt from the jurisdiction of the FTC Act. Sections 4 and 5 of the FTC Act confer on the Commission jurisdiction only over persons, partnerships, or corporations organized to carry on business for their profit or that of their members. *See* 15 U.S.C. 44, 45(a)(2).

[8] 15 U.S.C. 57a.

[9] 15 U.S.C. 45(m)(1)(A).

[10] 15 U.S.C. 45(a)(1).

[11] 15 U.S.C. 1601-1666j (mandates disclosures and other requirements in connection with consumer credit transactions).

[12] 15 U.S.C. 1639 (provides protections for consumers entering into certain high-cost mortgage refinance loans).

[13] 15 U.S.C. 1667-1667f (requires disclosures, limits balloon payments, and regulates advertising in connection with consumer lease transactions).

[14] 15 U.S.C. 1692-1692p (prohibits abusive, deceptive, and unfair debt collection practices by third-party debt collectors).

[15] 15 U.S.C. 1681-1681x (imposes standards for consumer reporting agencies and information furnishers; places restrictions on the use of consumer report information). The Fair and Accurate Credit Transactions Act of 2003 amended the FCRA. Pub. L. No. 108-159, 117 Stat. 1952 (2003).

[16] 15 U.S.C. 1691-1691f (prohibits creditor practices that discriminate on the basis of race, religion, national origin, sex, marital status, age, receipt of public assistance, or the exercise of certain legal rights).

[17] 15 U.S.C. 1679-1679j (mandates disclosures and other requirements in connection with credit repair organizations, including a prohibition against charging fees until services are completed).

[18] 15 U.S.C. 1693-1693r (establishes rights and responsibilities of institutions and consumers in connection with electronic fund transfer services).

[19] 15 U.S.C. 6101-6108 (provides consumer protection from telemarketing deception and abuse and requires the Commission to promulgate implementing rules).

[20] 15 U.S.C. 6801-6809 (requires financial institutions to provide annual privacy notices; provides consumers the means to opt out from having certain information shared with non-affiliated third parties; and safeguards customers' personally identifiable information).

[21] 15 U.S.C. 45(a)(2). The FTC Act defines ''banks'' by reference to a listing of certain distinct types of legal entities. *See* 15 U.S.C. 44, 57a(f)(2). That list includes: national banks, federal branches of foreign banks, member banks of the Federal Reserve System, branches and agencies of foreign banks, commercial lending companies owned or controlled by foreign banks, banks insured by the Federal Deposit Insurance Corporation, and insured state branches of foreign banks.

[22] Congress clarified FTC jurisdiction when it enacted the GLB Act. Section 133(a) of the GLB Act states that an entity that is affiliated with a bank, but which is not itself a bank, is not a bank for purposes of the FTC Act. Section 133(a) of the GLB Act specifically provides:

CLARIFICATION OF FEDERAL TRADE COMMISSION JURISDICTION. Any person that directly or indirectly controls, is controlled directly or indirectly by, or is directly or indirectly under common control with, any bank or savings association . . . and is not itself a bank or savings association shall not be deemed to be a bank or savings association for purposes of any provisions applied by the Federal Trade Commission under the Federal Trade Commission Act.

Pub. L. No. 106-102, § 133(a), 113 Stat. 1383; 15 U.S.C. 41 note (a). This section has been interpreted to apply to subsidiaries of banks that are not themselves banks. *Minnesota v. Fleet Mortgage Corp.*, 181 F. Supp. 2d 995 (D. Minn. 2001).

[23] *See, e.g., FTC v. CompuCredit Corp.*, Civil Action No. 1:08-CV-01976-BBM-RGV (N.D. Ga. 2008) (approving stipulated final order involving FTC action against entity that contracted to perform credit card marketing services for a bank); *FTC v. Am. Standard Credit Sys.*, 874 F. Supp. 1080, 1086 (C.D. Cal. 1994) (dismissing argument that entity that contracted to perform credit card marketing and other services for a bank is not subject to FTC Act).

[24] *See* 15 U.S.C. 44.

[25] *See Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331, 334-35 (4th Cir. 2005). In addition, the Commission asserts jurisdiction over ''sham charities'' that operate as for-profit entities in practice. *See, e.g., FTC v. Ameridebt, Inc.*, 343 F. Supp. 2d 451 (D. Md. 2004).

C. Deceptive and Unfair Acts and Practices

1. Deceptive Acts and Practices

Section 5 of the FTC Act broadly proscribes deceptive or unfair acts or practices in or affecting commerce. An act or practice is deceptive if there is a representation, omission of information, or practice that is likely to mislead consumers, who are acting reasonably under the circumstances, and the representation, omission, or practice is one that is material.[26] Injury is likely if the misleading or omitted information is material to consumers, *i.e.*, likely to affect a decision to purchase or use a product or service.

To determine that an act or practice is deceptive, the Commission first must conclude that there is a representation, omission of information, or a practice that is likely to mislead consumers. A claim about a product or service may be either express or implied. An express claim generally is established by the representation itself. An implied claim, on the other hand, is an indirect representation, which must be examined within the context of other information that is either presented or omitted. Deception may occur based on what is stated or because of the omission of information that would be important to the consumer. In determining that an advertisement is deceptive, for example, the Commission considers whether the overall net impression of the ad (including language and graphics) is likely to mislead consumers.[27]

Second, the Commission considers the act or practice from the perspective of a consumer acting reasonably under the circumstances.[28] Reasonableness is evaluated based on the sophistication and understanding of consumers in the group to whom the representation or sales practice is directed. If a specific audience is targeted, the Commission will consider the effect on a reasonable member of that target group. A representation may be susceptible to more than one reasonable interpretation, and if one such interpretation is misleading, the advertisement is deceptive, even if other non-deceptive interpretations are possible.[29]

Third, to conclude that deception has occurred, the Commission must determine that the representation, omission, or practice is material, *i.e.*, one that is likely to affect a consumer's decision to purchase or use a product or service. A deceptive representation, omission, or practice that is material is likely to cause consumer injury—that is, but for the deception, the consumer may have made a different choice.[30] Express claims about a product or service, such as statements about cost, are presumed to be material. Claims about purpose and efficacy of a product or service are also presumed to be material.[31]

2. Unfair Acts and Practices

Section 5(n) of the FTC Act also sets forth a three-part test to determine whether an act or practice is unfair.[32] First, the practice must be one that causes or is likely to cause substantial injury to consumers. Second, the injury must not be outweighed by countervailing benefits to consumers or to competition. Third, the injury must be one that consumers could not reasonably have avoided.

In analyzing whether injury is substantial, the Commission is not concerned with trivial, speculative, or more subjective types of harm. The substantial injury test may be met by small harm to a large number of consumers. In most cases, substantial injury involves monetary harm. Once it determines that there is substantial consumer injury, the Commission considers whether the harm is offset by any countervailing benefits to consumers or to competition. Thus, the Commission considers both the costs of imposing a remedy and any benefits that consumers enjoy as a result of the practice at issue. Finally, the injury must be one that consumers cannot reasonably avoid. If consumers reasonably could have made a different choice that would have avoided the injury, but did not do so, the practice is not deemed to be unfair under the FTC Act.

In applying its unfairness standard, the Commission takes the approach that well-informed consumers are capable of making choices for themselves. The agency therefore may prohibit or restrict acts and practices if they unreasonably create, or take advantage of, an obstacle to the ability of consumers to make informed choices, thus causing, or being likely to cause, consumer injury.[33]

II. Loan Modification and Foreclosure Rescue Services

With the recent economic downturn, more consumers have become delinquent on their mortgages or at risk of foreclosure. Others, even if not yet delinquent, are struggling to pay their mortgage debt. To respond to these problems, many consumers have sought to modify their loans or purchase services to assist them in avoiding foreclosure. However, the acts and practices of some companies that provide or advertise loan modification and foreclosure rescue services have raised substantial consumer protection concerns. To date, the Commission has addressed these concerns primarily through law enforcement under Section 5 of the FTC Act. Through this ANPR, the FTC seeks comment on whether it should also issue rules to address the conduct of those who provide or advertise loan modification and foreclosure rescue services.

A. Mortgage Loan Servicing

In the past, mortgage lenders usually made loans to consumers and then held the loans until consumers paid off their mortgages or sold their homes. In more recent years, however, more mortgage lenders have regularly sold their loans to others. Thus, the owner of a mortgage loan may be either the originating lender or an investor who has purchased the loan.

Owners of loans often contract with others to service their loans. A mortgage servicer is the agent responsible for handling the day-to-day aspects of a loan on behalf of the loan's owner. A mortgage servicer's responsibilities

[26] Federal Trade Commission Policy Statement on Deception, *appended to In re Cliffdale Assocs.*, 103 F.T.C. 110, 174-84 (1984) (Deception Policy Statement).

[27] Disclaimers or qualifying statements are important to consider for deception analysis. Such disclaimers must be sufficiently clear, prominent, and understandable to convey the qualifying information effectively to consumers. The Commission recognizes that often ''reasonable consumers do not read the entirety of an ad or are directed away from the importance of the qualifying phrase by the acts or statements of the seller.'' Deception Policy Statement at 181. Thus, fine print disclosures at the bottom of a print ad or television screen are unlikely to cure an otherwise deceptive representation.

[28] Deception Policy Statement at 177-81.

[29] *Id.* at 178.

[30] *Id.* at 182-83.

[31] *Novartis Corp. v. FTC*, 223 F.3d 783, 786-87 (D.C. Cir. 2000).

[32] 15 U.S.C. 45(n). Section 5(n) of the FTC Act also provides that ''[i]n determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence.''

[33] *See* Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (December 17, 1980), reprinted in *In re Int'l Harvester Co.*, 104 F.T.C. 949, 1070, 1073 (1984) (Unfairness Policy Statement); *see also* Trade Regulation Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 CFR 429 (making it an unfair and deceptive practice for anyone engaged in ''door-to-door'' sales of consumer goods or services with a purchase price of $25 or more to fail to provide buyer with certain oral and written disclosures regarding buyer's right to cancel within three business days); *FTC v. Holland Furnace*, 295 F.2d 302 (7th Cir. 1961) (seller's servicemen dismantled home furnaces then refused to reassemble them until consumers agreed to buy services or replacement parts).

include collecting monthly mortgage payments and crediting borrowers' accounts. A servicer may also maintain an escrow account which covers charges such as property taxes and homeowners insurance. If a borrower falls behind on monthly payments and becomes delinquent on the loan, the mortgage servicer also conducts activities associated with a defaulted loan, such as attempting to collect overdue payments, negotiating loss mitigation options, and, if necessary, overseeing foreclosure proceedings.

Generally, financially distressed homeowners having difficulty making mortgage payments can contact their mortgage servicers directly and seek assistance. Pursuant to guidelines or agreements with the owners of loans, many servicers provide loss mitigation options for distressed homeowners. Owners of loans often have an incentive to consider such options because of the cost associated with foreclosure proceedings.

Mortgage servicers may provide various loss mitigation options to help distressed homeowners avoid foreclosure, including a repayment plan, forbearance agreement, short sale, deed-in-lieu of foreclosure, or loan modification.[34] A repayment plan gives a borrower a fixed amount of time to repay the overdue amount by adding a portion of what is past due to the regular payment. A forbearance agreement reduces or suspends payments for a period of time, at the end of which the borrower resumes regular payments as well as a lump sum payment or additional partial payments. A short sale is an agreement to sell the house before foreclosure and to have the servicer forgive any shortfall between the sales price and the mortgage balance. A deed-in-lieu of foreclosure allows a borrower to transfer voluntarily the property title to the servicer, in exchange for cancellation of the remainder of the debt. A loan modification is an agreement to change permanently one or more of the terms of the mortgage loan to make the borrower's monthly payments more affordable.[35]

A loan modification, in particular, benefits distressed homeowners because borrowers can avoid foreclosure and are more likely to be able stay in their homes with more affordable payments. In addition, if loans are in default, once they have been modified, servicers will reinstate the loans and treat borrowers as being current on their mortgages. The specific loan modification policies used vary by mortgage servicer.

B. Mortgage Foreclosure

Foreclosure is the legal means an owner of a mortgage loan can use to take possession of a home when a borrower defaults on the loan. In general, a borrower is in default thirty days after the first missed mortgage payment. Typically, a mortgage servicer may attempt various loss mitigation options prior to initiating foreclosure proceedings, which generally occur three to six months after the first missed mortgage payment.[36]

Foreclosure processes differ by state and depend on the details of state foreclosure laws. Differences among states include the requirements of notification and the types of foreclosure proceedings available. Generally, there are three types of foreclosures processes: judicial foreclosure, power of sale foreclosure, and strict foreclosure. Judicial foreclosure involves the owner of the loan filing suit in court and the home being sold under the court's supervision. All states allow judicial foreclosure, and in some states it is the only foreclosure option available. Power of sale foreclosure, also known as ''statutory foreclosure,'' involves the sale of the home at public auction by the servicer if the mortgage contains a ''power of sale'' clause or if a deed of trust was used instead of a mortgage. Many states permit power of sale foreclosure, which is often more expedient than judicial foreclosure. In a power of sale foreclosure, the owner of the loan sends notices demanding payment to borrowers who have defaulted. Once the required waiting period has passed, the mortgage servicer can sell the home at public auction, subject to judicial review. Strict foreclosure is available in a limited number of states and permits the owner of the loan to file lawsuits against borrowers who have defaulted. If the borrower cannot pay the mortgage debt within the period of time set by court order, the property title goes directly to the owner of the loan.

C. Developments in the Mortgage Marketplace

As a result of the recent downturn in the economy and housing market, many American homeowners are in financial distress. The rate of mortgage loan delinquency and foreclosure has risen to the highest level in three decades.[37] The recent economic downturn has also given rise to a new and broader range of third-party providers who offer to assist homeowners—for free or for a fee—in obtaining a loan modification or preventing foreclosure.

The FTC and other agencies like the U.S. Department of Housing and Urban Development (HUD) have generally advised consumers who are behind on their mortgage payments to contact their mortgage servicer about the possibility of loan modification or other options.[38] The Commission has initiated a stepped-up consumer outreach initiative on foreclosure rescue and loan modification fraud. The Commission has issued consumer education publications warning homeowners against foreclosure rescue and loan modification scams. Most recently, the Commission issued a new consumer education publication on this topic, which several servicers have provided directly to consumers, including during loan counseling sessions, in monthly statements, in correspondence to delinquent borrowers, and on their websites.[39]

In addition, government agencies have instituted new programs to help homeowners in financial distress. For

[34] Servicers consider loss mitigation options if a delinquent borrower does not have adequate equity to sell the house and pay off the mortgage in full or to refinance into a more affordable loan. A delinquent borrower can also file Chapter 13 personal bankruptcy to prevent foreclosure, often as a debt management option of last resort. If a borrower has regular income, Chapter 13 may allow the borrower to keep property, such as a mortgaged house or car. In Chapter 13, the court may approve a repayment plan that allows the use of future income toward payment of debts during a three-to-five year period, rather than requiring surrender of property.

[35] For example, the servicer may lower the monthly payment, alter the payment schedule, fix or lower the interest rate, apply fees and arrearage to the principal, or even reduce the unpaid principal balance.

[36] *See* U.S. Department of Housing and Urban Development, *Foreclosure Process*, *available at* (*http://www.hud.gov/foreclosure/foreclosureprocess.cfm*).

[37] *See* Mortgage Bankers Association, *Delinquencies Continue to Climb in Latest MBA National Delinquency Survey* (Mar. 5, 2009), *available at* (*http://www.mbaa.org/NewsandMedia/PressCenter/68008.htm*). According to the Mortgage Bankers Association's (MBA) National Delinquency Survey, the delinquency rate for mortgage loans on one-to-four unit residential properties rose to a seasonally adjusted rate of 7.88% of all loans, as of the end of the fourth quarter of 2008, which is the highest rate ever based on data dating back to 1972. Over 11% of loans are either in foreclosure or delinquent by at least one payment, which is the highest rate ever recorded in the MBA national delinquency survey.

[38] *See* FTC Publication, *Mortgage Payments Sending You Reeling? Here's What to Do*, *available at* (*http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea04.shtm*).

[39] *See* FTC Publication, *A Note to Homeowners*, *available at* (*http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea16.pdf*); *see also* FTC Publication, *Foreclosure Rescue Scams: Another Potential Stress for Homeowners in Distress*, *available at* (*http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre42.shtm*).

example, on March 4, 2009, the U.S. Department of the Treasury introduced the Making Home Affordable Program to assist eligible homeowners to refinance or modify their mortgage loans to an affordable payment. Under the program, mortgage servicers who adopt certain loan modification guidelines and provide eligible homeowners with loan modifications can qualify to receive substantial government incentives.[40] .

In addition to federal efforts, state and local agencies and non-profit organizations also offer similar foreclosure prevention assistance and other housing-related services. Non-profit organizations and housing counseling agencies continue to provide a wide array of free services to homeowners who are in financial distress. HUD has certified numerous non-profit housing counseling agencies. These agencies provide homeowners with assistance, such as offering consumer education, assisting with debt management, negotiating directly with servicers to make mortgage payments more affordable—thereby providing foreclosure relief and helping consumers stay in their homes.

The private sector also has developed and offered programs at no cost to help distressed homeowners. HUD-approved counseling agents, mortgage companies, investors, and other mortgage market participants created the HOPE NOW Alliance (Hope Now) to provide homeowners with free foreclosure prevention assistance. Consumers can visit Hope Now's website, *www.hopenow.com,* or call the Homeowner's HOPE Hotline, 1-888-995-HOPE, to find housing counselors from HUD-certified agencies who can help guide them through various foreclosure prevention options, including loan modification.

At the same time that governmental and private sector entities (both for-profit and non-profit) are increasing their efforts to assist distressed homeowners, there has been an increase in individuals and entities offering to assist consumers in securing loan modifications and foreclosure rescue services in exchange for a fee. Foreclosure rescue and loan modification entities frequently market their services via direct mail, email, radio, television, and Internet advertisements.[41] They sometimes send targeted written solicitations to consumers facing mortgage rate resets[42] or foreclosure.[43] Specifically, foreclosure rescue and loan modification entities often identify such consumers by reviewing notices of default and other publicly-available records.

Foreclosure rescue and loan modification entities, sometimes also referred to as ''foreclosure consultants,'' generally offer to negotiate with a consumer's servicer to secure a reduction in mortgage payments or otherwise obtain a favorable modification of loan terms on behalf of a consumer. Foreclosure rescue and loan modification entities charge a fee for their services, and this fee is almost always charged up-front. In many instances, these entities claim that they have knowledge of and experience with the mortgage industry and lending because they are attorneys or mortgage brokers. In some cases, instead of simply offering to negotiate on behalf of a consumer, foreclosure rescue operations require consumers to enter a new loan with them or to transfer title to the property (for example, to remain in the home as a renter with the option to repurchase or otherwise maintain the opportunity to reacquire title).

Consumers may choose to pay a fee for the services of providers of foreclosure rescue and loan modification services rather than use free services for a variety of reasons. Some distressed homeowners may be drawn to, or targeted for, aggressive advertisements by fee for service providers and may be unaware of the free services available to them. They also may be unwilling or unable to work directly with their mortgage servicer or with a non-profit organization. For example, consumers may be wary of or unsatisfied with a mortgage servicer's loss mitigation offer, or frustrated with their inability to contact the appropriate person at their servicer.

III. FTC Law Enforcement

A. Application of the FTC Act and Consumer Protection Concerns

The FTC has taken a number of law enforcement actions to protect consumers from unfair and deceptive loan modification and foreclosure rescue practices. The Commission has recently filed numerous lawsuits against defendants for allegedly engaging in deceptive practices.[44] Most recently, the FTC—along with other federal and state regulators—announced law enforcement actions as part of a broader crackdown on loan modification and foreclosure rescue entities.[45] In connection with this effort, the Commission also sent warning letters to 71 companies for marketing potentially deceptive mortgage loan modification and foreclosure assistance programs.[46]

In the FTC's law enforcement actions against those who offer loan modification and foreclosure rescue services, the Commission has alleged that a number of acts and practices were deceptive under Section 5 of the FTC Act:

First, many defendants promised a high likelihood of success but failed to fulfill their promise to modify

[40] *See* Home Affordable Modification Program Guidelines (Mar. 4, 2009), *available at* (*http://www.financialstability.gov/roadtostability/homeowner.html*)

[41] *See, e.g., FTC v. National Foreclosure Relief, Inc.*, Case No. SACV09-117 DOC (MLGx) (C.D. Cal. filed Feb. 2, 2009) (alleging that defendants targeted consumer in arrears with mailer advertisements).

[42] Mortgage loans are sometimes categorized as having either a ''fixed'' or ''adjustable'' rate. A fixed rate mortgage loan maintains the same interest rate throughout its term. An adjustable mortgage, by contrast, has an interest rate which is subject to change (or ''reset'') after a certain introductory period; and that reset can result in an increased interest rate.

[43] *See, e.g.*, Testimony of Prentiss Cox, before the U.S. Senate Committee on Commerce Science & Technology (Feb. 26, 2009) at 2 (noting that ''families are often desperate to save their homes,'' and that ''[a]s soon as a house enters the foreclosure process, the homeowner in foreclosure typically is subject to an avalanche of mail, phone calls and personal visits from people promising to help the homeowner''); *see also* Steve Tripoli & Elizabeth Renuart, National Consumer Law Center, Dreams Foreclosed: The Rampant Theft of Americans' Home Through Foreclosure ''Rescue'' Scams (2005), at 9 (''The 'rescuer' identifies distressed homeowners through public foreclosure notices in newspapers or at government offices. . . . The 'rescuer' then contacts the homeowner by phone, personal visit, card or flyer left at the door . . . or advertising. Initial contact typically revolves around a simple message such as 'Stop foreclosure with just one phone call,' 'I'd like to $ buy $ your house,' 'You have options,' or 'Do you need instant debt relief and CASH?'''), *available at* (*http://www.consumerlaw.org/news/content/ForeclosureReportFinal.pdf*).

[44] *See, e.g., FTC v. New Hope Property LLC*, Case No. 1:09-cv-01203-JBS-JS (D.N.J. filed Mar. 17, 2009); *FTC v. Hope Now Modifications, LLC*, Case No. 1:09-cv-01204-JBS-JS (D.N.J. filed Mar. 17, 2009); *FTC v. National Foreclosure Relief, Inc.*, Case No. SACV09-117 DOC (MLGx) (C.D. Cal. filed Feb. 2, 2009); *FTC v. United Home Savers, LLP*, Case No. 8:08-cv-01735-VMC-TBM (M.D. Fla. filed Sept. 3, 2008); *FTC v. Foreclosure Solutions, LLC*, No. 1:08-cv-01075 (N.D. Ohio filed Apr. 28, 2008); *FTC v. Mortgage Foreclosure Solutions, Inc.*, Case No. 8:08-cv-388-T-23EAJ (M.D. Fla. filed Feb. 26, 2008); *FTC v. National Hometeam Solutions, Inc.*, Case No. 4:08-cv-067 (E.D. Tex. filed Feb. 26, 2008).

[45] See *FTC v. Federal Loan Modification Law Center, LLP*, Case No. SACV09-401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009); *FTC v. Thomas Ryan*, Civil No. 1:09-00535 (HHK) (D.D.C. filed March 25, 2009); *FTC v. Home Assure, LLC*, Case No. 8:09-CV-00547-T-23T-SM (M.D. Fla. filed Mar. 24, 2009); *see also*, Press Release, *Federal and State Agencies Crack Down on Mortgage Modification and Foreclosure Rescue Scams* (Apr. 6, 2009), *available at* (*http://www.ftc.gov/opa/2009/04/hud.shtm*); Press Release, *Federal, State Partners Announce Multi-Agency Crackdown Targeting Foreclosure Rescue Scams, Loan Modification Fraud* (Apr. 6, 2009), *available at* (*http://www.ftc.gov/opa/2009/04/loanfraud.shtm*).

[46] An example of these letters is available at (*http://www.ftc.gov/os/2009/04/090406warningletter.pdf*).

consumers' existing loans or to stop foreclosure.[47] For example, some defendants assured consumers that they could stop foreclosure or obtain a loan modification with claims such as a ''97% success rate.''[48] However, many defendants allegedly did little or nothing to negotiate with the mortgage servicer or to stop foreclosure. Second, many defendants promised to fully or partially refund consumers' payments in the event that negotiation efforts to obtain a loan modification or to prevent foreclosure were unsuccessful.[49] Often, defendants allegedly did not provide the promised refunds. Third, some defendants represented that they were affiliated with governmental or free non-profit programs,[50] when in fact they were not.[51]

Moreover, most defendants charged substantial, up-front fees, which appears to be a prevalent practice in the for-profit foreclosure rescue and loan modification industry. When defendants use deception to secure advance payment and then fail to fulfill their promise to stop a foreclosure or obtain a loan modification, consumers are unlikely to receive a refund or recover their money.[52] Payment of up-front fees, which are sometimes thousands of dollars, exacerbates the consumer injury from deception, and imposes a significant burden on consumers already in financial distress.

In addition, some defendants advise consumers, including those who are still current on their loans, to stop making mortgage payments and to cease communication with their mortgage servicer while the foreclosure rescue or loan modification operator purportedly negotiates on their behalf.[53] If the operator fails to take adequate steps to obtain a loan modification or to prevent foreclosure, the operator may actually increase the likelihood of foreclosure, because consumers fail to take advantage of other options available to them that might help save their homes.[54]

B. State Law Enforcement

Many states have engaged in legislative and law enforcement efforts to address conduct in the loan modification and foreclosure rescue industry. First, several states have filed lawsuits against loan modification or foreclosure rescue entities for violating state consumer protection laws prohibiting unfair and deceptive practices.[55] Second, some states have applied existing statutes specifically regulating the debt settlement, debt management, or credit counseling industries to cover foreclosure rescue and loan modification practices.[56] Third, numerous states and the District of Columbia have recently enacted statutes that specifically restrict or ban ''foreclosure consultants'' from engaging in some of the foreclosure rescue and loan modification practices detailed above.[57] State law enforcement agencies have filed numerous suits against individuals and entities for violations of these statutes.[58]

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[47] For example, in one case the Commission charged a foreclosure rescue operation for promising consumers that it could stop ''any foreclosure,'' but then failing to stop foreclosure or taking minimal steps to do so.*See FTC v. National Hometeam Solutions, LLC*, Case No. 4:08-cv-067 (E.D. Tex. filed Feb. 26, 2008).

[48] *See, e.g., FTC v. Federal Loan Modification Law Center, LLP*, Case No. SACV09-401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009); *FTC v. National Foreclosure Relief, Inc.,* Case No. SACV09-117 DOC (MLGx) (C.D. Cal. filed Feb. 2, 2009); *FTC v. Foreclosure Solutions, LLC*, No. 1:08-cv-01075 (N.D. Ohio filed Apr. 28, 2008); *FTC v. Mortgage Foreclosure Solutions, Inc.,* Case No. 8:08-cv-388-T-23EAJ (M.D. Fla. filed Feb. 26, 2008). Additionally, some entities claim to be associated with or to have good relationships with the consumer's mortgage servicer. *FTC v. Home Assure, LLC*, Case No. 8:09-CV-00547-T-23T-SM (M.D. Fla. filed Mar. 24, 2009).

[49] *See, e.g., FTC v. Home Assure, LLC*, Case No. 8:09-CV-00547-T-23T-SM (M.D. Fla. filed Mar. 24, 2009) (alleging that defendant promised ''100% SATISFACTION GUARANTEE OR YOUR MONEY BACK''); *FTC v. United Home Savers, LLP*, Case No. 8:08-cv-01735-VMC-TBM (M.D. Fla. filed Sept. 3, 2008); *FTC v. National Hometeam Solutions, LLC*, Case No. 4:08-cv-067 (E.D. Tex. filed Feb. 26, 2008).

[50] The Federal Reserve Board recently promulgated amendments to Regulation Z of TILA, generally effective October 1, 2009, which would ban various mortgage entities from a number of relevant practices, including banning mortgage advertisers from: misrepresenting an advertised loan as being part of a ''government loan program'' or otherwise endorsed or sponsored by a government entity; making misleading claims of debt elimination; and using the term ''counselor'' to refer to for-profit mortgage creditors or brokers. *See* 73 FR 44589-90, 44602. To the extent that loan modification or foreclosure rescue entities are offering loans to consumers, they may fall within the ambit of these rules.

[51] For example, in two cases the Commission charged defendants for falsely advertising themselves to be associated with the HOPE NOW Alliance, and then breaking promises to secure loan modifications or alternatively, to refund the money of consumers whose loans could not be modified. *SeeFTC v. New Hope Property LLC*, Case No. 1:09-cv-01203-JBS-JS (D.N.J. filed Mar. 2009); *FTC v. Hope Now Modifications, LLC*, Case No. 1:09-cv-01204-JBS-JS (D.N.J. filed Mar. 2009). In another case, a defendant marketing purported loan modification services allegedly represented, via his website, that he was the ''House and Urban Department,'' displaying a government-like seal; and using a web address (''bailout-hud-gov.us'' or ''bailout.dohgov.us'') and other features to create the impression his business was associated with the U.S. government. *FTC v. Thomas Ryan*, Civil No. 1:09-00535 (HHK) (D.D.C. filed Mar. 25, 2009); *see alsoFTC v. Federal Loan Modification Law Center, LLP*, Case No. SACV09-401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009) (charging defendant with misrepresenting that it is part of or affiliated with the federal government).

[52] Note that, even if providers do fulfill their promises to provide refunds, this action does not cure the deception employed in enrolling the consumer in the program. *See, e.g., FTC v. Think Achievement Corp.*, 312 F.3d 259, 262 (7th Cir. 2002) (''[A] money-back guaranty does not sanitize a fraud.'')

[53] *See, e.g., FTC v. Home Assure, LLC*, Case No. 8:09-CV-00547-T-23T-SM (M.D. Fla. filed Mar. 24, 2009); *FTC v. National Hometeam Solutions, LLC*, Case No. 4:08-cv-067 (E.D. Tex. filed Feb. 26, 2008).

[54] The FTC has warned consumers about for-profit loan modification and foreclosure rescue operations which charge hefty fees for services which consumers can undertake themselves by contacting their mortgage servicer directly or obtain for free through organizations like Hope Now. *See* FTC Publication, *A note to Homeowners*, *available at* (*http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea16.pdf*).

[55] *See, e.g., State Foreclosure Rescue Enforcement Actions - Sampling of Actions: March 31, 2009*, *available at* (*http://www.ftc.gov/os/2009/04/090406foreclosurerescue.pdf*); *see also* Press Release, *Federal and State Agencies Crack Down on Mortgage Modification and Foreclosure Rescue Scams* (Apr. 6, 2009), *available at* (*http://www.ftc.gov/opa/2009/04/hud.shtm*); Press Release, *Federal, State Partners Announce Multi*-Agency Crackdown Targeting Foreclosure Rescue Scams, Loan Modification Fraud (Apr. 6, 2009), *available at* (*http://www.ftc.gov/opa/2009/04/loanfraud.shtm*).

[56] *See, e.g.,* Ohio Attorney General, Press Release, *Attorney General Dann Files 6 Suits Against Companies For Foreclosure Rescue Scams* (Aug. 8, 2007) (including count under state ''debt adjustment'' statute).

[57] *See, e.g.,* Cal. Civ. Code § 2945, *et seq.*; Colo. Rev. Stat. § 6-1-1101, *et seq.*; 6 Del C. § 2400B, *et seq.*; D.C. Code Ann. § 42-2431, *et seq.*; Fla. Stat. Ann. § 501.1377; GA. Code Ann. § 10-1-393; Hawaii Rev. Stat. Ann. § 480E-1, *et seq.*; IL Comp. Stat, Ann., Ch. 765 § 940/1, *et seq.*; Ind. Code Ann § 24-5.5-1-1, *et seq.*; Iowa Code § 714E.1, *et seq.*; ME Rev. Stat. Ann. tit 32 § 6191, *et seq.*; MD Real Property Code Ann.§ 7-301, *et seq.*; Code Mass. Reg., 940 CMR § 25.01, *et seq.*; Minn. Stat. Ann. § 325N.01, *et seq.*; MO Ann. Stat. § 407.935, *et seq.*; Neb. Rev. Stat. Ann. § 76-2701, *et seq.*; NH Rev. Stat. § 479-B:1, *et seq.*; NY CLS Real Prop. § 265-b; RI Gen. Laws § 5-79-1, *et seq.*

[58] *See, e.g.*, Press Release, Massachusetts Attorney General, *Attorney General Martha Coakley Obtains Temporary Restraining Order against Perpetrators of Loan Modification Scam; Warns Public About Scams Targeting Homeowners* (Apr. 7, 2009) (alleging defendant loan modification service violated state law prohibiting advance fees), *available at* (*http://www.mass.gov/?pageID=cagopressrelease&L=1&L0=Home&sid=Cago&b=pressrelease&f=2009_04_07_fox_loan_mods&csid=Cago*); Press Release, Illinois Attorney General, *MADIGAN FILES TWO MORTGAGE RESCUE FRAUD LAWSUITS, SEEKS IMMEDIATE BAN ON COMPANIES' OPERATIONS* (Apr. 6, 2009) (alleging defendant loan modification entity violated Illinois Mortgage Rescue Fraud Act for, inter alia, charging up-front fee), *available at* (*http://www.ag.state.il.us/pressroom/2009_04/20090406.html*); Press Release, Florida Attorney General, *Court Grants Request to Temporarily Stop Loan Modification Company's Up-Front Fees* (Feb. 23, 2009) (noting that Florida statute ''governs companies providing foreclosure-related rescue services including loan modification''), *available at* (*http://www.myfloridalegal.com/newsrel.nsf/pv/FF973C8A0EEE167B85257566006916E8*; Press Release, Minnesota Attorney General, *Attorney General Lori Swanson Expands Litigation Against Fraudulent Foreclosure Consultants And Issues Warning To Minnesota Homeowners In Mortgage Trouble To Seek Reputable Help And Steer Clear Of Scam Artists* (Jan. 29, 2009), *available at* (*http://www.ag.state.mn.us/consumer/pressrelease/090129foreclosureconsultants.asp*); Press Release, Illinois Attorney General's Office, *Madigan Sues*

In 1979, California enacted the first statute that specifically restricts the practices of entities offering foreclosure rescue or similar services.[59] More recently, in 2004, Minnesota enacted a statute, based on the California law, but adding several additional key restrictions on foreclosure reconveyance transactions.[60] Since then, over twenty states have passed their own foreclosure consultant statutes, which are modeled after the California and Minnesota laws. These state foreclosure consultant statutes generally include a number of requirements and restrictions, including: (1) banning covered entities from requiring or collecting advance fees before fully performing contracted or promised services to the consumer; (2) requiring written contracts containing certain provisions and disclosures; and (3) providing consumers with the right to cancel the contract in certain circumstances.

Some statutes also impose additional requirements on foreclosure rescue operations that require consumers to transfer title to their homes, and purport to offer reconveyance at a later date. These statutes often include the requirement that foreclosure rescue operations must verify before doing a reconveyance that the consumer has a reasonable ability to pay for the subsequent conveyance of the home back to the consumer.[61] Other states have decided to ban outright certain practices, like title reconveyances.[62]Some states also have enacted criminal statutes covering foreclosure rescue operations.[63]

Almost all state foreclosure consultant laws exempt state-licensed attorneys. Some for-profit loan modification and foreclosure rescue operations have partnered with attorneys,[64] which some operations may use to avoid state statutory prohibitions against the collection of advance fees. Some state bar associations have responded by issuing warnings to attorneys that many relationships between licensed attorneys and foreclosure consultants violate state ethics rules for attorneys.[65];

Some of the consumer protections that state statutes provide to homeowners in financial distress do not commence until the owner or servicer of a mortgage has served a notice of default on the borrower. However, some loan modification and foreclosure rescue services apparently provide services before a notice of default has been served, thereby limiting the protection accorded under state law to some homeowners in financial distress.

IV. Request for Comment

The Commission seeks written comments on a series of questions related to loan modification and foreclosure rescue. The FTC is seeking comments to determine whether certain acts and practices of loan modification and foreclosure rescue entities are unfair or deceptive under Section 5 of the FTC Act and should be incorporated into a proposed rule. These acts and practices include conduct that the FTC currently could challenge in a law enforcement action as violating Section 5 of the FTC Act. However, the Commission is not otherwise seeking comments on statutes that have been enacted and rules that have been issued.

The Commission invites interested persons to submit written comments on any issue of fact, law, or policy that may bear upon these issues. After examining the comments, the Commission will determine whether and how to incorporate them into any proposed rule.

The Commission encourages commenters to respond to the specific questions. However, commenters do not need to respond to all questions. Please provide explanations for your answers and detailed, factual supporting evidence.

Without limiting the scope of issues on which it seeks comment, the Commission is particularly interested in receiving comments on the following questions:

1. The Loan Modification and Foreclosure Rescue Industry

A. What empirical data are available concerning the nature, extent, and impact of the loan modification and foreclosure rescue industry? Please identify any such data sources.

B. What business models are used to provide loan modification and foreclosure rescue services? Please identify and describe any such business models and their impact on consumers and competition.

C. What are the distinctions between different models of providing loan modification and foreclosure rescue services (e.g., free versus fee-for-service, loan negotiation versus title transfer, etc.)?

D. What are the costs and benefits of various loan modification and foreclosure rescue services?

E. What roles do mortgage servicers play in the loan modification and foreclosure rescue industry? What are the costs and benefits of their conduct in the context of loan modification and foreclosure rescue services? Do the practices of mortgage servicers present consumer protection concerns? If so, how are these concerns the same as or different from those raised by third-party loan modification and foreclosure rescue entities?

F. What empirical data are available concerning the performance of loan modification and foreclosure rescue entities in obtaining promised results? Please identify any such data (broken down by business model, if possible) used to provide loan modification and foreclosure rescue services, including but not limited to data addressing the following:

1. The percentage or proportion of consumers enrolled in loan modification or foreclosure rescue services who successfully obtain a loan modification or foreclosure relief.

2. For the consumers described in (F)(1), the percentage who, after successfully obtaining the modification or foreclosure relief, remain current on their mortgage payments for a substantial period of time (e.g., six months, one year, or two years).

2. Need for FTC Rule

A. Given that many states have enacted and enforced laws concerning loan modification and foreclosure services and that the FTC has brought law enforcement actions against providers of these types of services under Section 5 of the FTC Act, should the FTC promulgate a rule to address these services? Why or why not?

3. Scope of Covered Practices

A. Should conduct by loan modification and foreclosure rescue service providers or advertisers that the FTC has challenged as unfair or

Seven Companies For Mortgage Rescue Fraud (Nov. 18, 2008), *available at* (*http://www.illinoisattorneygeneral.gov/pressroom/2008_11/20081118.html*).

[59] Cal. Civ. Code § 2945, *et seq.*

[60] Minn. Stat. Ann. § 325N.01, *et seq.*

[61] *See, e.g.*, Minn. Stat. Ann. § 325N.17. The Minnesota statute also requires, among other things, that the foreclosure rescue operator reconvey the foreclosed property to the homeowner or pay the homeowner such that the total consideration is at least 82% of the fair market value of the property.

[62] *See, e.g.*, D.C. Code Ann. § 42-2431, *et seq.*; Code Mass. Reg., 940 CMR § 25.01, *et seq.*

[63] *See, e.g.*, Iowa Code § 714E.1, *et seq.*

[64] *See, e.g.*, *FTC v. Federal Loan Modification Law Center, LLP*, Case No. SACV09-401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009) (alleging violations of FTC Act against professional law corporation and an attorney).

[65] *See, e.g.*, *Ethics Alert: Legal Services to Distressed Homeowners and Foreclosure Consultants on Loan Modifications* (Committee on Professional Responsibility and Conduct, The State Bar of California, San Francisco, CA) Feb. 2, 2009 at 1, *available at http://www.calbar.ca.gov/calbar/pdfs/ethics/Ethics-Alert-Foreclosure.pdf*; *Ethics Alert: Providing Legal Services to Distressed Homeowners* (The Florida Bar) Mar. 15, 2009, *available at* (*http://www.floridabar.org/tfb/TFBETOpin.nsf/EthicsIndex?OpenForm*).

deceptive in violation of Section 5 of the FTC Act in its law enforcement actions be incorporated into a proposed FTC rule? If so, what conduct should be included, how should it be addressed, and why?

B. Should conduct by loan modification and foreclosure rescue service providers or advertisers that states have declared unlawful by statute or regulation or have challenged in law enforcement actions be incorporated into a proposed FTC rule? Why or why not? If so, what prohibitions and restrictions should be incorporated in a proposed FTC rule?

1. Some states require providers to create written contracts and include key disclosures in these contracts. Should the Commission impose the same or similar disclosure requirements in a proposed FTC rule? If so, what disclosures should be included and why?

2. Some states require providers to give consumers who enroll the right to rescind or cancel their agreements with the providers. Should the Commission include the same or similar rights of rescission or cancellation in a proposed rule? If so, what rescission and cancellation rights should be included and why?

3. Some states have restricted the type, amount, and timing of the fees charged and refunds given by providers of loan modification and foreclosure rescue services. In particular, some states ban advance fees until all services promised or contracted for are completed.

(i) Should the Commission address in a proposed FTC rule any fee or refunds practices of providers of loan modification and foreclosure rescue services? If so, what practices should be addressed, how they should be addressed, and why?

(ii) Should the Commission ban the payment of advance fees for loan modification and foreclosure rescue services in a proposed FTC rule? If so, why or why not? What effect, if any, would an advance fee ban have on the willingness or ability of loan modification and foreclosure rescue services providers to do business?

(iii) Should the Commission impose fee restrictions in a proposed FTC rule other than a ban on the advance fees that providers of loan modification and foreclosure rescue services receive? If so, what restrictions should be imposed and why? Would these restrictions prevent or mitigate the potential harm caused by payment of these fees? For example, to what extent might the possible harm from advance fees be prevented or mitigated by requiring providers to make specific disclosures regarding the timing, amount, or allocation of fees? Additionally, to what extent might such harm be prevented or mitigated by requiring providers to make more general disclosures regarding the nature and material restrictions of their services (e.g., the disclosures regarding the likelihood of success, timing of services or negotiations with mortgage servicers, refund restrictions, or any potentially negative ramifications of using the service)?

4. Some states have foreclosure rescue laws which, in whole or in part, only apply once a consumer has received a notice of default. At what stage or stages of the process should a proposed FTC rule protect consumers? Should it take effect before consumers receive a notice of default, after the notice of default is received, or once foreclosure proceedings have begun? Why?

5. Please identify any other state restrictions or challenged conduct which should (or should not) be addressed in a proposed FTC rule, and explain why.

C. Are there any unfair or deceptive acts and practices by providers or advertisers of loan modification and foreclosure rescue services that neither the FTC nor the states have addressed that a proposed FTC rule should address? If so, how should these acts and practices be addressed and why?

4. Scope of Covered Entities

A. As described in the text, an FTC proposed rule would not cover banks, thrifts, federal credit unions, and non-profits. To what extent do these types of entities provide or advertise loan modification and foreclosure rescue services? To what extent do these entities compete with entities that an FTC proposed rule would cover and what effect would an FTC proposed rule have on such competition?

B. As described in the text, many states have exempted attorneys from laws (e.g., foreclosure consultant laws) which regulate the conduct of providers and advertisers of loan modification and foreclosure rescue services. What are the costs and benefits of exempting attorneys from these laws? What has been the effect of such exemptions on competition between attorneys and non-attorneys in providing or advertising loan modification and foreclosure rescue services? Should an FTC proposed rule include an exemption for attorneys or any other class of persons or entities? Why or why not?

By direction of the Commission.

Donald S. Clark

Secretary

[FR Doc. E9–12596 Filed 5–29–09: 8:45 am]

BILLING CODE 6750–01–S

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 100 and 165

[USCG–2009–0127]

RIN 1625–AA00

Safety Zones: Annual Events Requiring Safety Zones in the Captain of the Port Duluth Zone

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes establishment of safety zones for annual events in the Captain of the Port Duluth Zone. This rule proposes removal of a safety zone currently located in part 100, and the addition of it to part 165. Further, this rule proposes new safety zones to be added to part 165. These safety zones are necessary to protect spectators, participants, and vessels from the hazards associated with fireworks displays.

DATES: Comments and related materials must reach the Coast Guard on or before July 1, 2009.

ADDRESSES: You may submit comments identified by Coast Guard docket number USCG–2009–0127 to the Docket Management Facility at the U.S. Department of Transportation. To avoid duplication, please use only one of the following methods:

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

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

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

(4) *Fax:* 202–493–2251.

FOR FURTHER INFORMATION CONTACT: LT Aaron Gross, Chief of Port Operations U.S. Coast Guard Sector Duluth; (218) 720–5286 Ext. 111.

I. Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted, without change, to *http://www.regulations.gov* and will include any personal information you have provided. We have an agreement with the Department of Transportation (DOT) to use the Docket Management Facility.

A. Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2009–0127), indicate the specific section of this document to which each comment applies, and give the reason for each comment. We recommend that you include your name, mailing address, and an e-mail address or other contact information in the body of your document to ensure that you can be identified as the submitter. This also allows us to contact you in the event further information is needed or if there are questions. For example, if we cannot read your submission due to technical difficulties and you cannot be contacted, your submission may not be considered. You may submit your comments and material by electronic means, mail, fax, or delivery to the Docket Management Facility at the address under **ADDRESSES**, but please submit your comments and material by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

B. Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov* at any time, click on ''Search for Dockets,'' and enter the docket number for this rulemaking (USCG–2009–0127) in the Docket ID box, and click enter. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

C. 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).

SUPPLEMENTARY INFORMATION:

Public Meeting

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

Background and Purpose

This rule proposes the removal of the ''Duluth Fourth Fest Fireworks'' safety zone currently published in § 100.901 and adding it to proposed § 165.945. The Coast Guard proposes this change in an effort to consolidate all Captain of the Port Duluth Zone 4th of July fireworks display safety zones. Additionally, in § 165.945 we propose adding safety zones for fireworks in support of the Cornucopia Fireworks display, Cornucopia, Wisconsin; City of Bayfield Fireworks display, Bayfield, Wisconsin; Madeline Island Fireworks display, LaPointe, Wisconsin; and the Ashland Fireworks display, Ashland, Wisconsin. These safety zones are necessary to protect vessels and people from the hazards associated with fireworks displays. Such hazards include obstructions to the waterway, the explosive danger of fireworks and falling debris.

Discussion of Proposed Rule

The proposed rule is necessary to ensure the safety of vessels and people during annual firework events in the Captain of the Port Duluth area of responsibility that may pose a hazard to the public. This rule proposes the removal of a regulation currently published in 33 CFR 100.901 under Sector Sault Ste. Marie, and the addition of it to proposed § 165.945. It also proposes the addition of four new events never before published in the CFR. All of the events listed occur in the Captain of the Port Duluth Zone.

The proposed safety zones will be enforced only immediately before, during, and after the aforementioned events.

The Captain of the Port Duluth will notify the public that the zones in this proposal will be enforced by all appropriate means to the affected segments of the public including publication in the **Federal Register**. Such means of notification may also include, but are not limited to Broadcast Notice to Mariners or Local Notice to Mariners. The Captain of the Port will issue a Broadcast Notice to Mariners notifying the public when enforcement of the safety zone established by this section is cancelled.

All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or the designated representative. Entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port Duluth, or his designated representative. The Captain of the Port or his designated representative may be contacted via VHF Channel 16.

Regulatory Evaluation

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

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation is unnecessary.

The Coast Guard's use of these safety zones will be periodic and of short duration. These safety zones will only be enforced immediately before, during, and after the time the events occur. The Coast Guard expects insignificant adverse impact to mariners from the activation of these safety zones.

Small Entities

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

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

This proposed rule would affect the following entities, some of which might

be small entities: The owners of operators of vessels intending to transit or anchor in the areas designated as safety zones in subparagraphs (1) through (5) during the dates and times the safety zones are being enforced.

These safety zones would not have a significant economic impact on a substantial number of small entities for the following reasons: This proposed rule would be in effect for short periods of time, and only once per year, per zone. The safety zones have been designed to allow traffic to pass safely around the zone whenever possible and vessels will be allowed to pass through the zones with the permission of the Captain of the Port.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed 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 proposed 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 proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact LT Aaron Gross, Chief of Port Operations, Coast Guard Marine Safety Unit Duluth, Duluth, MN at (218) 720–5286 Ext 111. 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 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 proposed rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

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

Taking of Private Property

This proposed rule will not effect the 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 proposed rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

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

Energy Effects

We have analyzed this 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 Commandant Instruction M16475.lD and Department of Homeland Security Management Directive 023–01, 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 not likely to have a significant effect on the human environment. An environmental analysis checklist supporting this preliminary determination is available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

For the reasons discussed in the preamble, the Coast Guard proposes to

amend 33 CFR parts 100 and 165 as follows:

List of Subjects

33 CFR Part 100

Regattas and Marine Parades.

33 CFR Part 165

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

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

Authority: 33 U.S.C. 1233.

§ 100.901 [Amended]

2. In Table 1 to § 100.901 Table, under the entry for ''Sector Saulte Ste. Marie, MI'' remove the following: ''Duluth Fourth Fest Fireworks.

Sponsor: Office of the Mayor, Duluth, MN.

Date: 4th of July weekend.

Location: That portion of the Duluth Harbor Basin Northern Section bounded on the south by a line drawn on a bearing of 087° true from the Cargill Pier through Duluth Basin Lighted Buoy #5 (LLNR 15905) to the opposite shore on the north by the Duluth Aerial Bridge. That portion of Duluth Harbor Basin Northern Section within 600 yards of position 46°46′47″ N 092°06′10″ W.''

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

3. The authority citation for Part 165 continues to read as follows:

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

4. Add § 165.945 to read as follows:

§ 165.945 Safety Zones; Annual Fireworks Events in the Captain of the Port Duluth Zone.

(a) *Safety Zones*. The following areas are designated Safety zones.

(1) *Duluth Fourth Fest, Duluth, MN*. (i) *Location*. All waters of the Duluth Harbor Basin Northern Section within 600 yards of position 46°46′47″ N, 092°06′10″ W.; at Duluth, MN. (DATUM: NAD 83).

(ii) *Enforcement date*. This section is enforced from 7 p.m. to 11 p.m. on July 4 of each year.

(2) *Cornucopia Fireworks, Cornucopia, WI*. (i) *Location*. All waters of Lake Superior bounded by the arc of a circle within a 100-foot radius from the Fireworks launch site with its center position: 46°48′36″ N, 090°48′ 36″ W.; at Cornucopia, WI. (DATUM: NAD 83).

(ii) *Enforcement date*. This section is enforced from 9 p.m. to 11 p.m. on July 4 of each year.

(3) *City of Bayfield Fireworks, Bayfield, WI*. (i) *Location*. All waters of Lake Superior bounded by the arc of a circle with a 100-foot radius from the Fireworks launch site with its center in position: 46°48′ 36″ N, 090°48′ 36″ W.; Bayfield, WI. (DATUM: NAD 83).

(ii) *Enforcement date*. This paragraph is enforced from 9 p.m. to 11 p.m. on July 4 of each year.

(4) *Madeline Island Fireworks, LaPointe, WI*. (i) *Location*. All waters of Lake Superior bounded by the arc of a circle with a 250-foot radius from the fireworks launch site with its center in position: 46°46′42″ N, 090°47′18″ W.; at Lapointe, WI. (DATUM: NAD 83).

(ii) *Enforcement date*. This paragraph is enforced from 9:15 p.m. to 10:30 p.m. on July 4 of each year.

(5) *Ashland Fireworks, Ashland, WI*. (i) All waters of Lake Superior, near Ashland, Wisconsin, bounded by the arc of a circle with a 250-foot radius from the Fireworks launch site with its center in position: 46°46′42″ N, 090°47′18″ W.; Ashland, WI. (DATUM: NAD 83).

(ii) *Enforcement date*. This paragraph is enforced from 9 p.m. to 11 p.m. on July 4 of each year.

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

(1) *Designated Representative* means any Coast Guard commissioned, warrant, or petty officer designated by the Captain of the Port Duluth to monitor a safety zone, permit entry into the zone, give legally enforceable orders to persons or vessels within the zones, and take other actions authorized by the Captain of the Port.

(2) *Public vessel* means vessels owned, chartered, or operated by the United States, or by a State or political subdivision thereof.

(c) *Regulations*. (1) In accordance with the general regulations in § 165.23 of this part, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port Duluth, or his designated representative.

(2)(i) These safety zones are closed to all vessel traffic, except as may be permitted by the Captain of the Port, or his designated representative.

(ii) All persons and vessels must comply with the instructions of the Coast Guard Captain of the Port, or his designated representative.

(iii) Upon being hailed by the U.S. Coast Guard by siren, radio, flashing light or other means, the operator of a vessel shall proceed as directed.

(3)(i) All vessels must obtain permission from the Captain of the Port, or his designated representative to enter, move within, or exit the safety zone established in this section when this safety zone is enforced.

(ii) Vessels and persons granted permission to enter the safety zone must obey all lawful orders or directions of the Captain of the Port or a designated representative.

(iii) While within a safety zone, all vessels must operate at the minimum speed necessary to maintain a safe course.

(d) *Exemption*. Public vessels, as defined in paragraph (b) of this section, are exempt from the requirements in this section.

(e) *Waiver*. For any vessel, the Captain of the Port Duluth, or his designated representative may waive any of the requirements of this section, upon finding that operational conditions or other circumstances are such that application of this section is unnecessary or impractical for the purposes of public or environmental safety.

(f) *Notification*. The Captain of the Port Duluth will notify the public by all appropriate means that the zones in this proposal will be enforced. Notification may include publication in the **Federal Register**, Broadcast Notice to Mariners, or Local Notice to Mariners. The Captain of the Port will issue a Broadcast Notice to Mariners notifying the public when enforcement of the safety zone established by this section is cancelled.

Dated: May 19, 2009.

M.P. Lebsack,

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

[FR Doc. E9–12603 Filed 5–29–09; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2008–0797–200824(b); FRL–8911–4]

Approval and Promulgation of Air Quality Implementation Plans: South Carolina; Approval of Section 110(a)(1) Maintenance Plan for the 1997 8-Hour Ozone Standard for Cherokee County

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a revision to the South Carolina State Implementation Plan (SIP) concerning the maintenance plan addressing the

1997 8-hour ozone standard for Cherokee County, South Carolina. This maintenance plan was submitted for EPA action on December 13, 2007, by the State of South Carolina, and ensures the continued attainment of the 1997 8-hour ozone national ambient air quality standard through the year 2014. EPA is proposing to approve the SIP revision pursuant to section 110 of the Clean Air Act. The maintenance plan meets all the statutory and regulatory requirements, and is consistent with EPA's guidance. On March 12, 2008, EPA issued a revised ozone standard. Today's action, however, is being taken to address requirements under the 1997 8-hour ozone standard. Requirements for the Cherokee County Area under the 2008 8-hour ozone standard will be addressed in the future.

In the Final Rules Section of this **Federal Register**, EPA is approving the State's SIP revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this document. Any parties interested in commenting on this document should do so at this time.

DATES: Written comments must be received on or before July 1, 2009.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2008–1186 by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *E-mail: benjamin.lynorae@epa.gov.*
3. *Fax:* (404) 562–9019.
4. *Mail:* ''EPA–R04–OAR–2008–0797,'' Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960.
5. *Hand Delivery or Courier:* Lynorae Benjamin, Chief, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

Please see the direct final rule which is located in the Rules section of this **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Zuri Farngalo, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Mr. Farngalo may be reached by phone at (404) 562–9152 or by electronic mail address *farngalo.zuri@epa.gov.*

SUPPLEMENTARY INFORMATION: For additional information see the direct final rule which is published in the Rules section of this **Federal Register**.

Dated: May 15, 2009.

Beverly H. Banister,

Acting Regional Administrator, Region 4.

[FR Doc. E9–12548 Filed 5–29–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2008–0053; FRL–8910–9]

RIN 2060–AN47

National Emission Standards for Hazardous Air Pollutants: Area Source Standards for Paints and Allied Products Manufacturing

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing national emission standards for control of hazardous air pollutants (HAP) for the Paints and Allied Products Manufacturing area source category. The proposed emissions standards for new and existing sources are based on EPA's proposed determination as to what constitutes the generally available control technology or management practices (GACT) for the area source category.

DATES: Comments must be received on or before July 1, 2009, unless a public hearing is requested by June 11, 2009. If a hearing is requested on this proposed rule, written comments must be received by July 16, 2009. Under the Paperwork Reduction Act, comments on the information collection provisions must be received by the Office of Management and Budget on or before July 1, 2009.

ADDRESSES: EPA will accept comment on the proposal for 30 days after publication in the **Federal Register**. Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2008–0053, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*: Follow the instructions for submitting comments.
- *Agency Web site: http://www.epa.gov/oar/docket.html*. Follow the instructions for submitting comments on the EPA Air and Radiation Docket Web site.
- *E-mail: a-and-r-Docket@epa.gov*. Include Docket ID No. EPA–HQ–OAR–2008–0053 in the subject line of the message.
- *Fax:* Send comments to (202) 566–9744, Attention Docket ID No. EPA–HQ–OAR–2008–0053.
- *Mail:* Area Source NESHAP for Paints and Allied Products Manufacturing Docket, Environmental Protection Agency, Air and Radiation Docket and Information Center, Mailcode: 2822T, 1200 Pennsylvania Avenue NW., Washington, DC 20460. Please include a total of two copies. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th Street NW., Washington, DC 20503.
- *Hand Delivery:* EPA Docket Center, Public Reading Room, EPA West, Room 3334, 1301 Constitution Avenue NW., Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2008–0053. 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 or any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Area Source NESHAP for Paints and Allied Products Manufacturing Docket, at the EPA Docket and Information Center, EPA West, Room 3334, 1301 Constitution Avenue NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Melissa Payne, Regulatory Development and Policy Analysis Group, Office of Air Quality Planning and Standards (C404–05), Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone number: (919) 541–3609; fax number: (919) 541–0242; e-mail address: *payne.melissa@epa.gov*.

SUPPLEMENTARY INFORMATION: The supplementary information in this preamble is organized as follows:

I. General Information
A. Does This Action Apply to Me?
B. What should I consider as I prepare my comments to EPA?
C. Where can I get a copy of this document?
D. When would a public hearing occur?
II. Background Information for Proposed Area Source Standards
A. What is the statutory authority and regulatory approach for the proposed standards?
B. What source category is affected by the proposed standards?
C. What are the production processes, emissions sources, baseline emissions, and available controls?
III. Summary of Proposed Standards
A. Do the proposed standards apply to my source?
B. When must I comply with the proposed standards?
C. What are the proposed standards?
D. What are the compliance requirements?
E. What are the notification, recordkeeping, and reporting requirements?
IV. Rationale for this Proposed Rule
A. How did we select the source category?
B. How did we select the affected source?
C. How are the Paints and Allied Products Manufacturing metal and volatile HAP addressed by this rule?
D. How did we determine GACT?
E. How did we select the compliance requirements?
F. How did we decide to propose to exempt this area source category from title V permit requirements?
V. Summary of Impacts of the Proposed Standards
A. What are the air impacts?
B. What are the cost impacts?
C. What are the economic impacts?
D. What are the non-air health, environmental, and energy impacts?
VI. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
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 Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer Advancement Act
J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.

I. General Information

A. Does This Action Apply to Me?

The regulated categories and entities potentially affected by this proposed action are shown in the table below. You are subject to this subpart if you own or operate a facility that performs paints and allied products manufacturing that is an area source of hazardous air pollutant (HAP) emissions and processes, uses, or generates materials containing the following HAP: benzene, methylene chloride, and compounds of cadmium, chromium, lead, and nickel. If the proposed standards are applicable to a paints and allied product manufacturing area source, the standards apply to all organic HAP emissions and all metal HAP emissions from all paints and allied products manufacturing operations at the area source.

The paints and allied products manufacturing area source rule (CCCCCCC) would cover all coatings, but does not include resin manufacturing, which is covered by the chemical manufacturing area source standard (VVVVVV). Facilities that manufacture both resins and coatings would be required to comply with both rules. Paints and allied products are defined in Sec. 63.11606 as any material such as a paint, ink, or adhesive that is intended to be applied to a substrate and consists of a mixture of resins, pigments, solvents, and/or other additives. Typically, these materials are described by Standard Industry Classification (SIC) codes 285 or 289 and North American Industry Classification System (NAICS) codes 3255 and 3259 and are produced by physical means, such as blending and mixing, as opposed to chemical synthesis means, such as reactions and distillation. The source category does not include the following: (1) The manufacture of products that do not leave a dried film of solid material on the substrate, such as thinners, paint removers, brush cleaners, and mold release agents; (2) the manufacture of electroplated and electroless metal films; and (3) the manufacture of raw materials, such as resins, pigments, and solvents used in the production of paints and allied products. [1]

[1] Paint thinners and paint remover are covered under the Industrial Organic Chemical Manufacturing Area Source NESHAP, and electroplated and electroless metal films are covered under the Plating and Polishing Operations Area Source NESHAP. Resins manufacturing is covered under the Plastic Materials and Resins Manufacturing Area Source NESHAP and pigments manufacturing is covered under the Inorganic Pigment Manufacturing Area Source NESHAP.

Category	NAICS code [2]	Examples of regulated entities
Paint & Coating Manufacturing	325510	Area source facilities engaged in mixing pigments, solvents, and binders into paints and other coatings, such as stains, varnishes, lacquers, enamels, shellacs, and water repellant coatings for concrete and masonry.
Adhesive Manufacturing	325520	Area source facilities primarily engaged in manufacturing adhesives, glues, and caulking compounds.
Printing Ink Manufacturing	325910	Area source facilities primarily engaged in manufacturing printing inkjet inks and inkjet cartridges.
All Other Miscellaneous Chemical Product and Preparation Manufacturing.	325998	Area source facilities primarily engaged in manufacturing indelible ink, India ink writing ink, and stamp pad ink.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. To determine whether your facility would be regulated by this action, you should examine the applicability criteria in 40 CFR 63.11599, subpart CCCCCCC (NESHAP for Area Sources: Paints and Allied Products Manufacturing). If you have any questions regarding the applicability of this action to a particular entity, consult either the State delegated authority or the EPA regional representative as listed in 40 CFR 63.13 of subpart A (General Provisions).

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

Do not submit information containing CBI to EPA through *http://www.regulations.gov* or e-mail. Send or deliver information identified as CBI only to the following address: Roberto Morales, OAQPS Document Control Officer (C404–02), Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina 27711, Attention Docket ID EPA–HQ–OAR–2008–0053. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

C. Where Can I Get a Copy of This Document?

In addition to being available in the docket, an electronic copy of this proposed action will also be available on the Worldwide Web (WWW) through EPA's Technology Transfer Network (TTN). A copy of this proposed action will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at the following address: *http://www.epa.gov/ttn/oarpg*. The TTN provides information and technology exchange in various areas of air pollution control.

D. When Would a Public Hearing Occur?

If anyone contacts EPA requesting to speak at a public hearing concerning this proposed rule by June 11, 2009, we will hold a public hearing on June 16, 2009. Persons interested in presenting oral testimony at the hearing, or inquiring as to whether a hearing will be held, should contact Ms. Christine Adams at (919) 541–5590 at least two days in advance of the hearing. If a public hearing is held, it will be held at 10 a.m. at the EPA's campus located at 109 T.W. Alexander Drive in Research Triangle Park, NC, or an alternate site nearby.

II. Background Information for Proposed Area Source Standards

A. What Is the Statutory Authority and Regulatory Approach for the Proposed Standards?

Section 112(d) of the Clean Air Act (CAA) requires EPA to establish national emission standards for hazardous air pollutants (NESHAP) for both major and area sources of HAP that are listed for regulation under CAA section 112(c). A major source emits or has the potential to emit 10 tons per year (tpy) or more of any single HAP or 25 tpy or more of any combination of HAP. An area source is a stationary source that is not a major source.

Section 112(k)(3)(B) of the CAA calls for EPA to identify at least 30 HAP which, as the result of emissions from area sources, pose the greatest threat to public health in the largest number of urban areas. EPA implemented this provision in 1999 in the Integrated Urban Air Toxics Strategy, (64 FR 38715, July 19, 1999). Specifically, in the Strategy, EPA identified 30 HAP that pose the greatest potential health threat in urban areas, and these HAP are referred to as the ''30 urban HAP.'' Section 112(c)(3) requires EPA to list sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the emissions of the 30 urban HAP are subject to regulation. We implemented these requirements through the Integrated Urban Air Toxics Strategy (64 FR 38715, July 19, 1999). A primary goal of the Strategy is to achieve a 75 percent reduction in cancer incidence attributable to HAP emitted from stationary sources.

Under CAA section 112(d)(5), we may elect to promulgate standards or requirements for area sources ''which provide for the use of generally available control technologies or management practices (GACT) by such sources to reduce emissions of hazardous air pollutants.'' Additional information on GACT is found in the Senate report on the legislation (Senate Report Number 101–228, December 20, 1989), which describes GACT as:

> * * * methods, practices and techniques which are commercially available and appropriate for application by the sources in the category considering economic impacts and the technical capabilities of the firms to operate and maintain the emissions control systems.

Consistent with the legislative history, we can consider costs and economic impacts in determining GACT. This is particularly important when developing regulations, like this one, that may include many small businesses, as defined by the Small Business Administration.

Determining what constitutes GACT involves considering the control technologies and management practices that are generally available to the area sources in the source category. We also consider the standards applicable to major sources in the same industrial sector to determine if the control technologies and management practices are transferable and generally available to area sources. In appropriate

[2] North American Industry Classification System.

circumstances, we may also consider technologies and practices at area and major sources in similar categories to determine whether such technologies and practices could be considered generally available for the area source category at issue. Finally, as noted above, in determining GACT for a particular area source category, we consider the costs and economic impacts of available control technologies and management practices on that category.

We are proposing these national emission standards in response to a court-ordered deadline that requires EPA to issue standards for categories listed pursuant to section 112(c)(3) and (k) by August 17, 2009 (*Sierra Club* v. *Johnson,* no. 01–1537, D.D.C., March 2006). Other rulemakings will include standards for the remaining source categories that are due in June 2009.

B. What Source Category Is Affected by the Proposed Standards?

These proposed standards would affect any facility that manufactures paints, inks, adhesives, stains, varnishes, shellacs, putties, sealers, caulks, and other coatings, the intended use of which is to leave a dried film of solid material on a substrate. The paints and allied products manufacturing process may include, but is not limited to, any one or combination of the following steps: weighing, mixing, grinding, tinting, thinning, heating, cooking, flushing, and packaging. The paints and allied products may be manufactured in liquid or solid form.

We listed the Paints and Allied Products Manufacturing area source category under CAA section 112(c)(3) in one of a series of amendments (November 22, 2002, 67 FR 70427) to the original source category list included in the 1999 Integrated Urban Air Toxics Strategy. EPA listed this area source category for regulation pursuant to section 112(c)(3), based on emissions of the following six urban HAP: benzene, methylene chloride, and compounds of cadmium, chromium, lead, and nickel.

The definition of containing HAP is identical to the Occupational Safety and Health Administration (OSHA) definitions specified in 29 CFR 1910.1200(d)(4), *i.e.* a concentration of 0.1 percent by mass or more for carcinogens, as shown in formulation data provided by the manufacturer or supplier, such as the Material Safety Data Sheet for the material. The six Paints and Allied Products Manufacturing HAP are classified as carcinogens.

Throughout this proposed rule, we refer to compounds of cadmium, chromium, lead, and nickel as the ''Paints and Allied Products Manufacturing metal HAP.'' We refer to benzene and methylene chloride as the ''Paints and Allied Products Manufacturing volatile HAP.''

Based on 2002 U.S. Census data, we estimate that 2,510 paints and allied products manufacturing facilities are currently operating in the U.S. Independent estimates by the industry trade association confirm our calculations. Nearly all (97 percent) of the paints and allied products manufacturing facilities are in urban areas. Our analyses also indicate that the 2,190 facilities that comprise the Paints and Allied Products Manufacturing area source category are small businesses, which the Small Business Administration generally defines as facilities with less than 500 employees. The 2002 Census data also show that nearly 50 percent of the facilities in this source category have less than 10 employees.

C. What Are the Production Processes, Emission Sources, Baseline Emissions, and Available Controls?

1. Paints and Allied Products Manufacturing Processes

Paints and allied products manufacturing can be classified as a batch process and generally involves the blending and mixing of resins, pigments, solvents, and additives. Traditional coatings manufacturing consists of four major steps:

- Preassembly and premix;
- Pigment grinding, milling, and dispersing;
- Product finishing and blending; and
- Product filling and packaging.

The Paints and Allied Products Manufacturing volatile HAP emissions are a result of solvents that evaporate during the manufacturing process, and include benzene and methylene chloride. The Paints and Allied Products Manufacturing metal HAP emissions occur from the handling of solid materials such as pigments and resins during the manufacturing process. The metal HAP for this listing are cadmium, chromium, lead, and nickel compounds.

The preassembly and premix step involves the collection of raw materials that will be used to produce the desired coating product. These materials are added to a high speed dispersion or mixing vessel. The types of raw materials that are used for solvent-based coatings include resins, organic solvents, plasticizers, dry pigment, and pigment extenders; water, ammonia, dispersant, pigment, and pigment extenders are used for water-based coatings.

Pigment grinding or milling entails the incorporation of the pigment into the paint or ink vehicle to yield fine particle dispersion. The three stages of this process include wetting, grinding, and dispersion, which may overlap in any grinding operation. The wetting agent, normally a surfactant, wets the pigment particles by displacing air, moisture, and gases that are adsorbed on the surface of the pigment particles. Grinding is the mechanical breakup and separation of pigment clusters into isolated particles and may be facilitated by the use of grinding media such as pebbles, balls, or beads. Finally, dispersion is the movement of wetted particles into the body of the liquid vehicle to produce a particle suspension.

A wide array of milling equipment is used, depending on the types of pigments being handled. Commonly-used equipment includes the following: Roller mills, ball and pebble mills, attritors, sand mills, bead and shot mills, high-speed stone and colloid mills, high-speed dispersers, high-speed impingement mills, and horizontal media mills. Roller and ball mills are considered somewhat outdated methods and are usually associated with elevated volatile organic compound (VOC) emissions due to their more open design. Lids are commonly used on milling and mixing vessels to reduce product loss; the types of lids used range from plywood boards to plastic elasticized covers and, less often, steel lids.

High-speed dispersers, using disk-type impellers, are the most common method of mixing, or dispersion, in the industry. Because no grinding media are present in the mixing vat, pigment disperses on itself and against the surfaces of the rotor. While high-speed disk dispersion may work well for products such as undercoats and primers, it may not be appropriate for high-quality paints and inks, which instead use the other types of milling equipment as described above.

The finishing step involves adding small amounts of pigments, solids, or liquids to achieve the required color or consistency of the final product. The filling step involves packaging the final product for shipment to the buyer.

The process operations that generate HAP emissions include: emissions from loading of materials into the mixing tanks; heat-up losses during operation of the mixers; surface evaporation during mixing and blending; and filling losses

that occur during transfer into the receiving container. In addition, miscellaneous operations generating HAP emissions can include: solvent reclamation during the purification of dirty or spent solvent; cleaning of the process equipment; wastewater conveyance and treatment used to handle and treat contaminated water generated during the manufacturing process; material storage of solvents, pigments, and resins; leaks from the transport of stored materials to the process; and emissions from accidental spills during manufacturing and cleaning activities.

2. Paints and Allied Products Manufacturing Area Source HAP Emission Sources

The National Emissions Inventory (NEI) database was used to determine the sources of HAP emissions and to estimate the amount of HAP emissions produced from these sources. A summary of the data is presented in the following table. Total HAP emissions presented in the NEI database for the source category are 1,500 Tons per year (tons/yr), or 1,400 Megagrams per year (Mg/yr). The table shows that over 90 percent of the HAP emissions occur during the paints and allied products manufacturing process. Product manufacturing generally includes the addition of raw materials to the process vessels, grinding of solids, mixing, and packaging of the final product.

Category	HAP Tons/year (Mg/year)	Percentage of total
Product Manufacturing	1,406 (1,275)	90.7
Combustion Processes	1.60 (1.45)	0.103
Raw Material Storage	14.9 (13.5)	0.961
Equipment Cleaning and Fugitive Emissions	40.5 (36.7)	2.61
Other Miscellaneous Processes	63.8 (57.9)	4.12
Coating Application Testing	22.0 (20.0)	1.42

Source: 2002 NEI Database.

3. Paints and Allied Products Manufacturing Baseline HAP Emissions

Baseline HAP emissions were calculated using the HAP emissions from the 2002 NEI database and extrapolating the emissions data to estimate the emissions for all paints and allied products manufacturing area sources. Using this approach, we estimated the 2002 nationwide baseline HAP emissions (including total metal HAP and volatile HAP) to be 4,800 tons/yr (4,300 Mg/yr).

The total nationwide baseline emissions of the six listed urban HAP was estimated to be 221 tons/yr. This total includes 213 tons/yr of the listed urban volatile HAP (benzene, methylene chloride), and 8 tons/yr of the listed urban metal HAP (cadmium, chromium, lead, nickel).

4. Paints and Allied Products Manufacturing HAP Emission Controls

Emissions reduction approaches were reviewed for the Paints and Allied Products Manufacturing volatile and metal HAP. The data indicate that add-on controls to reduce volatile HAP are not commonly used on process vessels in the paints and allied products manufacturing industry. An absence of prior Federal regulation or specific State or local rules, along with the generally high capital investment needed for add-on control devices, may contribute to these findings. Management practices currently used by the paints and allied products manufacturing industry to control volatile HAP emissions include coating substitution or reformulation from conventional solvent-based coatings, solvent substitution, use of process vessel covers, and other measures (*e.g.*, covered storage of cleaning rags). Water-based and higher solids content coatings have been developed to reduce volatile HAP emissions.

For the Paints and Allied Products Manufacturing metal HAP, our analysis showed that add-on controls for such emissions from process vessels are widespread throughout the industry. Particulate controls are used to capture metal HAP, which are included in particulate emissions. Typical particulate collection devices used by the industry include: baghouses, cyclones, and venturi scrubbers. Each of these mechanical collectors can achieve 98 percent reduction in particulate emissions. According to our data, 79 percent of facilities use particulate matter control technology. Along with dust collectors and other fabric filters, they are used to control airborne dust and particulate matter, primarily in the pigment loading area and during the mixing process. Generally, fabric filters and vent systems are used at facilities that use powdered or dry pigments in their coatings formulations to protect workers from exposure to hazardous materials in the pigments. Management practices used to abate particulate emissions of the Paints and Allied Products Manufacturing metal HAP include lower HAP content coatings, better materials management, use of sandmills instead of ballmills, and equipment modifications.

III. Summary of Proposed Standards

A. Do the Proposed Standards Apply to My Source?

The proposed subpart CCCCCCC standards would apply to new and existing affected sources of paints and allied products manufacturing. The affected source is the new or existing paints and allied products manufacturing operation that processes, uses, or generates any of the following urban HAP: benzene, methylene chloride, and compounds of cadmium, chromium, lead, and nickel. An existing source is a paints and allied products manufacturing operation that processes, uses, or generates any of the following urban HAP: compounds of cadmium, chromium, lead, and nickel and benzene and methylene chloride. A new source is a paints and allied products manufacturing operation that processes, uses, or generates any of the following urban HAP: compounds of cadmium, chromium, lead, and nickel and benzene and methylene chloride, and that commences construction or reconstruction of the affected source on or after the date that this proposed rule is published in the **Federal Register**.

We recognize that standards limited to the emission points of the listed urban HAP in this area source category would be sufficient to satisfy the requirement in section 112(c)(3) and (k)(3)(B) that EPA regulate sufficient source categories to account for 90 percent of the urban HAP emissions. However, section 112 of the CAA does not prohibit EPA from regulating other HAP emitted from area sources listed pursuant to section 112(c)(3). Section

112(d)(5) states that for area sources listed pursuant to section 112(c), the Administrator may, in lieu of section 112(d)(2) ''MACT'' standards, promulgate standards or requirements ''applicable to sources'' which provide for the use of GACT or management practices ''to reduce emissions of hazardous air pollutants.'' This provision does not limit EPA's authority to regulate only those urban HAP emissions for which the category is needed to achieve the 90 percent requirement in section 112(c)(3). Finally, we do not expect this requirement to cause significant additional cost to the regulated facilities, while it will have added environmental benefit.

B. When Must I Comply With the Proposed Standards?

All existing area source facilities subject to this proposed rule would be required to comply with the rule requirements no later than two years after the date of publication of the final rule in the **Federal Register**. New sources would be required to comply with the rule requirements upon date of publication of the final rule in the **Federal Register** or upon startup of the facility, whichever is later.

C. What Are the Proposed Standards?

We are proposing use of a particulate control device as GACT for metal HAP and management practices as GACT for volatile HAP emissions. The standards apply when any operation is being performed that processes, uses, or generates any HAP.

For metal HAP, this proposed rule would require owners or operators of all existing and new affected facilities to operate a particulate control device at all times during the manufacturing process that metal HAP emissions could be present, based on the Material Safety Data Sheet, and visible emissions from the particulate control device shall not exceed 5 percent opacity when averaged over a six-minute period. The Paints and Allied Products Manufacturing metal HAP emissions can be present during the preassembly/premix and pigment grinding and milling manufacturing processes.

New and existing affected sources will be required to comply with the following management practices for the control of all volatile HAP emissions during the preassembly/premix and grinding/milling manufacturing steps:

(1) Process and storage vessels, except for process vessels which are mixing vessels, must be equipped with covers or lids meeting the requirements of paragraphs (1)(i) through (iii) of this section. These vessels must be kept covered when not in use.

(i) The covers or lids can be of solid or flexible construction, provided they do not warp or move around during the manufacturing process.

(ii) The covers or lids must maintain contact along at least 90 percent of the vessel rim.

(iii) The covers or lids must be maintained in good condition.

(2) Mixing vessels must be equipped with covers that completely cover the vessel, except for safe clearance of the mixer shaft. The vessels must be kept covered during the manufacturing process, except for operator access for quality control testing of the product, and during the addition of pigments or other materials used to meet the final product specifications.

(3) Leaks and spills of materials containing volatile HAP must be immediately minimized and cleaned up.

(4) Waste solvent rags or other materials used for cleaning must be kept in closed storage vessels.

If the proposed standards are applicable to your paints and allied products manufacturing area source, then the proposed standards would apply to all organic HAP emissions from the manufacturing operation and all metal HAP emissions from the preassembly/premix and grinding/milling manufacturing steps at the area source, not just the Paints and Allied Products Manufacturing volatile and metal HAP. We are proposing that the standards for each type of emission point apply to all of the emission points of that type in an affected source, including those that do not emit Paints and Allied Products Manufacturing volatile or metal HAP. For example, an area source may have two process vessels, one containing tetrachloroethylene and the other containing methylene chloride, and, under the proposed rule, both would be part of the affected source and subject to the process vessel standards.

D. What Are the Compliance Requirements?

To demonstrate initial compliance, this proposed rule would require a new or existing source to certify that the required control technologies and management practices have been implemented and that all equipment associated with the processes will be properly operated and maintained. In addition, a visual emission test using EPA Method 9 will be required to be performed on the particulate control device on or before the compliance date and every six months thereafter.

To demonstrate on-going compliance, the proposed rule requires owners and operators of affected facilities to inspect the particulate control device monthly to ensure that the unit is operating as specified in the manufacturer's operating instructions, and to perform a visual emission test using EPA Method 9 on the particulate control device every 6 months.

E. What Are the Notification, Recordkeeping, and Reporting Requirements?

We are proposing notification, reporting, and recordkeeping requirements to ensure compliance with this proposed rule. The owner or operator of a new or existing affected source would be required to comply with certain requirements of the General Provisions (40 CFR part 63, subpart A), which are identified in Table 1 of this proposed rule. Each facility would be required to submit an Initial Notification and a Notification of Compliance Status according to the requirements in 40 CFR 63.9, General Provisions to part 63. These notifications are needed for EPA to determine applicability and initial compliance with specific rule requirements.

The Initial Notification would be required within 120 days of the effective date of the NESHAP. That report serves to alert appropriate agencies (State agencies and EPA Regional Offices) of the existence of each affected source and puts them on notice for future compliance actions. The notification of compliance status (NOCS) report, which is due 150 days after the compliance date of the NESHAP, is a more comprehensive report that describes the affected source, the associated emissions points, and the strategy being used to comply.

Under this proposed rule, each facility would prepare an annual compliance certification for the previous calendar year. The annual compliance certification must be completed no later than January 31 of each year and kept for five years. Facilities would be required to submit this annual compliance report if there is any deviation from the requirements or visual emissions testing during the year, and would include these deviation reports with their compliance report. We recognize that most of these facilities are small businesses; therefore we are requiring the submission of this annual compliance certification only if deviations occur during the year, so that there is not an undue economic burden on small businesses.

The facility must generate a monthly record for the implemented management practices and the particulate control device inspections (daily, weekly, monthly and Method 9, as applicable), listed in Sections C and D above, respectively. For demonstrating ongoing compliance, the proposed requirements include daily, weekly, and annual inspections, semi-annual visible emission testing, monthly checklists and annual certifications that the management practices are being followed and the particulate control device is being properly operated according to manufacturer instructions.

A responsible official at the facility must sign off by the 15th day of the following month that all requirements were met in the previous month. In implementing the requirements of this rule, sources can consider including procedures from their existing Standard Operating Procedures provided the procedures are relevant to implementing the required management practices.

Owners and operators would be required to maintain all records and annual certifications that demonstrate initial and ongoing compliance with this proposed rule, including records of all required notifications and reports, with supporting documentation; and records showing compliance with the control technology and management practices. The records must be kept readily accessible on site for two years, and may be kept at an offsite location for the remaining three years.

IV. Rationale for This Proposed Rule

A. How Did We Select the Source Category?

As described in section II.B, we listed the Paints and Allied Products Manufacturing source category under CAA section 112(c)(3) on November 22, 2002 (67 FR 70427). The inclusion of this source category on the area source category list was based on its contributions to the urban HAP emissions in the 1990 CAA section 112(k) inventory (benzene, methylene chloride, and compounds of cadmium, chromium, lead, and nickel).

For this source category, we collected information on the production operations, emission sources, and available controls for both area and major sources using reviews of published literature, information gathered during the major source NESHAP, and reviews of operating permits. We also held discussions with industry representatives and EPA experts. This research confirmed that the Paints and Allied Products Manufacturing source category continues to emit the Paints and Allied Products Manufacturing volatile and metal HAP. We found that current emissions of such HAP have been significantly reduced from the amounts estimated in the section 112(k) 1990 base year inventory due to product reformulation, OSHA controls, and a shift in end-use and consumer preferences.

Consistent with the record supporting the listing of the Paints and Allied Products Manufacturing source category, we are proposing that the category include those area source paints and allied product manufacturing facilities that process, use, or generate paints and allied product manufacturing HAP or materials containing these HAP. We are defining materials containing HAP in a manner consistent with the definitions used in other area source categories, *e.g.*, plating and polishing (73 FR 14126) and metal fabrication (73 FR 42977). Therefore, materials containing the Paints and Allied Products Manufacturing volatile and metal HAP, for the purposes of this category, means a material containing methylene chloride, benzene and compounds of cadmium, chromium, lead, and/or nickel in amounts greater than or equal to 0.1 percent by weight, as shown in formulation data provided by the manufacturer or supplier, such as in the Material Safety Data Sheet.

B. How Did We Select the Affected Source?

Affected source, as defined in 40 CFR 63.2, means the collection of equipment, activities, or both within a single contiguous area and under common control that is included in a section 112(c) source category or subcategory for which a section 112(d) standard is established. In selecting the affected source for regulation for the paints and allied products manufacturing area source category, we identified the sources of HAP emissions, which include HAP-emitting colorants and cleaning products. We also identified the quantity of HAP emissions from the individual or groups of emissions points. We are proposing to designate all of the blending and mixing processes in the manufacturing operation, within a single contiguous area and under common control, as the affected source. This proposed designation is consistent with the approach EPA employed for other paints and allied product manufacturing regulations, *i.e.*, the major source NESHAP and the New Source Performance Standards (NSPS). This proposed rule includes requirements for the control of primary and fugitive emissions from paints and allied products manufacturing operations.

C. How Are the Paints and Allied Products Manufacturing Metal and Volatile HAP Addressed by This Rule?

For this proposed rule, we have selected particulate matter (PM) as a surrogate for paints and allied products manufacturing metal HAP. When emitted, each of the metal HAP compounds behaves as PM. The control technologies used for the control of PM emissions achieve comparable levels of performance for these metal HAP emissions, *i.e.* when PM is captured, HAP metals are captured non-preferentially as part of the PM. We also determined that it was not practical to establish individual standards for each specific type of metal HAP that could be present in the emissions, *e.g.*, separate standards for compounds of cadmium, chromium, lead, and nickel, because the types and quantities of metal HAP can vary widely in the raw materials. Therefore, emission standards requiring control of PM would also achieve comparable control of metal HAP emissions.

D. How Did We Determine GACT?

As provided in CAA section 112(d)(5), we are proposing standards representing GACT for the Paints and Allied Products Manufacturing area source HAP emissions. As noted in section II of this preamble, the statute requires the Agency to establish standards for area sources listed pursuant to section 112(c). The statute does not set any condition precedent for issuing standards under section 112(d)(5), other than that the area source category or subcategory at issue must be one that EPA listed pursuant to section 112(c), which is the case here.

Most of the facilities in this source category have good operational controls in place for particulate matter. Furthermore, we believe that almost all of the area source paints and allied products manufacturing facilities are small businesses. Below, we explain in detail our proposed GACT determinations.

1. GACT for New and Existing Sources

We gathered background information on paints and allied products manufacturing facilities from a review of operating permits, the NEI database, and discussions with industry representatives to identify the emission controls and management practices that are currently used to control volatile and metal HAP emissions. We identified the control technologies and management practices that minimize

emissions from paints and allied products during the manufacturing process and that are commonly used in the industry.

a. Management Practices for Volatile HAP

The data indicate that add-on controls to reduce volatile HAP are used only sparingly on process vessels, as reported in both the State permits and the NEI database. This is probably due to the absence of Federal regulation of this industry and a lack of specific State or local rules. We believe that in the time since the data were collected for the 2002 NEI, most facilities have begun to produce low-VOC and low volatile HAP paints. This is a result of a shift in market demand due to the recent Federal paint and coating rules for other sources, such as the Boat Manufacturing, Fabric Surface Coating, Large Appliance Surface Coating, Metal Can Surface Coating, Metal Furniture Surface Coating, Plastic Parts, Aerospace, and Wood Furniture NESHAPs. Consumer demand for low-VOC paints may also be a factor.

A common management practice that is used to reduce volatile HAP emissions is through the use of process vessel covers. The Miscellaneous Organic NESHAP estimated that 95 percent of the major source facilities in the paints and allied products manufacturing NAICS code use process vessel covers. We believe that the same percentage of the area source facilities in the paints and allied products manufacturing category are currently using process vessel covers; this information agrees with estimates provided by industry. Therefore, we propose the use of process vessel covers as GACT for volatile HAP in the paints and allied products manufacturing industry according to the following requirements:

(1) During the preassembly/premix and grinding/milling manufacturing steps, process and storage vessels, except for process vessels which are mixing vessels, must be equipped with covers or lids meeting the requirements of paragraphs (A)(1)(i) through (iii) of this section. These vessels must be kept covered when not in use.

(i) The covers or lids can be of solid or flexible construction, provided they do not warp or move around during the manufacturing process.

(ii) The covers or lids must maintain contact along at least 90 percent of the vessel rim.

(iii) The covers or lids must be maintained in good condition.

(2) During the preassembly/premix and grinding/milling manufacturing steps, mixing vessels must be equipped with covers that completely cover the vessel, except for safe clearance of the mixer shaft. The vessels must be kept covered during the manufacturing process, except for operator access for quality control testing of the product, and during the addition of pigments or other materials used to meet the final product specifications.

(3) Leaks and spills of materials containing volatile HAP must be immediately minimized and cleaned up.

(4) Waste solvent rags or other materials used for cleaning must be kept in closed storage vessels.

The facility must use a monthly checklist as a record for the implemented work practices as listed above. A responsible official at the facility must sign off that all work practice requirements have been met. Existing written standard operating procedures may be used as the work practices plan if those procedures include the activities required by the final rule for a work practices plan.

b. Technology Control for Metal HAP

Paints and allied products manufacturing operating permits were obtained from State agency Web sites to determine the prevalence of add-on controls for metal HAP. The permit information, as well as discussions with the industry, show that add-on controls for metal HAP emissions from process vessels are commonly used throughout the industry. We believe that particulate control devices are primarily used because of concerns with workplace safety and, in some cases, to satisfy OSHA regulations. Information from the operating permits indicates that 23 of 29 (79 percent) area source facilities use add-on controls for particulate emissions. Based on this permit information, we determined that the use of controls to reduce particulate emissions during the preassembly/premix and grinding/milling steps of the paints and allied products manufacturing process commonplace.

To determine an applicable particulate matter standard, we reviewed the State operating permits for facilities in this source category. Most of the permits listed a concentration or mass emission particulate limit that requires testing using an appropriate particulate test method, in most cases EPA Method 5. We have concerns about the economic impact of particulate matter emissions testing for smaller facilities. The typical EPA Method 5 particulate matter emissions test on a stack costs between $3,000 and $10,000, which would be a significant economic burden for these area sources. Other area source rules and the States have used opacity as an effective surrogate for assessing mass emissions and to assure effective particulate emissions control. The use of visual emissions or opacity testing, as opposed to emission testing, is a lower cost method to determine compliance, and accommodates the different levels of activity that can occur from facility to facility, from product to product, and day to day within the same facility. This also reduces the cost impact on small businesses. There is a correlation between particulate matter concentration and opacity in the particulate matter control device outlet stream, and studies have shown that particulate concentrations are approximately zero at an opacity of zero.[3] For example, a test at a wet cement kiln with a fabric filter showed that when outlet concentrations were less than 0.009 grains/dry standard cubic feet (gr/dscf), opacity was less than 2 percent. This opacity is low enough that it would probably be observed as zero under most conditions. This in turn would result in a very low incidence of visible emissions during any observation period. A review of area source NESHAP opacity limits found several examples of particulate control devices being subject to zero or very low visible emission tests. Therefore, we believe that establishing a 5 percent opacity limit averaged over a six-minute period is an appropriate standard to effectively measure the effectiveness of a source's particulate emission control.

Section 112(d)(1) of the Clean Air Act gives the Administrator discretion to distinguish among classes, types, and sizes of sources in a category when establishing emissions standards under section 112(d). EPA is not proposing to subcategorize the paints and allied products manufacturing source category for purposes of the standards proposed in today's action based on our conclusion that there are no distinguishable differences in the grinding and mixing processes, which produce most of the HAP at paints and allied products manufacturing facilities. EPA solicits comments on its proposal to establish GACT standards for this source category without distinguishing among the sources based on class, type, or size. Commenters who believe EPA should establish subcategories for this source category should provide data to support their position.

Another consideration of GACT is the cost of compliance. To estimate the cost impacts, we used the permit

[3] Study of Benefits of Opacity Monitors Applied to Portland Cement Kilns. Prepared by Ronald Meyers, U.S. EPA, May 15, 1991, pp. 3–1–3–6.

information to estimate the percentage of the industry that already uses an add-on particulate control device. The most prevalent particulate control device used was a fabric or cartridge-type filter. Therefore, we used these technologies to estimate the annual cost of adding a particulate control device to a paints and allied products manufacturing facility, which was calculated to be $6,700. The total cost of requiring fabric filters on the estimated number of facilities that currently do not operate a particulate control device would be $3 million and would reduce metal HAP emission by 4.2 tons/yr (3.8 Mg/yr). In addition, this regulation as proposed would reduce particulate matter emissions by 6,300 tons/yr (5,700 Mg/yr), and fine particulate emissions ($PM_{2.5}$) by 3,000 tons per year (2,700 Mg/yr).

For metal HAP, this rule proposes that all owners or operators of existing facilities route emissions from their pigment and solids addition processes to a particulate control device and that visible emissions from the particulate control device shall not exceed 5 percent opacity when averaged over a six-minute period. The manufacturing processes include the addition of pigments and other solids to the process vessels, and grinding and milling of pigments and solids. After the addition processes, the pigment and associated metal HAP are in solution, and metal HAP emissions are minimal.

The manufacturer's specifications for maintenance and all other functioning parameters must be followed. The particulate control device must be designed and operated so that visible emissions from the unit shall not exceed 5 percent opacity when averaged over a six-minute period.

c. Reduction of All HAP Emissions in the Paints Manufacturing Process

The control technology and management practices proposed in this rule are equally effective at controlling emissions of HAP other than the Paints and Allied Products Manufacturing volatile and metal HAP. Applying the proposed standards to only the Paints and Allied Products Manufacturing HAP would require the facility to speciate HAP, as opposed to measuring total HAP when demonstrating compliance. This would require the facility to measure only the Paints and Allied Products Manufacturing metal HAP, which is mixed in with the other particulate matter emissions, and is a small percentage of the total. Applying the proposed standards to only the Paints and Allied Products Manufacturing urban HAP would require the facility to use different test methods to quantify these HAP emissions, which would increase compliance costs with no environmental benefits.

We are proposing to apply the standard to all HAP, as many of the area sources emit a significant amount of HAP in addition to the paints and allied products manufacturing urban HAP (for example, the listed HAP are only four percent of total HAP emissions at paints and allied products manufacturing facilities). Facilities that process, use, or generate HAP, but do not process, use, or generate any of the Paints and Allied Products volatile and metal HAP are not subject to the requirements of this NESHAP.

We have determined that sources would not have to install different controls or implement different management practices to implement the proposed standards for all HAP. Also, as part of the GACT analysis, we have found that the costs of applying the proposed standards to all HAP emissions from this source category are reasonable. For all of these reasons, we propose to apply these standards to all volatile HAP emissions in the manufacturing process and all metal HAP emissions from the preassembly/premix and grinding/milling steps of the manufacturing operations at paints and allied products manufacturing area sources, once the applicability criteria set forth in CCCCCCC are met. We request comment on the environmental, cost, and economic impacts of this approach.

E. How Did We Select the Compliance Requirements?

We are proposing notification, reporting, and recordkeeping requirements to ensure compliance with this proposed rule. We are requiring an Initial Notification and Notification of Compliance Status because these requirements are consistent with § 63.9 of the General Provisions of this part.

For demonstrating ongoing compliance, the proposed requirements include daily, weekly, and annual inspections, semi-annual visible emission testing, monthly checklists and annual certifications that the management practices are being followed and the particulate control device is being properly operated according to manufacturer instructions. Based on our data, most facilities currently operate at the GACT level of control and almost all of the affected facilities are small businesses. Therefore, we are proposing a requirement that would ensure compliance without placing an undue burden on the affected facilities. We believe the proposed requirements for monthly checklists, particulate control device inspections, visible emissions testing, and annual certifications achieve that objective, and can be adequately done by facility employees.

Under this proposed rule, each facility would prepare an annual compliance certification and keep it on site in a readily-accessible location. Facilities would be required to submit this annual compliance certification as a report only if there are any deviations from the work practice requirements during the year, and would include a description of the deviation with their compliance certification report. Deviations may include, but are not limited to, exceeding the opacity standard or failure to meet any requirements or management practices established in this proposed rule. We recognize that most of these facilities are small businesses; therefore we are requiring the submission of this annual compliance certification report only if deviations occur during the year so that there is not an undue economic burden.

We are proposing that existing affected sources must achieve compliance two years after the final rule is published in the **Federal Register**. Because some facilities may be subject to EPA rules for the first time and because most of these facilities are small businesses, with 50 percent of them having less than 10 employees, we believe the 2-year period would provide ample time for facilities to identify any changes that are needed to comply with the control technology, management practices, and recordkeeping and reporting requirements and institute those changes. All new affected sources would be required to comply upon the date of publication of the final rule, or startup, whichever is later.

F. How Did We Decide To Propose To Exempt This Area Source Category From Title V Permitting Requirements?

We are proposing to exempt affected facilities in the Paint and Allied Products Manufacturing area source category from title V permitting requirements for the reasons described below.

Section 502(a) of the CAA provides that the Administrator may exempt an area source category from title V if he determines that compliance with title V requirements is ''impracticable, infeasible, or unnecessarily burdensome'' on an area source category. See CAA section 502(a). In December 2005, in a national rulemaking, EPA interpreted the term ''unnecessarily burdensome'' in CAA

section 502 and developed a four-factor balancing test for determining whether title V is unnecessarily burdensome for a particular area source category, such that an exemption from title V is appropriate. See 70 FR 75320, December 19, 2005 (''Exemption Rule'').

The four factors that EPA identified in the Exemption Rule for determining whether title V is ''unnecessarily burdensome'' on a particular area source category include: (1) Whether title V would result in significant improvements to the compliance requirements, including monitoring, recordkeeping, and reporting that are proposed for an area source category (70 FR 75323); (2) whether title V permitting would impose significant burdens on the area source category and whether the burdens would be aggravated by any difficulty the sources may have in obtaining assistance from permitting agencies (70 FR 75324); (3) whether the costs of title V permitting for the area source category would be justified, taking into consideration any potential gains in compliance likely to occur for such sources (70 FR 75325); and (4) whether there are implementation and enforcement programs in place that are sufficient to assure compliance with the proposed NESHAP for the area source category, without relying on title V permits (70 FR 75326).

In discussing these factors in the Exemption Rule, we further explained that we considered on ''a case-by-case basis the extent to which one or more of the four factors supported title V exemptions for a given source category, and then we assessed whether considered together those factors demonstrated that compliance with title V requirements would be 'unnecessarily burdensome' on the category, consistent with section 502(a) of the Act.'' See 70 FR 75323. Thus, in the Exemption Rule, we explained that not all of the four factors must weigh in favor of exemption for EPA to determine that title V is unnecessarily burdensome for a particular area source category. Instead, the factors are to be considered in combination, and EPA determines whether the factors, taken together, support an exemption from title V for a particular source category.

In the Exemption Rule, in addition to determining whether compliance with title V requirements would be unnecessarily burdensome on an area source category, we considered, consistent with the guidance provided by the legislative history of section 502(a), whether exempting the area source category would adversely affect public health, welfare or the environment. See 70 FR 15254–15255, March 25, 2005. We propose that requiring compliance with title V for this area source category would be unnecessarily burdensome. We further propose that the exemption from title V would not adversely affect public health, welfare or the environment. Our rationale for this decision follows.

In considering the proposed exemption from title V requirements for sources in the category affected by this proposed rule, we first compared the title V monitoring, recordkeeping, and reporting requirements (factor one) to the requirements in this proposed NESHAP for the Paints and Allied Products Manufacturing area source category. Title V requires periodic testing or monitoring to ensure compliance. One way that title V may improve compliance is by requiring monitoring (including recordkeeping designed to serve as monitoring) to assure compliance with the emissions limitations and control technology requirements imposed in the standard. This proposed standard would provide for monitoring in the form of visual emissions and opacity testing that would assure compliance with the requirements of this proposed rule. This proposed NESHAP would also require the preparation of an annual compliance certification report and submission of this report if there are any deviations during the year, which will identify for the agency implementing this rule those facilities with compliance issues, in the same way as a title V permit. Records would be required to ensure that the compliance requirements are followed and any needed corrective actions are taken, including such records as results of the visual emissions and opacity tests and the resulting corrective actions such as replacing a torn fabric filter bag. Therefore, this proposed rule contains monitoring sufficient to assure compliance with the requirements of this proposed rule.

In addition, title V imposes a number of recordkeeping and reporting requirements that may be important for assuring compliance. These include requirements for a monitoring report at least every 6 months, prompt reports of deviations, and an annual compliance certification. See 40 CFR 70.6(a)(3) and 40 CFR 71.6(a)(3), 40 CFR 70.6(c)(1) and 40 CFR 71.6(c)(1), and 40 CFR 70.6(c)(5) and 40 CFR 71.6(c)(5). This proposed NESHAP would also require an annual compliance certification report and submission of this report if there are any deviations during the year, which should call attention to those facilities in need of supervision to the State agency in the same way as a title V permit. Records would be required to ensure that the control technology requirements and management practices are followed, including records about particulate matter control maintenance and Material Safety Data Sheets for all HAP and materials containing HAP as processed, used, or generated in the manufacturing process.

We also considered the extent to which title V could potentially enhance compliance for area sources covered by this NESHAP through recordkeeping or reporting requirements. For any affected paints and allied products manufacturing area source facility, the proposed NESHAP would require an initial notification and a compliance status report, which would include certifications by responsible officials that the facilities are in compliance and will continue to comply with the NESHAP. In addition, the affected facilities must maintain records showing compliance. The required records are similar to the information that must be provided in the deviation reports required under 40 CFR 70.6(a)(3) and 40 CFR 71.6(a)(3).

We believe the monitoring, recordkeeping, and reporting requirements in this proposed rule are sufficient to assure compliance with the requirements of this proposed rule. Therefore, we conclude that title V would not result in significant improvements to the compliance requirements we are proposing for this area source category.

Under the second factor, we determined whether title V permitting would impose a significant burden on the area sources in the category and whether that burden would be aggravated by any difficulty the source may have in obtaining assistance from the permitting agency. Subjecting any source to title V permitting imposes certain burdens and costs that do not exist outside of the title V program. EPA estimated that the average cost of obtaining and complying with a title V permit was $65,700 per source for a 5-year permit period, including fees. See Information Collection Request for Part 70 Operating Permit Regulations, June 2007, EPA ICR Number 1587.07.

EPA does not have specific estimates for the burdens and costs of permitting Paints and Allied Products Manufacturing area sources; however, there are certain activities associated with the part 70 and 71 rules. These activities are mandatory and impose burdens on any facility subject to title V. They include reading and understanding permit program guidance and regulations; obtaining and understanding permit application forms;

answering follow-up questions from permitting authorities after the application is submitted; reviewing and understanding the permit; collecting records; preparing monitoring reports on a 6-month or more frequent basis; preparing and submitting prompt deviation reports, as defined by the State, which may include a combination of written, verbal, and other communications methods; collecting information, preparing, and submitting the annual compliance certification; preparing applications for permit revisions every 5 years; and, as needed, preparing and submitting applications for permit revisions. In addition, although not required by the permit rules, many sources obtain the contractual services of consultants to help them understand and meet the permitting program's requirements. The ICR for part 70 provides additional information on the overall burdens and costs, as well as the relative burdens of each activity described here. Also, for a more comprehensive list of requirements imposed on part 70 sources (hence, burden on sources), see the requirements of 40 CFR 70.3, 70.5, 70.6, and 70.7.

We found that almost all of the approximately 2,190 paints and allied products manufacturing facilities that would be affected by this proposed rule are small entities; over half have nine or fewer employees. As discussed previously, title V permitting would impose significant costs on these area sources, and, accordingly, we conclude that title V is a significant burden for sources in this category. More than 90 percent of the facilities that would be subject to this proposed rule are small entities with limited resources, and under title V they would be subject to numerous mandatory activities with which they would have difficulty complying, whether they were issued a standard or a general permit. Furthermore, given the number of sources in the category and the relatively small size of many of those sources, it would likely be difficult for them to obtain sufficient assistance from the permitting authority. Thus, we conclude that factor two supports title V exemption for paints and allied products manufacturing facilities.

The third factor, which is closely related to the second factor, is whether the costs of title V permitting for these area sources would be justified, taking into consideration any potential gains in compliance likely to occur for such sources. We explained above under the second factor that the economic and non-economic costs of compliance with title V would impose a significant burden on many paint and allied products manufacturing facilities. We also conclude in considering the first factor that, while title V might impose additional requirements, the monitoring, recordkeeping, and reporting requirements in the proposed NESHAP are adequate to assure compliance with the control technology and management practices proposed in the NESHAP. In addition, in our consideration of the fourth factor as discussed below, we find that there are adequate implementation and enforcement programs in place to assure compliance with the NESHAP. Because the costs, both economic and non-economic, of compliance with title V are high, and the potential for gains in compliance is low, title V permitting is not justified for this source category. Accordingly, the third factor supports title V exemptions for paints and allied products manufacturing area sources.

The fourth factor we considered in determining whether title V permitting for this area source category is unnecessarily burdensome is whether there are implementation and enforcement programs in place that are sufficient to assure compliance with this NESHAP without relying on title V permits. EPA has implemented regulations that provide States the opportunity to take delegation of area source NESHAP, and we believe that State-delegated programs are sufficient to assure compliance with this NESHAP. See 40 CFR part 63, subpart E; States must have adequate programs to enforce the section 112 regulations and provide assurances that they will enforce all NESHAP before EPA will delegate the program. Furthermore, EPA retains authority to enforce this NESHAP at any time under CAA sections 112, 113 and 114. In addition, small business assistance programs required by CAA section 507 may be used to assist area sources that have been exempted from title V permitting. Also, States and EPA often conduct voluntary compliance assistance, outreach, and education programs (compliance assistance programs), which are not required by statute. These additional programs would supplement and enhance the success of compliance with this area source NESHAP. We believe that the statutory requirements for implementation and enforcement of this NESHAP by the delegated States and EPA and the additional assistance programs described above together are sufficient to assure compliance with this area source NESHAP without relying on title V permitting.

In applying the fourth factor in the Exemption Rule, where EPA had deferred action on the title V exemption for several years, we had enforcement data demonstrating that States were not only enforcing the provisions of the area source NESHAP that we exempted, but that the States were also providing compliance assistance to assure that the area sources were in the best position to comply with the NESHAP. See 70 FR 75325–75326. Although we do not have similar data in this case because the paints and allied products manufacturing area source NESHAP has yet to be promulgated and enforced, we have no reason to think that States will be less diligent in enforcing this NESHAP. In fact, States must have adequate programs to enforce the section 112 regulations and provide assurances that they will enforce all NESHAP before EPA will delegate the program. See 40 CFR part 63, General Provisions, subpart E.

In light of all of the information presented here, we conclude that there are implementation and enforcement programs in place that are sufficient to assure compliance with the paint and allied products manufacturing NESHAP without relying on title V permitting. Balancing the four factors for this area source category strongly supports the proposed finding that title V is unnecessarily burdensome. While title V might add additional compliance requirements if imposed, we believe that there would not be significant improvements to compliance with the NESHAP, because the requirements in this proposed rule are sufficient to assure compliance with the standards and management practices imposed on this area source category. Thus, we propose that title V permitting is ''unnecessarily burdensome'' for the paints and allied products manufacturing area source category.

In addition to evaluating whether compliance with title V requirements is ''unnecessarily burdensome,'' EPA also considered, consistent with guidance provided by the legislative history of section 502(a), whether exempting this area source category from title V requirements would adversely affect public health, welfare, or the environment. Exemption of the paints and allied products manufacturing category from the title V requirements would not have an adverse affect on public health, welfare, or the environment because the level of control would remain the same if a permit were required. The title V permit program does not impose new substantive air quality control requirements on sources, but instead requires that certain procedural measures be followed, particularly with

respect to determining compliance with applicable requirements. As stated in our consideration of factor one for this category, title V would not lead to significant improvements in the compliance requirements applicable to existing or new area sources.

One of the primary purposes of the title V permitting program is to clarify, in a single document, the various and sometimes complex regulations that apply to sources in order to improve understanding of these requirements and to help sources to achieve compliance with the requirements. In this case, however, we do not believe that a title V permit is necessary to understand the requirements that would be applicable to these area sources because the requirements of the rule are not difficult to implement. The vast majority of NSPS and NESHAP standards apply only to major sources, with only a small number of such standards regulating any activities at area sources. Because there are so few standards that regulate areas sources, the likelihood that multiple NSPS or NESHAP would apply to these area sources is low. We also have no reason to think that new sources would be substantially different from the existing sources. In addition, we explained in the Exemption Rule that requiring permits could, at least in the first few years of implementation, potentially adversely affect public health, welfare, or the environment by shifting State agency resources away from ensuring compliance for major sources with existing permits to issuing new permits for these area sources, potentially reducing overall air program effectiveness. We therefore conclude that title V exemptions for the paints and allied products manufacturing area sources will not adversely affect public health, welfare, or the environment for all of the reasons explained above.

For the reasons stated here, we are proposing to exempt the Paints and Allied Products Manufacturing area source category from title V permitting requirements.

V. Summary of Impacts of the Proposed Standards

A. What Are the Air Impacts?

Area sources in the paints and allied products manufacturing category have made significant emission reductions since 1990 through product reformulation, process and cleaning changes, installation of control equipment, and as a result of OSHA regulations. Affected sources appear to be well-controlled, and our proposed GACT determination reflects such controls. For the sources that would be required to install emission controls to meet the emission limits specified in this proposed rule, we estimated the 2002 nationwide emissions of all of the paints and allied products manufacturing HAP (including total metal HAP and volatile HAP) to be 4,800 tons/yr (4,300 Mg/yr).

Based on our data, we estimate that 21 percent of the facilities, or 460 area sources, do not have particulate controls installed. Through compliance with this rule as proposed, these facilities would reduce total PM emissions by 6,300 tons/yr (5,700 Mg/yr), total metal HAP emissions by 4.2 tons/yr (3.8 Mg/yr), and listed urban metal HAP (cadmium, chromium, lead, nickel) emissions by 0.13 tons/yr (0.11 Mg/yr).

We estimate that requiring the use of covers on process vessels as proposed in this rule would reduce nationwide volatile HAP emissions of the paints and allied products manufacturing area source category by about 169 tons/yr (153 Mg/yr), and listed urban volatile HAP (benzene, methylene chloride) emissions by 5.1 tons/yr (4.6 Mg/yr). These emission reduction estimates are based on the assumption that 5 percent of the existing paints and allied products manufacturing facilities would add covers to their process vessels, and that the covers will achieve a 40 percent reduction in volatile HAP emissions.

We do not anticipate any indirect or secondary air impacts of this rule as proposed. The use of process vessel covers does not require any energy to be employed at existing paints and allied products manufacturing facilities.

B. What Are the Cost Impacts?

In this analysis, two types of control options were investigated. The first type looked at potential control options for controlling volatile HAP. The second type looked at potential control options for controlling metal HAP. Costs for these options were developed for two model plants that are typical of the paints and allied products manufacturing industry.

Based on the cost effectiveness calculations, process covers are the most cost effective option of reducing volatile HAP emissions from process vessels. The cost effectiveness of applying covers to the process vessels was calculated to be $34 per ton of volatile HAP reduced for a small model plant and $28 per ton of volatile HAP reduced for a large model plant. These costs were conservatively estimated assuming that 15 percent of the process vessels would be required to be covered. When all VOC emissions are taken into account, the total cost was considerably lower at $3 per ton of VOC removed for both small and large model plants.

Per industry feedback, we know that 2-percent of the product will evaporate during the manufacturing process if the vessels are not covered. We estimated that it would cost $38,000 in total capital costs and $5,500 annually for the 110 facilities that will be required to install process vessel covers to meet the requirements of this rule. However the rule would also provide a cost savings to these same facilities, because they will have more coatings product at the end of the manufacturing process.

We determined that a particulate control device is GACT for reducing metal HAP emissions. The cost effectiveness was calculated to be $1.6 million per ton of metal HAP removed for a small model plant, and $330,000 per ton of metal HAP removed for the large model plant. For particulate emissions, the cost effectiveness for a small model plant was calculated to be $1,200 per ton of PM removed, and $200 per ton of PM removed for the large model plant. For fine particulate emissions, the cost effectiveness was determined to be $2,500 per ton of $PM_{2.5}$ removed for small model plants, and $500 per ton of $PM_{2.5}$ removed for large model plants. Even though the metal HAP cost effectiveness values are high, we believe that the PM and $PM_{2.5}$ cost effectiveness values are reasonable. Additionally, the reduction of particulate matter would improve workplace safety and reduce the cross contamination of coating products.

The estimated total capital costs of this proposed rule for existing sources are $8.1 million for installing particulate control devices. The estimated annualized cost of the proposed rule for existing sources would be $3.1 million per year. The annualized costs account for the annualized capital costs of purchasing disposable process vessel covers for the existing facilities that would be required to install new emission controls, and the annualized cost of installing a particulate control device to facilities that currently do not have particulate control. The other affected facilities would incur costs only for submitting the notifications and for annual control device inspections because those facilities already meet the control, monitoring, and recordkeeping requirements that would be required under the proposed rule. The cost associated with recordkeeping and the one-time reporting requirements is estimated to be $147 per facility.

C. What Are the Economic Impacts?

Both the magnitude of costs needed to comply with the rule and the

distribution of these costs among affected facilities can have a role in determining how the market will change in response to a rule. Total annualized costs for the rule are estimated to be $3.1 million. Four hundred and sixty facilities are projected to incur costs because of the proposed rule (79% of the 2,190 facilities are projected to incur no costs because they already meet the control requirements).

The cost to sales ratio is estimated to assess the impact on the affected facilities. Two sizes were used for the facilities and high, average, and low prices were used for the product. Cost to sales ratios range from 0.19 percent for the small model plant with the lowest ($3.50 per gallon price) to 0.001 percent for the large model plant with the highest price ($19.91 per gallon). Thus all of the 2,190 facilities are projected to have a cost to sales ratio below 1.0 percent. The average cost to sales ratio is expected to be around 0.13 percent. Thus this regulation is not expected to have significant impact on a substantial number of small entities. The costs are so small that the impact is not expected to be significant. These small costs are not expected to result in a significant market impact whether they are passed on to the purchaser or absorbed.

In terms of economic impacts, this proposed standard is estimated to impact a total of 2,190 area source facilities, which are all small entities. Our analysis indicates that this proposed rule would not impose a significant adverse impact on any facilities, large or small.

D. What are the non-air health, environmental, and energy impacts?

To comply with the rule as proposed, we expect that affected facilities would control emissions by installing, operating, and maintaining a particulate control device, and using process vessel covers; none of these controls generate wastewater. Therefore, we project that this rule as proposed would have no impact on water emissions.

There were few data available on the amount of solid and hazardous waste disposed of from the paints and allied products manufacturing industry. The main source of solid waste comes from the collected particulate from the particulate control device. Other sources of solid waste include rags used for cleaning and coatings that do not meet customer specifications. If facilities switch to producing low HAP coatings or use low HAP cleaning materials, the amount of hazardous waste would greatly decrease. The actual amount depends on several variables, including the type of manufactured coatings, the cleaners used, and number of facilities switching to low HAP or wetted pigments. It was assumed that there would be no significant waste disposal impacts because many of the facilities are producing low HAP coatings. The few facilities required to install and operate monitoring devices or systems would collect small amounts of metal HAP. Therefore, minimal additional solid waste would be generated as a result of the metal HAP emissions collected. If a facility switches from solvent-based coating to a water-based coating there should be a reduction in the amount of solid waste produced due to the use of nonvolatile materials.

Energy impacts consist of the fuel (natural gas) needed to operate the combustion-based control device (thermal oxidizer) that is used to comply with the regulatory alternatives. It also includes the amount of electricity to operate the control devices. The estimated electricity and fuel impacts are already included in the annual cost of the control technologies. No additional energy is required for the process vessel covers or other management practices.

No detrimental secondary impacts are expected to occur because 79 percent of all existing facilities are currently achieving the GACT level of control. There are no additional energy impacts associated with operation of the control devices or monitoring systems.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action'' because it may raise novel legal or policy issues. Accordingly, EPA submitted this action to the OMB for review under Executive Order 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to OMB under the Paperwork Reduction Act, 44 U.S.C. 501 *et seq.* The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR number 2348.01.

The recordkeeping and reporting requirements in this proposed rule are based on the requirements in EPA's NESHAP General Provisions (40 CFR part 63, subpart A). The recordkeeping and reporting requirements in the General Provisions are mandatory pursuant to section 114 of the CAA (42 U.S.C. 7414). All information other than emissions data submitted to EPA pursuant to the information collection requirements for which a claim of confidentiality is made is safeguarded according to CAA section 114(c) and the Agency's implementing regulations at 40 CFR part 2, subpart B.

This proposed NESHAP would require Paints and Allied Product Manufacturing area sources to submit an Initial Notification and a Notification of Compliance Status according to the requirements in 40 CFR 63.9 of the General Provisions (subpart A). The annual burden for this information collection averaged over the first three years of this ICR is estimated to be a total of 2,887 labor hours per year at a cost of $322,009 or approximately $147 per facility.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

To comment on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, EPA has established a public docket for this rule, which includes this ICR, under Docket ID number [EPA–HQ–OAR–2008–0053]. Submit any comments related to the ICR to EPA and OMB. See **ADDRESSES** section at the beginning of this notice for where to submit comments to EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Office for EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after June 1, 2009, a comment to OMB is best assured of having its full effect if OMB receives it by July 1, 2009. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule would not have a significant economic impact on a substantial number of small entities.

Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

For the purposes of assessing the impacts of this proposed rule on small entities, small entity is defined as: (1) A small business that meets the Small Business Administration size standards for small businesses found 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 is estimated to impact a total of almost 2,200 area source paints and allied products manufacturing facilities; over ninety percent of these facilities are estimated to be small entities. We have determined that small entity compliance costs, as assessed by the facilities' cost-to-sales ratio, are expected to be approximately 0.13 percent for the estimated 460 facilities that would not initially be in compliance. Although this proposed rule contains requirements for new area sources, we are not aware of any new area sources being constructed now or planned in the next 3 years, and consequently, we did not estimate any impacts for new sources.

Although this proposed rule would not have a significant economic impact on a substantial number of small entities, EPA nonetheless has tried to reduce the impact of this rule on small entities. The standards represent practices and controls that are common throughout the paints and allied products industry. The standards also require only the essential recordkeeping and reporting needed to demonstrate and verify compliance. These standards were developed in consultation with small business representatives on the State and national level and the trade associations that represent small businesses.

We continue to be interested in the potential impacts of this proposed action on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This proposed rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or to the private sector in any one year. This proposed rule is not expected to impact State, local, or tribal governments. The nationwide annualized cost of this proposed rule for affected industrial sources is $3.1 million/yr. Thus, this proposed rule would not be subject to the requirements of sections 202 and 205 of the Unfunded Mandates Reform Act (UMRA).

This proposed rule would also not be subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. The proposed rule would not apply to such governments and would impose no obligations upon them.

E. Executive Order 13132: Federalism

Executive Order 13132 (64 FR 43255, August 10, 1999) requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This proposed rule does not impose any requirements on State and local governments. Thus, Executive Order 13132 does not apply to this proposed rule.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed rule from State and local officials.

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

Executive Order 13175 (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by Tribal officials in the development of regulatory policies that have Tribal implications.'' This proposed rule does not have Tribal implications, as specified in Executive Order 13175. This proposed rule imposes no requirements on Tribal governments. Thus, Executive Order 13175 does not apply to this proposed rule. EPA specifically solicits additional comment on this proposed rule from Tribal officials.

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

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This action is not subject to EO 13045 because it is based solely on technology performance.

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

This proposed rule is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, we have concluded that this rule is not likely to have any adverse energy effects. Existing energy requirements for this industry would not be significantly impacted by the additional controls or other equipment that may be required by this rule.

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113 (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This rulemaking involves technical standards. Therefore, the Agency conducted a search to identify potentially applicable voluntary consensus standards. However, we

identified no such standards, and none were brought to our attention in comments. Therefore, EPA has decided to use EPA Method 9.

EPA welcomes comments on this aspect of the proposed rulemaking and, specifically, invites the public to identify potentially-applicable voluntary consensus standards and to explain why such standards should be used in this regulation.

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

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

EPA has determined that this proposed rule would not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. This proposed rule would establish national standards for the Paints and Allied Products area source category. The nationwide standards would reduce HAP emissions and thus decrease the amount of emissions to which all affected populations are exposed.

List of Subjects in 40 CFR Part 63

Environmental protection, Air pollution control, Hazardous substances, Reporting and recordkeeping requirements.

Dated: May 22, 2009.

Lisa P. Jackson,

Administrator.

For the reasons stated in the preamble, title 40, chapter I, part 63 of the Code of Federal Regulations is proposed to be amended as follows:

PART 63—[AMENDED]

1. The authority citation for part 63 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart A—[AMENDED]

2. Part 63 is amended by adding subpart CCCCCCC to read as follows:

Subpart CCCCCCC—National Emission Standards for Hazardous Air Pollutants for Area Sources: Paints and Allied Products Manufacturing

Applicability and Compliance Dates

Sec.
63.11599 Am I subject to this subpart?
63.11600 What are my compliance dates?

Standards, Monitoring, and Compliance Requirements

63.11601 What are the standards for new and existing paints and allied products manufacturing facilities?
63.11602 What are the performance test and compliance requirements for new and existing sources?
63.11603 What are the notification, reporting, and recordkeeping requirements?
63.11604 [RESERVED]

Other Requirements and Information

63.11605 What General Provisions apply to this subpart?
63.11606 Who implements and enforces this subpart?
63.11607 What definitions apply to this subpart?
63.11608—63.11638 [RESERVED]

Tables to Subpart CCCCCCC of Part 63

Table 1 to Subpart CCCCCCC of Part 63—Applicability of General Provisions to Subpart CCCCCCC

Subpart CCCCCCC—National Emission Standards for Hazardous Air Pollutants for Area Sources: Paints and Allied Products Manufacturing

Applicability and Compliance Dates

§ 63.11599 Am I subject to this subpart?

(a) You are subject to this subpart if you own or operate a facility that performs paints and allied products manufacturing that is an area source of hazardous air pollutant (HAP) emissions and processes, uses, or generates materials containing one or more of the following HAP: benzene, methylene chloride, and compounds of cadmium, chromium, lead, and nickel.

(b) The affected source consists of all paints and allied products manufacturing processes at the facility.

(1) An affected source is existing if you commenced construction or reconstruction of the affected source on or before June 1, 2009.

(2) An affected source is new if you commenced construction or reconstruction of the affected source after June 1, 2009.

(c) You are exempt from the obligation to obtain a permit under 40 CFR part 70 or 40 CFR part 71, provided you are not otherwise required by law to obtain a permit under 40 CFR 70.3(a) or 40 CFR 71.3(a). Notwithstanding the previous sentence, you must continue to comply with the provisions of this subpart.

§ 63.11600 What are my compliance dates?

(a) If you own or operate an existing affected source, you must achieve compliance with applicable provisions in this subpart by 2 years after the date of publication of the final rule in the **Federal Register**.

(b) If you start up a new affected source on or before the date of publication of the final rule in the **Federal Register**, you must achieve compliance with the applicable provisions of this subpart by no later than the date of publication of the final rule in the **Federal Register**.

(c) If you start up a new affected source after the date of publication of the final rule in the **Federal Register**, you must achieve compliance with the applicable provisions of this subpart upon startup of your affected source.

Standards, Monitoring, and Compliance Requirements

§ 63.11601 What are the standards for new and existing paints and allied products manufacturing facilities?

(a) For each new and affected source, you must capture particulate emissions and route them to a particulate control device meeting the requirements of this section during the addition of pigments and other solids and during the grinding and milling of pigments and solids.

(1) For new and existing affected sources, visible 5 percent opacity when averaged over a six-minute period.

(2) [RESERVED]

(b) For each new and existing affected source, you must comply with the requirements in paragraphs (b)(1) through (4) of this section.

(1) Process and storage vessels, except for process vessels which are mixing vessels, must be equipped with covers or lids meeting the requirements of paragraphs (b)(1)(i) through (iii) of this section. These vessels must be kept covered when not in use.

(i) The covers or lids can be of solid or flexible construction, provided they do not warp or move around during the manufacturing process.

(ii) The covers or lids must maintain contact along at least 90 percent of the vessel rim.

(iii) The covers or lids must be maintained in good condition.

(2) Mixing vessels must be equipped with covers that completely cover the vessel, except for safe clearance of the

mixer shaft. The vessels must be kept covered during the manufacturing process, except for operator access for quality control testing of the product, and during the addition of pigments or other materials used to meet the final product specifications.

(3) Leaks and spills of materials containing volatile HAP must be immediately minimized and cleaned up.

(4) Waste solvent rags or other materials used for cleaning must be kept in closed storage vessels.

§ 63.11602 What are the performance test and compliance requirements for new and existing sources?

(a) For each new and existing affected source, you must demonstrate initial compliance by conducting the inspection and monitoring activities in paragraph (a)(1) of this section and ongoing compliance by conducting the inspection and testing activities in paragraph (a)(2) of this section.

(1) Initial particulate control device inspections and tests. You must conduct an initial inspection of each particulate control device according to the requirements in paragraphs (a)(1)(i) through (iii) of this section and perform a visible emissions test according to the requirements of paragraph (a)(1)(iv) of this section. You must record the results of each inspection and test according to paragraph (b) of this section and perform corrective action where necessary. You must conduct each inspection no later than 60 days after your applicable compliance date for each control device which has been operated within 60 days following the compliance date. For a control device which has not been installed or operated within 60 days following the compliance date, you must conduct an initial inspection prior to startup of the control device.

(i) For each wet particulate control system, you must verify the presence of water flow to the control equipment. You must also visually inspect the system ductwork and control equipment for leaks and inspect the interior of the control equipment (if applicable) for structural integrity and the condition of the control system.

(ii) For each dry particulate control system, you must visually inspect the system ductwork and dry particulate control unit for leaks. You must also inspect the inside of each dry particulate control unit for structural integrity and condition.

(iii) An initial inspection of the internal components of a wet or dry particulate control system is not required if there is a record that an inspection has been performed within the past 12 months and any maintenance actions have been resolved.

(iv) For each particulate control device, you must conduct an initial 30 minute visible emission test using Method 9 (40 CFR part 60, appendix A–4). If the results of the visible emissions test indicate an opacity greater than the applicable limitation in § 63.11601(a), you must take corrective action according to the equipment manufacturer's specifications or instructions and retest within 15 days.

(2) Ongoing particulate control device inspections and tests. Following the initial inspections, you must perform periodic inspections of each PM control device according to the requirements in paragraphs (a)(2)(i) or (ii) of this section. You must record the results of each inspection according to paragraph (b) of this section and perform corrective action where necessary. You must also conduct tests according to the requirements in paragraph (a)(2)(iii) of this section and record the results according to paragraph (b) of this section.

(i) You must inspect and maintain each wet control system according to the requirements in paragraphs (a)(2)(i)(A) through (C) of this section.

(A) You must conduct a daily inspection to verify the presence of water flow to the wet particulate control system.

(B) You must conduct weekly visual inspections of the system ductwork and wet particulate control equipment for leaks.

(C) You must conduct inspections of the interior of the wet control system (if applicable) to determine the structural integrity and condition of the control equipment every 12 months.

(ii) You must inspect and maintain each dry particulate control unit according to the requirements in paragraphs (a)(2)(ii)(A) and (B) of this section.

(A) You must conduct weekly visual inspections of the system ductwork for leaks.

(B) You must conduct inspections of the interior of the dry particulate control unit for structural integrity and to determine the condition of the fabric filter (if applicable) every 12 months.

(iii) For each particulate control device, you must conduct a 30 minute visible emission test every 6 months using Method 9 (40 CFR part 60, appendix A–4). If the results of the visible emissions test indicate an opacity greater than the applicable limitation in § 63.11601(a), you must take corrective action according to the equipment manufacturer's specifications or instructions and retest within 15 days.

(b) You must record the information specified in paragraphs (b)(1) through (6) of this section for each inspection and testing activity.

(1) The date, place, and time;

(2) Person conducting the activity;

(3) Technique or method used;

(4) Operating conditions during the activity;

(5) Results; and

(6) Description of correction actions taken.

§ 63.11603 What are the notification, reporting, and recordkeeping requirements?

(a) Notifications. You must submit the notifications identified in paragraphs (a)(1) and (2) of this section.

(1) Initial Notification of Applicability. If you own or operate an existing affected source, you must submit an initial notification of applicability required by § 63.9(b)(2) no later than 120 days after the date of publication of the final rule in the **Federal Register**. If you own or operate a new affected source, you must submit an initial notification of applicability required by § 63.9(b)(2) no later than 120 days after initial start-up of the operations or 120 days after the date of publication in the **Federal Register**, whichever is later. The notification of applicability must include the information specified in paragraphs (a)(1)(i) through (iii) of this section.

(i) The name and address of the owner or operator;

(ii) The address (*i.e.*, physical location) of the affected source; and

(iii) An identification of the relevant standard, or other requirement, that is the basis of the notification and the source's compliance date.

(2) Notification of Compliance Status. If you own or operate an existing affected source, you must submit a Notification of Compliance Status in accordance with § 63.9(h) of the General Provisions within 2 years and 120 days after the date of publication of the final rule in the **Federal Register**. If you are the owner of a new affected source, you must submit a Notification of Compliance Status within 120 days after initial start-up, or by 120 days after the date of publication of the final rule in the **Federal Register**, whichever is later. This Notification of Compliance Status must include the information specified in paragraphs (a)(2)(i) and (ii) of this section.

(i) Your company's name and address;

(ii) A statement by a responsible official with that official's name, title, phone number, e-mail address and

signature, certifying the truth, accuracy, and completeness of the notification, a description of the method of compliance (*i.e.*, compliance with management practices, installation of a wet or dry scrubber) and a statement of whether the source has complied with all the relevant standards and other requirements of this subpart.

(b) Annual Compliance Certification Report. You must prepare an annual compliance certification report according to the requirements in paragraphs (b)(1) through (b)(3) of this section. This report does not need to be submitted unless a deviation from the requirements of this subpart has occurred. When a deviation from the requirements of this subpart has occurred, the annual compliance certification report must be submitted along with the deviation report.

(1) Dates. You must prepare and, if applicable, submit each annual compliance certification report according to the dates specified in paragraphs (b)(1)(i) through (iii) of this section.

(i) The first annual compliance report must cover the first annual reporting period which begins the day of the compliance date and ends on December 31.

(ii) Each subsequent annual compliance report must cover the annual reporting period from January 1 through December 31.

(iii) Each annual compliance report must be prepared no later than January 31 and kept in a readily-accessible location for inspector review. If a deviation has occurred during the year, each annual compliance report must be submitted along with the deviation report, and postmarked no later than February 15.

(2) General Requirements. The annual compliance certification report must contain the information specified in paragraphs (b)(2)(i) through (iii) of this section.

(i) Company name and address;

(ii) A statement in accordance with § 63.9(h) of the General Provisions that is signed by a responsible official with that official's name, title, phone number, e-mail address and signature, certifying the truth, accuracy, and completeness of the notification and a statement of whether the source has complied with all the relevant standards and other requirements of this subpart; and

(iii) Date of report and beginning and ending dates of the reporting period. The reporting period is the 12-month period beginning on January 1 and ending on December 31.

(3) Deviation Report. If a deviation has occurred during the reporting period, you must include a description of deviations from the applicable requirements, the time periods during which the deviations occurred, and the corrective actions taken. This deviation report must be submitted along with your annual compliance report, as required by paragraph (b)(1)(iii) of this section.

(c) Records. You must maintain the records specified in paragraphs (c)(1) through (4) of this section in accordance with paragraphs (c)(5) through (7) of this section, for five years after the date of each recorded action.

(1) As required in § 63.10(b)(2)(xiv), you must keep a copy of each notification that you submitted in accordance with paragraph (a) of this section, and all documentation supporting any Notification of Applicability and Notification of Compliance Status that you submitted.

(2) You must keep a copy of each Annual Compliance Certification Report prepared in accordance with paragraph (b) of this section.

(3) You must keep a copy of the particulate control device manufacturer specifications and recommendations on site at all times.

(4) You must keep records of all inspections and tests as required by § 63.11602(b).

(5) Your records must be in a form suitable and readily available for expeditious review, according to § 63.10(b)(1).

(6) As specified in § 63.10(b)(1), you must keep each record for 5 years following the date of each recorded action.

(7) You must keep each record onsite for at least 2 years after the date of each recorded action according to § 63.10(b)(1). You may keep the records offsite for the remaining 3 years.

§ 63.11604 [RESERVED]

Other Requirements and Information

§ 63.11605 What General Provisions apply to this subpart?

Table 1 of this subpart shows which parts of the General Provisions in §§ 63.1 through 63.16 apply to you.

§ 63.11606 Who implements and enforces this subpart?

(a) This subpart can be implemented and enforced by the U.S. EPA or a delegated authority such as a State, local, or tribal agency. If the U.S. EPA Administrator has delegated authority to a State, local, or tribal agency pursuant to 40 CFR part 63, subpart E, then that Agency has the authority to implement and enforce this subpart. You should contact your U.S. EPA Regional Office to find out if this subpart is delegated to your State, local, or tribal agency.

(b) In delegating implementation and enforcement authority of this subpart to a State, local, or tribal agency under 40 CFR part 63, subpart E, the authorities contained in paragraphs (b)(1) through (4) of this section are retained by the Administrator of the U.S. EPA and are not transferred to the State, local, or tribal agency.

(1) Approval of an alternative nonopacity emissions standard under § 63.6(g).

(2) Approval of a major change to test methods under § 63.7(e)(2)(ii) and (f). A ''major change to test method'' is defined in § 63.90

(3) Approval of a major change to monitoring under § 63.8(f). A ''major change to monitoring'' is defined in § 63.90.

(4) Approval of a major change to recordkeeping/reporting under § 63.10(f). A ''major change to recordkeeping/reporting'' is defined in § 63.90. As required in § 63.11432, you must comply with the requirements of the NESHAP General Provisions (40 CFR part 63, subpart A) as shown in the following table.

§ 63.11607 What definitions apply to this subpart?

Terms used in this subpart are defined in the Clean Air Act, § 63.2, and in this section as follows:

Deviation means any instance in which an affected source subject to this subpart, or an owner or operator of such a source:

(1) Fails to meet any requirement or management practices established by this subpart;

(2) Fails to meet any term or condition that is adopted to implement a requirement in this subpart and that is included in the operating permit for any affected source required to obtain such a permit; or

(3) Fails to meet any emissions limitation or management practice in this subpart during startup, shutdown, or malfunction, regardless of whether or not such failure is permitted by this subpart.

Fabric filter means an air collection and control system that that utilizes a bag filter to reduce the emissions of metal HAP and other particulate matter.

Material containing HAP means a material containing benzene, methylene chloride, or compounds of cadmium, chromium, lead, and/or nickel, in amounts greater than or equal to 0.1 percent by weight, as shown in formulation data provided by the

manufacturer or supplier, such as the Material Safety Data Sheet for the material.

Paints and allied product means a material such as paint, ink, or adhesive that is intended to be applied to a substrate and consists of a mixture of resins, pigments, solvents, and/or other additives.

Paints and allied product manufacturing means the production of paints, inks, adhesives, stains, varnishes, shellacs, putties, sealers, caulks, and other coatings, the intended use of which is to leave a dried film of solid material on a substrate. Paints and allied product manufacturing does not include the manufacture of:

(1) Products that do not leave a dried film of solid material on the substrate, such as thinners, paint removers, brush cleaners, and mold release agents;

(2) Electroplated and electroless metal films; and

(3) Raw materials, such as resins, pigments, and solvents used in the production of paints and coatings.

Paints and allied product manufacturing process means all the equipment which collectively function to produce a paints or allied product. A process may consist of one or more unit operations. For the purposes of this subpart, the manufacturing process includes any, all, or a combination of, weighing, blending, mixing, grinding, tinting, dilution or other formulation. Cleaning operations are considered part of the manufacturing process. Quality assurance and quality control laboratories are not considered part of a paints and allied product manufacturing process.

Particulate control device means the air pollution control equipment used to remove PM from the effluent gas stream generated by a reaction vessel.

Process vessel means any stationary or portable tank or other vessel of any capacity and in which mixing, blending, diluting, dissolving, temporary holding, and other processing steps occur in the manufacturing of a coating.

Storage vessel means a tank, container or other vessel that is used to store organic liquids that contain one or more of the listed HAP as raw material feedstocks or products. It also includes objects, such as rags or other containers which are stored in the vessel. The following are not considered storage vessels for the purposes of this subpart:

(1) Vessels permanently attached to motor vehicles such as trucks, railcars, barges, or ships;

(2) Pressure vessels designed to operate in excess of 204.9 kilopascals and without emissions to the atmosphere;

(3) Vessels storing organic liquids that contain HAP only as impurities;

(4) Wastewater storage tanks; and

(5) Process vessels.

§ 63.11608–63.11638 [RESERVED]

Table 1 to Subpart CCCCCCC of Part 63—Applicability of General Provisions to Paints and Allied Products Manufacturing Area Sources

As required in § 63.11599, you must meet each requirement in the following table that applies to you.

Part 63 General Provisions to be incorporated for Paints and Allied Products Manufacturing Area Sources:

Citation	Subject	Applies to subpart CCCCCCC
63.1 [1]	Applicability	Yes.
63.2	Definitions	Yes.
63.3	Units and abbreviations	Yes.
63.4	Prohibited activities	Yes.
63.5	Preconstruction review and notification requirements	No.
63.6(a),(b)(1)–(b)(5),(c), (e)(1),(f)(2), (f)(3),(g),(i), (j).	Compliance with standards and maintenance requirements	Yes.
63.7	Performance testing requirements	No.
63.8	Monitoring requirements	No.
63.9(a)–(d),(i), and (j)	Notification requirements	Yes.
63.10(a),(b)(1),(d)(1)	Recordkeeping and reporting	Yes.
63.11	Control device and work practice requirements	No.
63.12	State authority and delegations	Yes.
63.13	Addresses of State air pollution control agencies and EPA regional offices	Yes.
63.14	Incororation by reference	Yes.
63.15	Availability of information and confidentiality	Yes.
63.16	Performance track provisions	Yes.

[1] § 63.11599(c), ''Am I subject to this subpart?'' exempts affected sources from the obligation to obtain title V operating permits.

[FR Doc. E9–12563 Filed 5–29–09; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 090130104–9910–01]

RIN 0648–AX60

International Fisheries; Western and Central Pacific Fisheries for Highly Migratory Species; Fishing Restrictions and Observer Requirements in Purse Seine Fisheries for 2009–2011 and Turtle Mitigation Requirements in Purse Seine Fisheries

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes regulations under authority of the Western and Central Pacific Fisheries Convention Implementation Act (Act) to implement certain decisions of the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC). Those decisions require that the members of the WCPFC, including the United States, take certain measures with respect to their purse seine fisheries in the area of competence of the WCPFC, which includes most of the western and central Pacific Ocean (WCPO). This action is necessary for the United States to satisfy its international obligations under the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Convention), to which it is a Contracting Party.

DATES: Comments must be submitted in writing by June 22, 2009.

ADDRESSES: You may submit comments, on this proposed rule, identified by 0648–AX60, and the regulatory impact review (RIR) prepared for the proposed rule by any of the following methods:

- Electronic submissions: Submit all electronic public comments via the Federal e-Rulemaking portal, at *http://www.regulations.gov*
- Mail: William L. Robinson, Regional Administrator, NMFS Pacific Islands Regional Office (PIRO), 1601 Kapiolani Blvd., Suite 1110, Honolulu, HI 96814. Include the identifier ''0648–AX60'' in the comments.

Instructions: All comments received are part of the public record and generally will be posted to *http://www.regulations.gov* without change. All personal identifying information (for example, name and address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information. NMFS will accept anonymous comments (if submitting comments via the Federal e-Rulemaking portal, enter ''N/A'' in the relevant required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

An initial regulatory flexibility analysis (IRFA) prepared under authority of the Regulatory Flexibility Act (RFA) is included in the Classification section of the **SUPPLEMENTARY INFORMATION** section of this proposed rule.

Copies of the RIR and copies of the environmental assessment (EA) prepared under authority of the National Environmental Policy Act are available at *http://www.fpir.noaa.gov/IFD/ifd_documents_data.html* or may be obtained from William L. Robinson, Regional Administrator, NMFS PIRO (see **ADDRESSES**).

FOR FURTHER INFORMATION CONTACT: Tom Graham, NMFS PIRO, 808–944–2219.

SUPPLEMENTARY INFORMATION:

Electronic Access

This proposed rule is also accessible at *http://www.gpoaccess.gov/fr*.

Background on the Convention and the WCPFC

The Convention entered into force in June 2004. The full text of the Convention can be obtained from the WCPFC website at: *http://www.wcpfc.int/convention.htm*. The Convention Area comprises the majority of the western and central Pacific Ocean (WCPO). In the North Pacific Ocean the eastern boundary of the Convention Area is at 150 W. longitude. A map showing the boundaries of the Convention Area can be found on the WCPFC website at: *http://www.wcpfc.int/pdf/Map.pdf*. The Convention focuses on the conservation and management of highly migratory species (HMS) and the management of fisheries for HMS, and also has provisions related to non-target, associated, and dependent species in such fisheries.

The WCPFC, established under the Convention, is comprised of the Members, including Contracting Parties to the Convention and fishing entities that have agreed to be bound by the regime established by the Convention. Other entities that participate in the WCPFC include Participating Territories and Cooperating Non-Members. Participating Territories participate with the authorization of the Contracting Parties with responsibility for the conduct of their foreign affairs. Cooperating Non-Members are identified by the WCPFC on a yearly basis. In accepting Cooperating Non-Member status, such States agree to implement the decisions of the WCPFC in the same manner as Members.

The current Members of the WCPFC are Australia, Canada, China, Chinese Taipei (Taiwan), Cook Islands, European Community, Federated States of Micronesia, Fiji, France, Japan, Kiribati, Korea, Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Philippines, Samoa, Solomon Islands, Tonga, Tuvalu, United States, and Vanuatu. The current Participating Territories are French Polynesia, New Caledonia and Wallis and Futuna (affiliated with France); Tokelau (affiliated with New Zealand); and the Territory of American Samoa, the Commonwealth of the Northern Mariana Islands and the Territory of Guam (affiliated with the United States of America). The Cooperating Non-Members for 2009 are Belize, El Salvador, Indonesia, Mexico, and Senegal.

International Obligations of the United States Under the Convention

The United States ratified the Convention and, in doing so, became a Contracting Party to the Convention and a Member of the WCPFC in 2007. From 2004 until that time, the United States participated in the WCPFC as a Cooperating Non-Member. As a Contracting Party to the Convention and a Member of the WCPFC, the United States is obligated to implement the decisions of the WCPFC in a legally binding manner. The Act, enacted in 2007, authorizes the Secretary of Commerce, in consultation with the Secretary of State and the Secretary of the Department in which the United States Coast Guard (USCG) is operating (currently the Department of Homeland Security), to promulgate such regulations as may be necessary to carry out the obligations of the United States under the Convention, including the decisions of the WCPFC. The authority to promulgate regulations has been delegated to NMFS.

WCPFC Decisions Regarding Bigeye Tuna, Yellowfin Tuna, and Sea Turtles in Purse Seine Fisheries

At its Fifth Regular Session, in December 2008, the WCPFC adopted

Conservation and Management Measure (CMM) 2008–01, ''Conservation and Management Measure for Bigeye and Yellowfin Tuna in the Western and Central Pacific Ocean.'' The CMM, available with other decisions of the WCPFC at *http://www.wcpfc.int/decisions.htm*, places certain obligations on the WCPFC Members, Participating Territories, and Cooperating Non-members (collectively, CCMs). The CMM is based in part on the findings by the WCPFC that the stock of bigeye tuna (*Thunnus obesus*) in the WCPO is experiencing a fishing mortality rate greater than the rate associated with maximum sustainable yield and that the stock of yellowfin tuna (*Thunnus albacares*) in the WCPO is experiencing a fishing mortality rate close to the rate associated with maximum sustainable yield. The Convention calls for the WCPFC to adopt measures designed to maintain or restore stocks at levels capable of producing maximum sustainable yield, as qualified by relevant environmental and economic factors. Accordingly, the objectives of CMM 2008–01 include achieving, over the 2009–2011 period, a reduction in fishing mortality on bigeye tuna in the WCPO of at least 30 percent and no increase in fishing mortality on yellowfin tuna in the WCPO, relative to a specified historical baseline.

CMM 2008–01 includes provisions that: (1) for 2009–2011, establish purse seine fishing effort limits on the high seas in the Convention Area and require CCMs to implement compatible measures in their respective areas of national jurisdiction; (2) in the period 2009–2011, prohibit deploying and servicing fish aggregating devices (FADs) or associated electronic devices, and prohibit purse seine fishing on schools in association with FADs on the high seas in the Convention Area during specified periods each year (August 1 through September 30 in 2009 and July 1 through September 30 in 2010 and 2011; hereafter, ''FAD prohibition periods'') and require CCMs to implement compatible measures in their respective areas of jurisdiction; (3) in 2010 and 2011, close two specific high seas areas within the Convention Area to purse seine fishing, unless the WCPFC decides otherwise at its regular annual session in December 2009; (4) in 2010 and 2011, require that all bigeye tuna, yellowfin tuna, and skipjack tuna be retained on board purse seine vessels in the Convention Area up to the point of first landing or transshipment, with certain exceptions and contingent on the WCPFC Regional Observer Programme (WCPFC ROP) being able to provide 100 percent observer coverage; and (5) in 2009, require that WCPFC ROP or national observers be on board all purse seine vessels fishing in the Convention Area during the FAD prohibition period, and in 2010 and 2011, require that WCPFC ROP observers be on board all purse seine vessels fishing in the Convention Area.

The WCPFC also adopted CMM 2008–03, ''Conservation and Management of Sea Turtles.'' The CMM prescribes specific measures to be used to handle, resuscitate, and release sea turtles captured in HMS fisheries, and for purse seine vessels, requires that certain procedures be used to deal with sea turtles encircled and entangled in purse seines or FADs, including carrying and using dip nets.

Proposed Action

The proposed rule would include the following elements:

(1) Fishing Effort Limits

The proposed rule would establish a limit, from 2009 through 2011, on the number of fishing days per year that may be spent by the U.S. purse seine fleet on the high seas and in areas under U.S. jurisdiction (including the U.S. exclusive economic zone, or EEZ) within the Convention Area. Paragraph 10 of CMM 2008–01 gives the United States the choice of using the 2004 level or the average 2001–2004 level as the baseline for the limits on the high seas. Paragraphs 12 and 18 of CMM 2008–01 require the United States to take measures to reduce purse seine fishing mortality on bigeye tuna in the U.S. EEZ, in a way that is compatible with certain measures that the Parties to the Nauru Agreement (PNA) are to implement within their respective areas of national jurisdiction (as prescribed in Paragraphs 11 and 17 of the CMM). The pertinent measures to be implemented by the PNA are described in the following paragraph.

The PNA have established, and under CMM 2008–01 are required to implement, the Vessel Day Scheme (VDS), which limits the number of days fished by purse seine vessels in the EEZs of the PNA to no greater than 2004 levels and provides for the allocation of the limit among the PNA. The VDS defines a fishing day as any calendar day, or part of calendar day, during which a purse seine vessel is outside of a port, except when the vessel is not undertaking fishing activities (i.e., when all fishing gear is stowed). For the purpose of this proposed rule, ''fishing day'' would be defined in similar manner. The PNA VDS specifies rolling three-year management periods. The rolling three-year management periods function by having the limit on the number of fishing days set for each of the years in the initial three-year management period. In theory, before the end of the first year, the fishing limit is then to be set for the fourth year, and before the end of the second year, the fishing limit is set for the fifth year, and so on, so that the maximum allowable fishing days are always established for three years in advance. Transfer of a certain number of fishing days between management years by individual PNA is allowed (up to 100 percent of the days from another year in the same three-year management period; up to 30 percent of the days from the final year of the preceding management period). Allocated fishing days may also be transferred, within specified limits, among PNA.

Paragraph 7 of CMM 2008–01 provides that determinations of effort levels for the purpose of implementing the CMM shall include fishing rights under existing regional fisheries arrangements or agreements that were registered with the WCPFC by December 2006 in accordance with CMM 2005–01, ''Conservation and Management Measure for Bigeye and Yellowfin Tuna in the Western and Central Pacific Ocean,'' provided that the number of licenses authorized under such arrangements does not increase. The South Pacific Tuna Treaty (SPTT) is such an agreement, and the United States has registered the SPTT with the WCPFC in accordance with CMM 2005–01. The number of licenses allowed for the U.S. purse seine fleet under the SPTT is 45, five of which are reserved for vessels engaged in joint ventures with Pacific Island Parties to the SPTT, and these numbers have not increased. The licensing requirements of the SPTT do not apply to the U.S. EEZ, but the area of application of the SPTT does include portions of the U.S. EEZ. Since the inception of the SPTT, all U.S. purse seine vessels that have been used to fish in the U.S. EEZ in the WCPO have been licensed under the SPTT. In other words, the set of vessels used to fish in the U.S. EEZ in the WCPO has been identical to the set of vessels used to fish on the high seas and in foreign EEZs in the WCPO under the terms of the SPTT, and consequently, all such vessels have been effectively managed as part of the SPTT-governed U.S. purse seine fleet. For these reasons, the number of non-joint venture licenses authorized under the SPTT, 40, is used as the basis for the proposed fishing effort limits for both the high seas and

the U.S. EEZ within the Convention Area.

This baseline of 40 vessels is used to derive the proposed fishing effort limits, expressed in terms of fishing days, by determining the average number of fishing days spent per vessel in the appropriate baseline period, and multiplying that number by 40 vessels. The numbers of days fished during the baseline periods were determined from the best available historical operational data from the U.S. purse seine fleet, as reported on regional purse seine logsheets. For both the high seas and the U.S. EEZ within the Convention Area, average fishing effort per vessel was greater in 2004 than during 2001–2004, so the 2004 levels are used for both areas. For the high seas in the Convention Area, the estimated average number of fishing days spent per vessel during 2004 (when 21 vessels were active in that area) was 50.76. For the U.S. EEZ in the Convention Area, the estimated average number of fishing days spent per vessel during 2004 (when 20 vessels were active in that area) was 13.95. Therefore, the proposed limit would be 2,030 fishing days per year (but not necessarily applied on an annual basis) for the high seas and 558 fishing days per year for the U.S. EEZ, or a total of 2,588 fishing days per year. If any vessels enter the fishery with any of the five licenses reserved for vessels engaged in joint ventures with the Pacific Island Parties to the SPTT, the limit may be adjusted accordingly.

To accommodate the need for operational flexibility in the event of inter-annual variability in the spatial and temporal distribution of optimal fishing grounds and times, the proposed rule would implement the fishing effort limit on three different time scales: First, there would be a limit of 7,764 fishing days (3 times the base of 2,588 fishing days) for the entire three-year 2009–2011 period. Second, there would be a limit of 6,470 fishing days (2.5 times the base of 2,588 fishing days) for each of the two-year periods 2009–2010 and 2010–2011. Third, there would be a limit of 3,882 fishing days (1.5 times the base of 2,588 fishing days) for each of the one-year periods 2009, 2010, and 2011. This approach would allow greater fishing effort in any given year than would be allowed under a strict annual limit, yet ensure that total fishing effort over the three-year period does not exceed the WCPFC-mandated limit for that period.

Once NMFS determines during any of those time periods that, based on information collected in vessel logbooks and other sources, the limit is expected to be reached by a specific future date, NMFS would issue a notice announcing the closure of the purse seine fishery in the Convention Area on the high seas and in areas of U.S. jurisdiction starting on that specific future date and will remain closed until the end of the applicable time period. Upon closure of the fishery, it would be prohibited to use a U.S. purse seine vessel to fish in the Convention Area on the high seas or in areas under U.S. jurisdiction through the end of the applicable time period. NMFS would publish the notice at least seven calendar days before the effective date of the closure to provide fishermen advance notice of the closure.

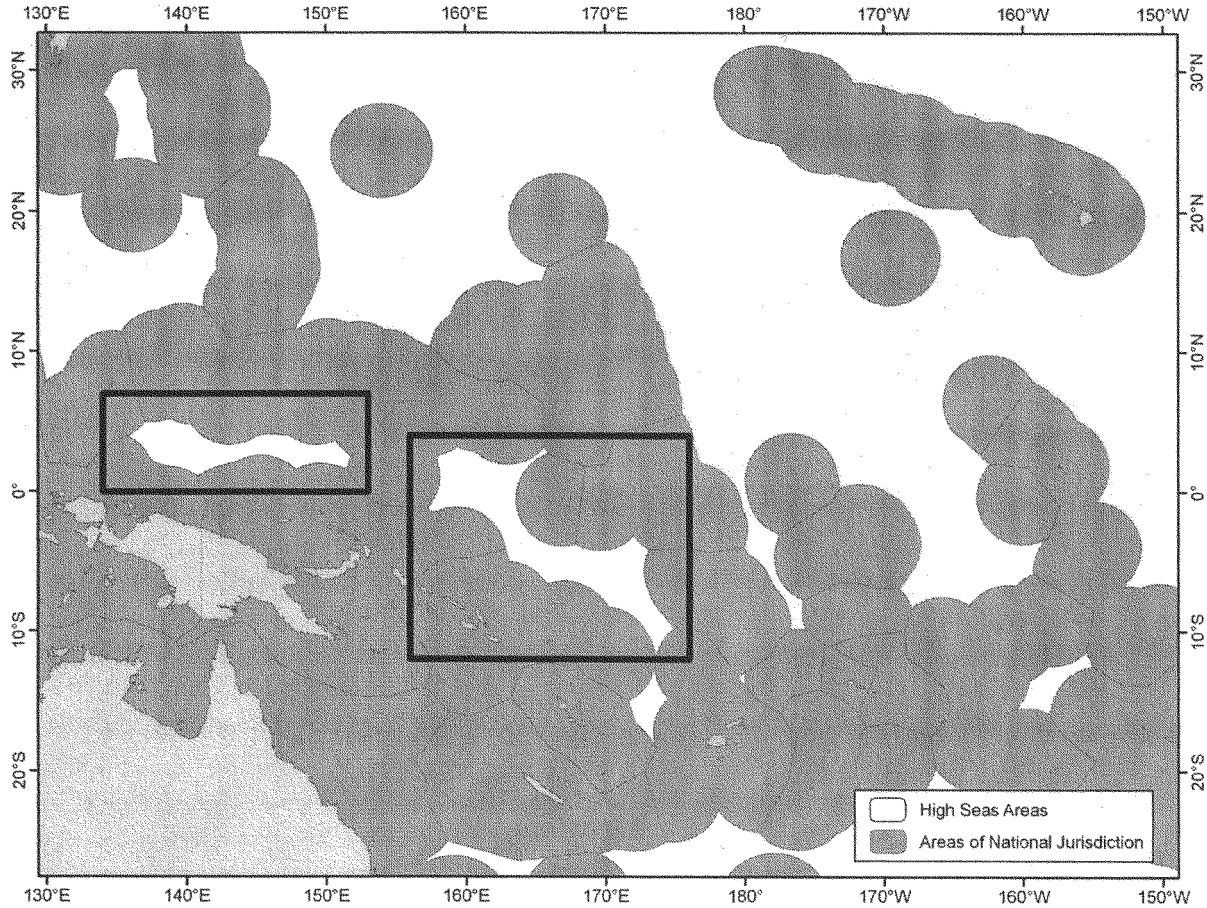
(2) FAD Prohibition Periods

The proposed rule would establish periods in each of the years 2009, 2010, and 2011 during which it would be prohibited to set purse seines around FADs, deploy FADs, and service FADs or their associated electronic equipment in the convention area. Also, to implement the provision in CMM 2008–01 to prohibit fishing ''on schools in association with FADs'', it would be prohibited during these periods to set a purse seine within one nautical mile of a FAD or to set a purse seine in a manner intended to capture fish that have aggregated in association with a FAD, such as by setting the purse seine in an area from which a FAD has been moved or removed within the previous eight hours or setting the purse seine in an area into which fish were drawn by a vessel from the vicinity of a FAD. FADs would be defined to include both artificial and natural floating objects that are capable of aggregating fish. In 2009, the FAD prohibition period would be August 1 through September 30. In 2010 and 2011, it would be July 1 through September 30.

(3) High Seas Area Closures

The proposed rule would establish two areas closed to fishing by U.S. purse seine vessels, effective January 1, 2010 through December 31, 2011. The areas would be the two areas of high seas within the Convention Area that are depicted on the map in Figure 1. In CMM 2008–01, the WCPFC has reserved the option of reversing its adoption of the closed areas at its regular annual session in December 2009. If such a decision occurs, NMFS will take appropriate action to rescind any closed areas that are established by regulation.

Figure 1. Proposed high seas closed areas. Areas of high seas are indicated in white; areas of claimed national jurisdiction, including territorial seas, archipelagic waters, and exclusive economic zones, are indicated in dark shading. Areas that would be closed to purse seine fishing are all high seas areas within the two rectangles bounded by the bold black lines. The coordinates of the two rectangles are set forth in the proposed regulation. This map displays indicative maritime boundaries only.



(4) Catch Retention

The proposed rule would prohibit discarding bigeye tuna, yellowfin tuna, or skipjack tuna (Katsuwonus pelamis) from a U.S. purse seine vessel at sea within the Convention Area. Exceptions would be provided for fish that are unfit for human consumption for reasons other than their size, for the last set of the trip if there is insufficient well space to accommodate the entire catch, and for cases of serious malfunction of equipment that necessitate that fish be discarded. This element of the proposed rule would become effective no earlier than January 1, 2010, and only upon NMFS' determination that an adequate number of WCPFC-approved observers are available for the purse seine vessels of all WCPFC CCMs as necessary to ensure compliance by such vessels with the catch retention requirement. Once it makes that determination, NMFS would announce the effective date of the requirement in a notice published in the **Federal Register**. The requirement would then remain in effect through December 31, 2011.

(5) Observer Coverage

The proposed rule would require that U.S. purse seine vessels carry observers deployed as part of the WCPFC ROP or deployed by NMFS on all trips in the Convention Area from August 1 through September 30, 2009 (the FAD prohibition period). It would also require, effective January 1, 2010, through December 31, 2011, that U.S. purse seine vessels carry WCPFC-approved observers on all trips in the Convention Area. These observer requirements would not apply to trips that take place exclusively within areas under the jurisdiction of the United States, including the U.S. EEZ and U.S. territorial sea, or any other single nation. They also would not apply in cases where NMFS has determined that an observer is not available.

(6) Sea Turtle Interaction Mitigation

The proposed rule would require that owners and operators of U.S. purse seine vessels operating in the Convention Area carry specific equipment and use specific measures to disentangle, handle, and release sea turtles that are encountered in fishing gear, including purse seines and FADs. The required equipment would be a dip net with specified minimum design standards. The required measures would include: immediately releasing sea turtles that are observed enclosed in purse seines; disentangling sea turtles that are observed entangled in purse seines or FADs; stopping net roll until a sea turtle is disentangled from a purse seine; resuscitating sea turtles that appear dead or comatose; and releasing sea turtles back to the ocean in a specified manner. Unlike all the other elements of the proposed rule, this element would be effective indefinitely.

Classification

The NMFS Assistant Administrator has determined that this proposed rule is consistent with the Western and Central Pacific Fisheries Convention Implementation Act and other applicable laws, subject to further consideration after public comment.

NMFS prepared an EA that analyzes the proposed rule's expected impacts on the human environment. In the EA, NMFS compared the effects of the proposed rule and four alternatives to the proposed rule, including the No-Action or baseline alternative and three action alternatives. Although the alternatives would likely result in slightly different environmental impacts, all alternatives would have only minor impacts on bigeye tuna and other living marine resources in the WCPO. Overall, the expected impacts

on bigeye tuna and other living marine resources from the proposed rule or any of the action alternatives are expected to be similar and generally beneficial. The action alternatives focus on analyzing a range of alternatives for the manner in which the limit on the number of fishing days would be implemented. NMFS initially considered two alternatives to the FAD prohibition period element of the proposed rule that were eliminated from detailed consideration. For the other elements of the proposed rule, NMFS was not able to identify any alternatives that were reasonable and feasible. The proposed rule is neither the most restrictive nor the least restrictive manner in which to implement the limit on the number of fishing days. Rather, the proposed rule seeks to establish a balance between the needs of fishery participants and the effects on the human environment.

The effects on the human environment from the proposed rule are expected to be minor for the following reasons. First, the duration of the proposed rule (with the exception of the sea turtle mitigation requirements) would be limited to three years, after which, unless similar or more restrictive future actions are taken, conditions would likely rebound to conditions similar to those under the No-Action or baseline alternative. Second, the proposed rule would have relatively minor effects on the conduct or catches of the U.S. purse seine fleet, and consequently only minor effects on the total fishing mortality rates of the stocks captured by the fleet, including bigeye tuna and yellowfin tuna in the WCPO. However, other present and reasonably foreseeable future actions for the conservation and management of HMS could cause similar beneficial effects, so overall, the cumulative impacts on the affected environment could be greater than if the proposed rule were implemented in isolation. Specifically, implementation by the United States of the provisions of CMM 2008–01 applicable to longline vessels (which NMFS intends to do via one or more separate rulemakings) and implementation by other CCMs of the provisions of the CMMs would enhance the beneficial impacts to bigeye tuna, yellowfin tuna, and other living marine resources. If the WCPFC adopts (and CCMs implement) similar or more restrictive measures after the three-year duration of CMM 2008–01, the beneficial impacts would be further enhanced (e.g., there could be a greater likelihood of attaining the objectives of CMM 2008–01).

The economic impacts of the proposed rule are addressed in the EA only insofar as they are related to impacts to the biophysical environment. They are addressed more fully in the RIR and IRFA. A copy of the EA is available from NMFS (see **ADDRESSES**).

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

An IRFA was prepared, as required by section 603 of the RFA. The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section in the preamble and in the **SUMMARY** section of the preamble. The analysis follows:

There would be no disproportionate economic impacts between small and large vessels resulting from this rule. Furthermore, there would be no disproportionate economic impacts, among all vessels, based on vessel size, gear, or homeport.

Estimated Number of Small Entities Affected

The proposed rule would apply to owners and operators of U.S. purse seine vessels used for fishing in the Convention Area. The number of affected vessels is the number licensed under the SPTT. The current number of licensed vessels is 39, but the number could soon reach the maximum number of licenses available under the Treaty (excluding joint-venture licenses), which is 40. Based on limited financial information available on the purse seine fleet, NMFS believes that as many as 10 of the affected vessels are owned by small entities (i.e., they are business entities with gross annual receipts of no more than $4.0 million).

Recordkeeping, Reporting, and Other Compliance Requirements

The proposed rule would not establish any new reporting or recordkeeping requirements (within the meaning of the Paperwork Reduction Act). Affected vessel owners and operators would have to comply with all the proposed requirements, as described at the beginning of this section in the preamble. Fulfillment of these requirements is not expected to require any professional skills that the affected vessel owners and operators do not already possess, except that the proposed sea turtle handling and release requirements might require some training of crew members, as described further below.

Economic Impacts to Small Entities

(1) Fishing Effort Limits

Owners and operators of purse seine vessels would have to cease fishing in the Convention Area in areas under U.S. jurisdiction and on the high seas if and when the fishery is closed as a result of the established effort limit being reached in one of the applicable periods (any of the calendar years 2009–2011, either of the two-year periods 2009–2010 and 2010–2011, or the three-year period 2009–2011). They would have to do so for the remainder of the calendar year. Closure of the fishery could cause foregone fishing opportunities and associated economic losses. The likelihood of the fishery being closed in any of the applicable periods and the economic losses a closure would bring cannot be projected with certainty.

Two factors potentially important with respect to the likelihood of the limit being reached are per-vessel fishing effort and climate/ocean conditions. Because the effort limits would be set at a level that would be expected from 40 vessels, which is the expected fleet size under no-action, the limits may not have a high likelihood of being reached. However, because the proposed limits are based on average per-vessel fishing effort from 2004, if per-vessel effort levels in the no-action 40–vessel fleet are greater than that historical level, the likelihood of the limit being reached would be that much greater. With respect to climatic and oceanic conditions, the spatial distribution of the fleet's fishing effort is strongly influenced by conditions associated with El Nino-Southern Oscillation (ENSO) patterns. The eastern areas of the WCPO have tended to be comparatively more attractive to the fleet during El Nino events, when warm water spreads from the western Pacific to the eastern Pacific. Consequently, the areas subject to the proposed limit appear to be somewhat more important fishing grounds during El Nino events. If El Nino conditions occur during 2009–2011 (the effective dates of this element of the proposed rule), the likelihood of the fishery being closed, along with any associated economic costs, would be slightly greater than if such an event does not occur. However, the proposed limits have been designed to mitigate that likelihood and the associated costs (not just in anticipation of El Nino events, but to accommodate the spatial-temporal variations in optimal fishing grounds that would be expected from any number of factors). Specifically, the most restrictive limit (in terms of allowable fishing days per unit of time) would be established for

the entire three-year period. Less restrictive limits would be established for the one-year and two-year periods within the overall 2009–2011 period. This would allow some of the overall allowable effort for the 2009–2011 period to be concentrated to a certain extent within shorter sub-periods, such as during El Nino events.

The area that would be closed constitutes a relatively small portion of the fishing grounds available to, and typically used by, the U.S. purse seine fleet. Unpublished NMFS data indicate that, on average, during 1997 through 2007, fishing effort in the U.S. EEZ and on the high seas made up about 30 percent of the annual total, and percentage among those years ranged from 22 to 40. In the event of a closure, affected vessels could continue to be used in the Convention Area in foreign EEZs, to the extent authorized. Given that foreign EEZs in the Convention Area have collectively received the majority of the U.S. purse seine fleet's fishing effort (60 to 78 percent in the years 1997–2007), the cost associated with being limited to such areas would likely not be substantial. Nonetheless, the closure of any fishing grounds would be expected to bring some (unquantifiable) costs to affected entities (e.g., because revenues per unit of fishing effort in the open area might, during the closed period, be lower than in the closed area), and as indicated in the preceding paragraph, the losses would vary depending on where the best fishing grounds are during the closed period, which is dependent in part on ENSO-related conditions.

The effort limit could affect the temporal distribution of fishing effort in the U.S. purse seine fishery. Since the limit would be competitive that is, not allocated among individual vessels, vessel operators might have an incentive to fish harder in the affected area earlier in a given limit-period (e.g., one of the calendar years 2009–2011) than they otherwise would. To the extent such a shift occurs, it could affect the seasonal timing of fish catches and deliveries to canneries. If, for example, deliveries from the fleet were substantially concentrated early in the year, it could adversely affect prices during that period. However, as discussed in the preceding paragraphs, the majority of fishing effort is expected to occur outside the area subject to the proposed limit, so the timing of catches and deliveries would not be appreciably impacted by a ''race-to-fish'' in the area subject to the limit. Furthermore, the timing of cannery deliveries by the U.S. fleet alone is unlikely to have an appreciable impact on prices, since the canneries buy from the fleets of multiple nations. A race to fish could bring costs to affected entities if it causes vessel operators to forego vessel maintenance or to fish in weather or ocean conditions that it otherwise would not. This could bring costs in terms of human safety as well as the economic performance of the vessel. A race-to-fish effect might also be expected in the time period between when a closure of the fishery is announced and when it is actually closed, which would be at least seven calendar days. For the reasons stated above, any such effect and its adverse impacts are expected to be minor. In addition, there is no evidence that economies of scale will favor those vessels that are defined as large over small vessels or vice versa when effort is constrained by these measures.

(2) FAD Prohibition Periods

The prohibitions on fishing in association with FADs during specified periods in each of the years 2009–2011 (August and September in 2009 and July through September in 2010 and 2011) would substantially constrain the manner in which purse seine fishing could be conducted during those periods. The costs associated with these constraints cannot be projected, but the fleet's historical use of FADs can give a qualitative indication of the costs. In the years 1997–2007, the proportion of sets made on FADs in the U.S. purse seine fishery ranged from less than 40 percent in some years to more than 90 percent in others. The importance of FADs in terms of profits appears to be quite variable over time, and is probably a function of many factors, including fuel prices (e.g., unassociated sets involve more searching time and thus tend to bring higher fuel costs than FAD sets) and market conditions (e.g., FAD-fishing, which tends to result in greater catches of small skipjack tuna than unassociated sets, might be more attractive and profitable when canneries are not rejecting small fish). Thus, the costs of implementing the FAD prohibition periods would depend on a variety of factors. The fact that the fleet has typically made a large portion of its sets on FADs suggests that prohibiting the use of FADs for two to three months each year would bring substantial costs to affected entities. Given current market conditions, it seems unlikely that any affected entities would choose not to fish during the FAD prohibition periods rather than fish without the use of FADs. However, as described below for element (5) on observer coverage, affected vessels would also bear costs associated with having to carry an observer during the 2009 FAD prohibition period. To mitigate the costs that the FAD prohibition periods would bring, vessel operators might choose to schedule their routine vessel maintenance during a portion of those periods.

(3) High Seas Area Closures

Closure of the two areas of high seas in the Convention Area in 2010 and 2011 would foreclose fishing opportunities and bring associated economic costs to affected entities. Those costs cannot be quantified, but because the affected areas constitute a relatively small portion of the fleet's traditional fishing grounds, the closures would not be expected to have a large effect on the ability of vessels to fish and generate revenue. NMFS unpublished data from vessel logbooks indicate that from 1997 through 2007, the proportion of the fleet's total annual catch that was taken from the two areas collectively was about 10 percent, and ranged from about 3 to 20 percent. Total fishing effort by particular vessels would likely be unaffected, but the spatial distribution of effort would necessarily shift out of the affected areas into what would be less attractive, and in some cases, less profitable, fishing grounds.

(4) Catch Retention

Implementing the catch retention requirement would bring costs associated with having to fill well space with less valuable, and in some cases, unmarketable, product. Those costs cannot be quantified, but historical tuna discard rates in the U.S. purse seine fishery give a qualitative indication. Based on vessel observer data for the U.S. EEZ for the years 1997–2001, annual estimated discard rates (by weight) of bigeye tuna, skipjack tuna, and yellowfin tuna averaged 9 percent, 13 percent, and 6 percent, respectively.

The compliance costs of the catch retention requirement would likely be different for vessels that tend to operate out of Pago Pago and deliver their catch to the canneries in Pago Pago versus vessels that transship most of their catch to other vessels. For vessels in the former category, which have to steam relatively far from the fishing grounds in order to land their fish, a fishing trip typically only ends when the fish holds are full in order to maximize revenue during a given trip. Revenues and profits for these vessels are therefore strongly dependent on the capacity of their fish wells and on the value of fish per unit of well space. There have been occasions where the canneries have charged vessel operators to unload small fish. If that occurs with small fish that

under this proposed rule are retained that otherwise would not be, vessel owners and operators would bear direct economic costs. For vessels that tend to transship their catches at ports near the fishing grounds, well space is a less important constraint on profits, so the economic impacts of this requirement on these vessels would likely be less.

(5) Observer Coverage

Compliance costs are first estimated for 2009, in which vessels would be required to carry an observer during the FAD prohibition period, from August 1 through September 30, and then estimated for 2010 and 2011, when vessels would be required to carry observers on all trips.

Under the current 20 percent observer coverage requirement under the SPTT, vessels that operate out of Pago Pago, American Samoa, typically carry an observer on about one trip per year. The observers required under the terms of the SPTT are deployed by the Pacific Islands Forum Fisheries Agency (FFA), which acts as the SPTT Administrator on behalf of the Pacific Island Parties to the SPTT. Under an agreement between the United States and the Pacific Island Parties to the SPTT, the observers deployed for the purpose of meeting this new WCPFC-mandated observer requirement would also be deployed by the FFA. Under the SPTT, the FFA dictates the deployment of observers and the U.S. facilitates their placement on vessels. Deployment is done in a way such that vessel operators have essentially no control over which trips will be observed.

In 2009, if an SPTT-mandated observer is deployed by the FFA on a trip that includes the FAD prohibition period, that would satisfy this new WCPFC-mandated observer requirement, and there would be no new compliance costs for the affected vessel in 2009. If, on the other hand, an SPTT-mandated observer is not deployed on the trip or trips that include the 2009 FAD prohibition period, then the affected vessel would have to carry an observer (assuming an observer is available) on that trip or trips as well as on any trips that it carries an SPTT-mandated observer. In that case, the new compliance costs would be as follows:

The owner and operator of the affected vessel would be responsible for both the cost of providing food, accommodation, and medical facilities to observers (termed ''observer accommodation costs'' here), and certain costs imposed by the FFA for the operation of its observer program as it is applied to the U.S. purse seine fleet (termed ''observer deployment costs'' here). For the purpose of estimating these costs, it is assumed that an affected vessel would schedule its trips such that it takes one trip during the 61–day FAD prohibition period and that the trip lasts for the duration of the period (vessel logbook data indicate average trip lengths of more than 70 days in 2003 and 2004, but the averages in 2007 and 2008 were less than 40 days; SPC 2009a). If the timing or duration of an affected vessel's trips differs from these assumptions, the costs it would bear would vary accordingly from the estimates given in the following paragraphs.

Observer accommodation costs are expected to be about $20 per day, so total observer accommodation costs in 2009 for an affected vessel would be $1,400.

Based on the budget for the FFA observer program for the 2008–2009 SPTT licensing period, which is based on a 20 percent coverage rate, observer deployment costs are approximately $8,630 per vessel per year, or per observed trip. According to the budget, about 28 percent of those costs, or $2,416, are fixed costs (as opposed to variable, or per-trip, costs). It is not known how the fixed component of costs would change with the increase in coverage from the current 20–percent level. Assuming that fixed costs do not change at all, the cost for an additional observed trip in 2009 would be about $6,200. If, on the other hand, fixed costs increase in proportion to the number of trips observed, the cost for an additional observed trip in 2009 would be about $8,600.

In 2010 and 2011, observer coverage would be required on all trips. Assuming, based on recent logbook data, that an affected purse seine vessel spends 285 days at sea each year, and, as described above, $20 per observed-sea-day in observer accommodation costs, annual observer accommodation costs at 100 percent coverage would be about $5,700 per vessel. Of these estimated costs, 80 percent, or $4,600 per vessel, would be ''new'' annual costs associated with this proposed requirement.

Observer deployment costs in 2010 and 2011 are estimated based on the FFA observer program budget for the 2008–2009 SPTT licensing period, as done for 2009 in the preceding paragraphs. If fixed costs do not change at all in response to the increased observer coverage rate, the annual cost per vessel at 100 percent coverage would be about $33,400. If fixed costs increase in proportion to the level of observer coverage, the annual cost per vessel at 100 percent coverage would be about $43,200. Of these estimated per-vessel costs, 80 percent, or $26,700 to $34,500, would be new annual costs associated with this proposed requirement.

In summary, in 2009, affected vessels would be subject to compliance costs of up to about $7,600 to $10,000 ($1,400 in observer accommodation costs plus $6,200 to $8,600 in observer deployment costs). In each of 2010 and 2011, affected vessels would be subject to compliance costs of up to about $31,300 to $39,100 ($4,600 in observer accommodation costs plus $26,700 to $34,500 in observer deployment costs). Detailed up-to-date information on revenues and costs in the fleet are not available, but a 1998 study found average gross revenues per vessel to be about $4.7 million, which is equivalent to about $6.1 million in 2009 dollars. Thus, the expected observer-related compliance costs are roughly 0.5 to 0.6 percent of average gross revenues.

As described above for element (2) on the FAD prohibition periods, to mitigate the costs associated with the 2009 FAD prohibition period, including the observer-related costs identified here, vessel operators might choose to schedule their routine vessel maintenance during a portion of that period.

(6) Sea Turtle Interaction Mitigation

The costs of complying with the proposed sea turtle interaction mitigation requirements would include the costs of obtaining the required dip net, ensuring that crew members are adequately trained to execute the required mitigation measures, and the time and labor required to handle and release sea turtles in the required manner (potentially at the expense of fishing time). A dip net with the minimum required specifications is estimated to cost no more than $100. Training costs cannot be quantified, but because the proposed requirements are relatively simple, crew members can probably become sufficiently skilled through informal training using educational materials provide by NMFS. Training costs are consequently expected to be minor. Handling and releasing sea turtles in the required manner might involve more time on the part of crew members than is currently spent dealing with sea turtles that are entangled or encountered. However, such incidents occur only rarely in the fishery, so the costs of labor and lost fishing time are expected to be minor.

Duplicating, Overlapping, and Conflicting Federal Regulations

NMFS has not identified any Federal regulations that duplicate, overlap with, or conflict with the proposed regulations, with the exception of the proposed observer requirements. U.S. purse seine vessels are subject to regulations issued under authority of the South Pacific Tuna Act of 1988 (SPTA; 16 U.S.C. 973–973r), at 50 CFR 300.43. Those regulations require that operators and crew members of vessels operating pursuant to the SPTT allow and assist any person identified as an observer by the Pacific Island Parties to the SPTT to board the vessel and conduct and perform specified observer functions. Under the terms of the SPTT, U.S. purse seine vessels carry such observers on approximately 20 percent of their trips. The proposed observer requirement would overlap with the existing regulations in that carrying an observer pursuant to 50 CFR 300.43 would satisfy the proposed requirement that an observer be carried during the FAD prohibition period of 2009. The proposed requirement would not duplicate or conflict with existing regulations.

Alternatives to the Proposed Rule

NMFS has identified and considered several alternatives to the proposed rule. The alternatives are limited to the way in which the fishing effort limits would be implemented.

One alternative differs from the proposed rule only in that the fishing effort limits would be allocated among individual vessels. This would likely alleviate any adverse impacts of the race-to-fish that might occur as a result of establishing the competitive fishing effort limits as in the proposed rule. As described in the previous paragraphs, those potential impacts include lower prices for landed product and risks to performance and safety stemming from fishing during sub-optimal times. Those impacts, however, are expected to be minor, so this alternative is not preferred.

Another alternative would differ from the proposed rule only in that there would be a single limit of 7,764 fishing days (three times the fishing effort rate of 2,588 fishing days per year) for the entire three-year period 2009–2011. This would provide slightly more operational flexibility to affected vessels than the proposed rule, which could bring lower compliance costs. However, the lack of any limits for a given year would bring the potential for a longer closed period (e.g., during a substantial part of 2011) than would likely occur under the proposed rule (under which relatively brief closures might be expected in one or more of the years 2009–2011). To the extent that continuous fishing and continuity of supply are important for the fishery, several short closures might cause less adverse economic impacts than a single long closure, and for this reason, this alternative is not preferred. For example, with a brief closure each year, vessel owners and operators might be able to schedule routine vessel maintenance during the closed periods and mitigate the losses of not being able to fish. This would be more difficult to do during a longer closed period. In any case, as described in the preceding paragraphs, because the majority of the fleet's traditional fishing grounds would not be subject to the limit or the closure, the potential losses caused by a closed period however short or long are likely to be relatively minor.

Another alternative would establish separate fishing effort limits for the high seas and for areas under U.S. jurisdiction and separate limits for each of the SPTT licensing years (which run from June 15 through June 14) during 2009–2011. In accordance with the baseline effort levels specified in CMM 2008–01, the limits would be 2,030 fishing days on the high seas and 558 fishing days in areas under U.S. jurisdiction. Because this alternative would provide less operational flexibility for affected purse seine vessels, the limits would be more constraining than those established under the proposed rule, and consequently more costly. It is not preferred for that reason.

The alternative of taking no action at all is not preferred because it would fail to accomplish the objective of the Act or satisfy the international obligations of the United States as a Contracting Party to the Convention.

List of Subjects in 50 CFR Part 300

Administrative practice and procedure, Fish, Fisheries, Fishing, Marine resources, Reporting and recordkeeping requirements, Treaties.

Dated: May 27, 2009.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 300, subpart O, which was proposed to be added at 74 FR 23965, is proposed to be further amended as follows:

PART 300—INTERNATIONAL FISHERIES REGULATIONS

Subpart O–Western and Central Pacific Fisheries for Highly Migratory Species

1. The authority citation for 50 CFR part 300, subpart O, continues to read as follows:

Authority: 16 U.S.C. 6901 *et seq.*

2. In § 300.211, definitions of ''Effort Limit Area for Purse Seine'' or ''ELAPS'', ''Fish aggregating device'' or ''FAD'', ''Fishing day'', ''Fishing trip'', and ''Purse seine'' are added, in alphabetical order, to read as follows:

§ 300.211 Definitions.

* * * * *

Effort Limit Area for Purse Seine, or *ELAPS*, means, within the area between 20° N. latitude and 20° S. latitude, areas within the Convention Area that either are high seas or are within the jurisdiction of the United States, including the EEZ and territorial sea.

Fish aggregating device, or *FAD*, means any artificial or natural floating object, whether anchored or not and whether situated at the water surface or not, that is capable of aggregating fish, as well as any objects used for that purpose that are situated on board a vessel or otherwise out of the water.

* * * * *

Fishing day means, for the purpose of § 300.223, any day in which a fishing vessel of the United States equipped with purse seine gear searches for fish, deploys a FAD, services a FAD, or sets a purse seine, with the exception of setting a purse seine solely for the purpose of testing or cleaning the gear and resulting in no catch.

Fishing trip means a period that a fishing vessel spends at sea between port visits and during which any fishing occurs.

* * * * *

Purse seine means a floated and weighted encircling net that is closed by means of a drawstring threaded through rings attached to the bottom of the net.

* * * * *

3. A new § 300.223 is added to read as follows:

§ 300.223 Purse seine fishing restrictions.

(a) *Fishing effort limits.* This section establishes limits on the number of fishing days that fishing vessels of the United States equipped with purse seine gear may collectively spend in the ELAPS.

(1) The limits are as follows:

(i) For each of the years 2009, 2010, and 2011, there is a limit of 3,882 fishing days.

(ii) For each of the two-year periods 2009–2010 and 2010–2011, there is a limit of 6,470 fishing days.

(iii) For the three-year period 2009–2011, there is a limit of 7,764 fishing days.

(2) NMFS will determine the number of fishing days spent in the ELAPS in each of the applicable time periods using data submitted in logbooks and other available information. After NMFS determines that the limit in any applicable time period is expected to be reached by a specific future date, and at least seven calendar days in advance of the closure date, NMFS will publish a notice in the **Federal Register** announcing that the purse seine fishery in the ELAPS will be closed starting on that specific future date and will remain closed until the end of the applicable time period.

(3) Once a fishery closure is announced pursuant to paragraph (a)(2) of this section, fishing vessels of the United States equipped with purse seine gear may not be used to fish in the ELAPS during the period specified in the **Federal Register** notice.

(b) *Use of fish aggregating devices.* From August 1 through September 30, 2009, and from July 1 through September 30 in each of 2010 and 2011, owners, operators, and crew of fishing vessels of the United States shall not do any of the following in the convention area:

(1) Set a purse seine around a FAD or within one nautical mile of a FAD.

(2) Set a purse seine in a manner intended to capture fish that have aggregated in association with a FAD, such as by setting the purse seine in an area from which a FAD has been moved or removed within the previous eight hours or setting the purse seine in an area into which fish were drawn by a vessel from the vicinity of a FAD.

(3) Deploy a FAD into the water.

(4) Repair, clean, maintain, or otherwise service a FAD, including any electronic equipment used in association with a FAD, in the water or on a vessel while at sea, except that a FAD may be inspected and handled as needed to identify the owner of the FAD, identify and release incidentally captured animals, un-foul fishing gear, or prevent damage to property or risk to human safety.

(c) *Closed areas.*

(1) Effective January 1, 2010, through December 31, 2011, a fishing vessel of the United States may not be used to fish with purse seine gear on the high seas within either Area A or Area B, the respective boundaries of which are the four lines connecting, in the most direct fashion, the coordinates specified as follows:

(i) Area A: 7° N. latitude and 134° E. longitude; 7° N. latitude and 153° E. longitude; 0° latitude and 153° E. longitude; and 0° latitude and 134° E. longitude.

(ii) Area B: 4° N. latitude and 156° E. longitude; 4° N. latitude and 176° E. longitude; 12° S. latitude and 176° E. longitude; and 12° S. latitude and 156° E. longitude.

(2) NMFS may, through publication of a notice in the **Federal Register**, nullify any or all of the area closures specified in paragraph (c)(1) of this section.

(d) *Catch retention.*

(1) Based on its determination as to whether an adequate number of WCPFC observers are available for the purse seine vessels of all Members of the Commission as necessary to ensure compliance by such vessels with the catch retention requirements established by the Commission, NMFS will, through publication of a notice in the **Federal Register**, announce the effective date of the provisions of paragraph (d) of this section. The effective date will be no earlier than January 1, 2010.

(2) If, after announcing the effective date of the these requirements under paragraph (1) of this section, NMFS determines that there is no longer an adequate number of WCPFC observers available for the purse seine vessels of all Members of the Commission as necessary to ensure compliance by such vessels with the catch retention requirements established by the Commission, NMFS may, through publication of a notice in the **Federal Register**, nullify any or all of the requirements specified in paragraph (d) of this section.

(3) Effective from the date announced pursuant to paragraph (d)(1) of this section through December 31, 2011, a fishing vessel of the United States equipped with purse seine gear may not discard at sea within the Convention Area any bigeye tuna (*Thunnus obesus*), yellowfin tuna (*Thunnus albacares*), or skipjack tuna (*Katsuwonus pelamis*), except in the following circumstances and with the following conditions:

(i) Fish that are unfit for human consumption, including but not limited to fish that are spoiled, pulverized, severed, or partially consumed at the time they are brought on board, may be discarded.

(ii) If at the end of a fishing trip there is insufficient well space to accommodate all the fish captured in a given purse seine set, fish captured in that set may be discarded, provided that no additional purse seine sets are made during the fishing trip.

(iii) If a serious malfunction of equipment occurs that necessitates that fish be discarded.

(e) *Observer coverage.*

(1) From August 1 through September 30, 2009, a fishing vessel of the United States that is equipped with purse seine gear may not be used to fish in the Convention Area without a WCPFC observer or an observer deployed by NMFS on board. This requirement does not apply to fishing trips that meet any of the following conditions:

(i) The portion of the fishing trip within the Convention Area takes place entirely within areas under U.S. jurisdiction or entirely within areas of jurisdiction of a single nation other than the United States.

(ii) No fishing takes place during the fishing trip in the Convention Area in the area between 20° N. latitude and 20° S. latitude.

(iii) The Regional Administrator has determined that an observer is not available for the fishing trip and a written copy of the Regional Administrator's determination, which must include the approximate start date of the fishing trip and the port of departure, is carried on board the fishing vessel during the entirety of the fishing trip.

(2) Effective January 1, 2010, through December 31, 2011, a fishing vessel of the United States may not be used to fish with purse seine gear in the Convention Area without a WCPFC observer on board. This requirement does not apply to fishing trips that meet any of the following conditions:

(i) The portion of the fishing trip within the Convention Area takes place entirely within areas under U.S. jurisdiction or entirely within the areas of jurisdiction of a single nation other than the United States.

(ii) No fishing takes place during the fishing trip in the Convention Area in the area between 20° N. latitude and 20° S. latitude.

(iii) The Regional Administrator has determined that a WCPFC observer is not available for the fishing trip and a written copy of the Regional Administrator's determination, which must include the approximate start date of the fishing trip and the port of departure, is carried on board the fishing vessel during the entirety of the fishing trip.

(3) Owners, operators, and crew of fishing vessels subject to paragraphs (e)(1) or (e)(2) of this section must accommodate WCPFC observers in accordance with the provisions of § 300.215(c).

(4) Meeting any of the conditions in paragraphs (e)(1)(i), (e)(1)(ii), (e)(1)(iii),

(e)(2)(i), (e)(2)(ii), or (e)(2)(iii) of this section does not exempt a fishing vessel from having to carry and accommodate a WCPFC observer pursuant to § 300.215 or other applicable regulations.

(f) *Sea turtle take mitigation measures.*

(1) *Possession and use of required mitigation gear.* Any owner or operator of a fishing vessel of the United States equipped with purse seine gear that is used to fish in the Convention Area must carry aboard the vessel the following gear:

(i) *Dip net.* A dip net is intended to facilitate safe handling of sea turtles and access to sea turtles for purposes of removing sea turtles from fishing gear, bringing sea turtles aboard the vessel when appropriate, and releasing sea turtles from the vessel. The minimum design standards for dip nets that meet the requirements of this section are:

(A) *An extended reach handle.* The dip net must have an extended reach handle with a minimum length of 150 percent of the freeboard height. The extended reach handle must be made of wood or other rigid material able to support a minimum of 100 lb (34.1 kg) without breaking or significant bending or distortion.

(B) *Size of dip net.* The dip net must have a net hoop of at least 31 inches (78.74 cm) inside diameter and a bag depth of at least 38 inches (96.52 cm). The bag mesh openings may be no more than 3 inches 3 inches (7.62 cm 7.62 cm) in size.

(ii) *Optional turtle hoist.* A turtle hoist is used for the same purpose as a dip net. It is not a required piece of gear, but a turtle hoist may be carried on board and used instead of the dip net to handle sea turtles as required in paragraph (f)(2) of this section. The minimum design standards for turtle hoists that are used instead of dip nets to meet the requirements of this section are:

(A) *Frame and net.* The turtle hoist must consist of one or more rigid frames to which a bag of mesh netting is securely attached. The frame or smallest of the frames must have a minimum opening (e.g., inside diameter, if circular in shape) of 31 inches (78.74 cm) and be capable of supporting a minimum of 100 lb (34.1 kg). The frame or frames may be hinged or otherwise designed so they can be folded for ease of storage, provided that they have no sharp edges and can be quickly reassembled. The bag mesh openings may be no more than 3 inches x 3 inches (7.62 cm x 7.62 cm) in size.

(B) *Lines.* Lines used to lower and raise the frame and net must be securely attached to the frame in multiple places such that the frame remains stable when lowered and raised.

(2) *Handling requirements.* Any owner or operator of a fishing vessel of the United States equipped with purse seine gear that is used to fish in the Convention Area must, if a sea turtle is observed to be enclosed or entangled in a purse seine, a FAD, or other fishing gear, comply with these handling requirements, including using the required mitigation gear specified in paragraph (f)(1) of this section as prescribed in these handling requirements. Any captured or entangled sea turtle must be handled in a manner to minimize injury and promote survival.

(i) *Sea turtles enclosed in purse seines.* If the sea turtle is observed enclosed in a purse seine but not entangled, it must be released immediately from the purse seine with the dip net or turtle hoist.

(ii) *Sea turtles entangled in purse seines.* If the sea turtle is observed entangled in a purse seine, the net roll must be stopped as soon as the sea turtle comes out of the water, and must not start again until the turtle has been disentangled and released. The sea turtle must be handled and released in accordance with paragraphs (f)(2)(iv), (f)(2)(v), (f)(2)(vi), and (f)(2)(vii) of this section.

(iii) *Sea turtles entangled in FADs.* If the sea turtle is observed entangled in a FAD, it must be disentangled or the FAD must be cut immediately so as to remove the sea turtle. The sea turtle must be handled and released in accordance with paragraphs (f)(2)(iv), (f)(2)(v), (f)(2)(vi), and (f)(2)(vii) of this section.

(iv) *Disentangled sea turtles that cannot be brought aboard.* After disentanglement, if the sea turtle is not already on board the vessel and it is too large to be brought aboard or cannot be brought aboard without sustaining further injury, it shall be left where it is in the water, or gently moved, using the dip net or turtle hoist if necessary, to an area away from the fishing gear and away from the propeller.

(v) *Disentangled sea turtles that can be brought aboard.* After disentanglement, if the sea turtle is not too large to be brought aboard and can be brought aboard without sustaining further injury, the following actions shall be taken:

(A) Using the dip net or a turtle hoist, the sea turtle must be brought aboard immediately; and

(B) The sea turtle must be handled in accordance with the procedures in paragraphs (f)(2)(vi) and (f)(2)(vii) of this section.

(vi) *Sea turtle resuscitation.* If a sea turtle brought aboard appears dead or comatose, the following actions must be taken:

(A) The sea turtle must be placed on its belly (on the bottom shell or plastron) so that it is right side up and its hindquarters elevated at least 6 inches (15.24 cm) for a period of no less than 4 hours and no more than 24 hours. The amount of the elevation varies with the size of the sea turtle; greater elevations are needed for larger sea turtles;

(B) A reflex test must be administered at least once every 3 hours. The test is to be performed by gently touching the eye and pinching the tail of a sea turtle to determine if the sea turtle is responsive;

(C) The sea turtle must be kept shaded and damp or moist (but under no circumstances place the sea turtle into a container holding water). A water-soaked towel placed over the eyes (not covering the nostrils), carapace and flippers is the most effective method of keeping a sea turtle moist; and

(D) If the sea turtle revives and becomes active, it must be returned to the sea in the manner described in paragraph (f)(2)(vii) of this section. Sea turtles that fail to revive within the 24–hour period must also be returned to the sea in the manner described in paragraph (f)(2)(vii) of this section, unless NMFS requests that the turtle or part thereof be kept on board and delivered to NMFS for research purposes.

(vii) *Sea turtle release.* After handling a sea turtle in accordance with the requirements of paragraphs (f)(2)(v) and (f)(2)(vi) of this section, the sea turtle must be returned to the ocean after identification unless NMFS requests the retention of a dead sea turtle for research. In releasing a sea turtle the vessel owner or operator must:

(A) Place the vessel engine in neutral gear so that the propeller is disengaged and the vessel is stopped;

(B) Using the dip net or a turtle hoist to release the sea turtle with little impact, gently release the sea turtle away from any deployed gear; and

(C) Observe that the turtle is safely away from the vessel before engaging the propeller and continuing operations.

(viii) *Other sea turtle requirements.* No sea turtle, including a dead turtle, may be consumed or sold. A sea turtle may be landed, offloaded, transshipped or kept below deck only if NMFS requests the retention of a dead sea turtle or a part thereof for research.

4. In § 300.222, paragraphs (v) through (aa) are added to read as follows:

§ 300.222 Prohibitions.

* * * * *

(v) Use a fishing vessel equipped with purse seine gear to fish in the ELAPS while the fishery is closed under § 300.223(a).

(w) Set a purse seine around, near or in association with a FAD or deploy or service a FAD in contravention of § 300.223(b).

(x) Use a fishing vessel equipped with purse seine gear to fish in an area closed under § 300.223(c).

(y) Discard fish at sea in the ELAPS in contravention of § 300.223(d).

(z) Fail to carry an observer as required in § 300.223(e).

(aa) Fail to comply with the sea turtle mitigation gear and handling requirements of § 300.223(f).

[FR Doc. E9–12646 Filed 5–29–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

RIN 0648–AW19

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Shrimp Fishery off the Southern Atlantic States; Amendment 7

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

ACTION: Notice of Availability of Amendment 7 to the Fishery Management Plan for the Shrimp Fishery of the South Atlantic Region; request for comments.

SUMMARY: The South Atlantic Fishery Management Council (Council) has submitted Amendment 7 to the Fishery Management Plan for the Shrimp Fishery of the South Atlantic Region (FMP) for review, approval, and implementation by NMFS. Amendment 7 proposes actions to rename the commercial vessel permit and the limited access endorsement; remove the requirement for a minimum level of landings for the renewal of a limited access endorsement; allow the reissue of a limited access endorsement that had been terminated because of failure to meet that minimum level; allow the reissue of an endorsement that had been terminated because of failure to renew it in a timely manner; and require the submission of economic data by participants in the fishery. The measures contained in the subject amendment are intended to maintain a viable rock shrimp fishery in the South Atlantic region.

DATES: Comments must be received no later than 5 p.m., eastern time, on July 31, 2009.

ADDRESSES: You may submit comments on the proposed rule, identified by ''0648–AW19'', by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov*.
- Fax: 727–824–5308, Attn: Kate Michie.
- Mail: Kate Michie, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

To submit comments through the Federal e-Rulemaking Portal: *http://www.regulations.gov*, enter ''NOAA-NMFS–2008–0319'' in the keyword search, then check the box labeled ''Select to find documents accepting comments or submissions'', then select ''Send a Comment or Submission.'' NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Copies of Amendment 7 may be obtained from the South Atlantic Fishery Management Council, 4055 Faber Place, Suite 201, North Charleston, SC 29405; phone: 843–571–4366 or 866–SAFMC–10 (toll free); fax: 843–769–4520; e-mail: safmc@safmc.net. Amendment 7 includes an Environmental Assessment, an Initial Regulatory Flexibility Analysis, a Regulatory Impact Review, and a Social Impact Assessment/Fishery Impact Statement.

FOR FURTHER INFORMATION CONTACT: Kate Michie, telephone: 727–824–5305; fax: 727–824–5308; e-mail: *Kate.Michie@noaa.gov*.

SUPPLEMENTARY INFORMATION: The South Atlantic shrimp fishery is managed under the FMP. The FMP was prepared by the Council and implemented by NMFS under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

Background

Amendment 5 to the FMP established a limited access program for the rock shrimp fishery in federal waters south of the South Carolina/Georgia state line. In 2003, endorsements were issued to vessels with at least 15,000 pounds of rock shrimp landings in any one year during 1997–2000. A vessel must land at least 15,000 pounds of rock shrimp in at least one year during any four consecutive years or the endorsement cannot be renewed. The Rock Shrimp Advisory Panel (AP) suggested these landings requirements because they were concerned about the high number of latent permit holders and vessels that fished infrequently. The limited access program criteria were set so the core group of participants would remain in the fishery while overall effort was reduced. Of the 155 vessels issued limited access endorsements, 105 are currently active, 20 are renewable, and 30 are non-renewable. Therefore, a maximum of 125 endorsements are or may become active in the rock shrimp fishery under the current permit requirements.

The need for action through Amendment 7 to the FMP is based on the desire to maintain a viable rock shrimp fishery in the South Atlantic region. The AP suggested the fishery could support no more than 150 vessels. However, fewer vessels may not fully utilize the resource. The Council has determined that actions implemented through Amendment 5 have resulted in the desired reduction in capacity and may no longer be necessary in light of changes in the rock shrimp fishery over the past six years.

The Council is primarily concerned about the 15,000–pound landing requirement because 43 vessels have not met the requirement after the first four years of the program. The AP suggested the Council consider whether this provision should be retained, revoked, revised, or possibly extended (i.e. allow vessels a longer time period to meet the requirement). In addition, the AP suggested reinstatement of endorsements lost as a result of not meeting the landings requirement.

Another issue involves the requirement for vessel owners to renew their vessel's endorsement within one year after the endorsement's expiration date to retain their eligibility. The Council is concerned about confusion over the rock shrimp limited access endorsement as implemented in the final rule for Amendment 5 versus the

limited access permit as specified in Amendment 5. In this case, some fishermen did not realize they needed both the open access permit and the limited access endorsement.

In total, 73 vessels will or have been eliminated from the rock shrimp fishery under current regulations due to not meeting the 15,000–pound requirement, the renewal period, or both. Thus 47 percent of the 155 endorsements originally issued may be eliminated if no changes are made to the current requirements and even more could be eliminated in the future for the same reasons.

In the Gulf of Mexico shrimp fishery, participants are selected each year to provide economic data to NMFS. Similar data for the South Atlantic shrimp fishery would allow NMFS to conduct analyses required by the Magnuson-Stevens Act and other applicable law. These data would also allow the Council to fully understand how proposed management measures would impact shrimp fishermen and dealers.

Amendment 7 proposes to rename the commercial vessel permit and the limited access endorsement; remove the requirement for a minimum level of landings for the renewal of a limited access endorsement; allow the reissue of a limited access endorsement that had been terminated because of failure to meet that minimum level; allow the reissue of an endorsement that had been terminated because of failure to renew it in a timely manner; and require the submission of economic data by participants in the fishery if selected.

The Council has submitted Amendment 7 for Secretarial review, approval, and implementation. NMFS' decision to approve, partially approve, or disapprove Amendment 7 will be based, in part, on consideration of comments, recommendations, and information received during the comment period on this notice of availability. After consideration of these factors, and consistency with the Magnuson-Stevens Act and other applicable laws, NMFS will publish a notice of agency action in the **Federal Register** announcing the Agency's decision to approve, partially approve, or disapprove Amendment 7, and the associated rationale.

Consideration of Public Comments

Public comments received by 5 p.m. eastern time, on July 31, 2009, will be considered by NMFS in the approval/disapproval decision regarding Amendment 7.

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

Dated: May 26, 2009

Kristen C. Koch,

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

[FR Doc. E9–12640 Filed 5–29–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

RIN 0648–XN22

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Bottom Longline Petition

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

ACTION: Denial of a petition for emergency rulemaking.

SUMMARY: NMFS announces its decision to deny a petition for emergency or interim rulemaking under the Administrative Procedure Act (APA) and Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). Several non-governmental organizations (NGOs) petitioned the U.S. Department of Commerce to immediately promulgate an emergency or interim rule under the Magnuson-Stevens Act to address loggerhead sea turtle interactions in the bottom longline component of the commercial reef fish fishery in the Gulf of Mexico (Gulf). NMFS finds the emergency rulemaking is not warranted because of an emergency rule promulgated independently at the request of Gulf of Mexico Fishery Management Council (Council), which satisfies the legal mandates of the Magnuson-Stevens Act and Endangered Species Act (ESA) for protecting hardshell sea turtles.

FOR FURTHER INFORMATION CONTACT: Peter Hood, telephone 727–824–5305, fax 727–824–5308, e-mail *Peter.Hood@noaa.gov*.

SUPPLEMENTARY INFORMATION: NMFS published a notice of receipt of petition for rulemaking on February 25, 2009 (74 FR 8494), and invited public comments for 30 days ending March 27, 2009. Summaries of and responses to comments are provided in the Response to Public Comments section below.

The Petitions

Oceana has petitioned the Council and NMFS to implement emergency regulations for the bottom longline component of the Gulf reef fish fishery to reduce the high levels of loggerhead sea turtle bycatch in the fishery and to implement appropriate long-term actions, through an amendment to the Fishery Management Plan for Reef Fish Resources of the Gulf of Mexico (FMP), to ensure adequate protection for the loggerhead sea turtle populations. The Oceana petition specifically requests NMFS prohibit the use of reef fish bottom longline gear in waters shallower than 55 fathoms (100m) in the Gulf to protect loggerhead sea turtles within the depths where all observed takes have occurred, and that NMFS prohibit the use of squid as bait when fishing with reef fish bottom longlines in waters deeper than 55 fathoms (100m) to further reduce the possibility of takes.

Another petition from the Center for Biological Diversity, Defenders of Wildlife, Earthjustice, Caribbean Conservation Corporation, Gulf Restoration Network, and Turtle Island Restoration Network alleges NMFS has violated the ESA by allowing the bottom longline component of the reef fish fishery to continue to operate, given evidence it has exceeded its take based on the incidental take statement (ITS) from a 2005 biological opinion (opinion). This petition requests that NMFS close the bottom longline component of the Gulf reef fish fishery immediately until NMFS has put in place sufficient measures to protect loggerhead sea turtles consistent with the guidelines of the ESA.

According to the petitions filed by the NGOs, the reasons sea turtle bycatch by reef fish bottom longlines requires emergency action are: (1) A NMFS report released in 2008 suggests hardshell sea turtle take has exceeded that allowed by the ITS from a 2005 opinion. The opinion concluded continued authorization of the Gulf reef fish fishery managed under the FMP was not likely to jeopardize the continued existence of sea turtles and smalltooth sawfish. An ITS was issued with the opinion specifying anticipated sea turtle and smalltooth sawfish take on a 3-year basis. For hardshell sea turtles, the anticipated 3-year incidental take for the bottom longline component of the Gulf reef fish fishery was 113 takes, of which 56 would be lethal. The 2008 NMFS report using observer data estimated the level of take during an 18-month period was between 411 and 1,983 hardshell sea turtles, primarily comprised of loggerhead sea turtles. This number has been revised in a 2009 NMFS report using 2008 observer data to between 463 and 2,020 hardshell sea

turtles for the 30-month time period. (2) Information from the Florida Fish and Wildlife Conservation Commission shows declining trends in the number of nesting loggerhead sea turtles on Florida beaches. Loggerhead sea turtle nesting at Florida index nesting beaches has declined 40 percent between 1989 and 2008. These declines have been interpreted as a possible decline in the sub-adult and adult population. (3) By not taking action, NMFS is in violation of the ESA. Specifically, the petitioners allege NMFS cannot ensure against jeopardy by continuing to authorize Gulf reef fish bottom longline fishing without having assessed the impacts of excessive take by the fishery in violation of ESA section 7(a)(2). They also allege that by allowing the fishery to continue, NMFS is allowing loggerhead sea turtle take to continue in violation of ESA sections 7(d) and 9.

Response to Assertions and Proposed Management Measures Set Forth in the Petition

NMFS agrees with the NGOs' assertion that estimated hardshell sea turtle, in particular loggerhead sea turtle take, has exceeded the level prescribed in the 2005 biological opinion. As a result, management action was needed to provide protection for threatened loggerhead sea turtles in compliance with the ESA and to reduce sea turtle bycatch and bycatch mortality in compliance with national standard 9 (NS 9) of the Magnuson-Stevens Act. NMFS and the Council had already initiated efforts to address the issue prior to receipt of either petition. Thus, NMFS has promulgated an emergency rule at the request of the Council to reduce hardshell sea turtle takes while the Council develops long-term measures in Amendment 31 to the FMP. This emergency rule moves the bottom longline component of the eastern Gulf reef fish fishery seaward of a line approximating the 50–fathom (91–m) depth contour and prohibits the use of longlines in the eastern Gulf once the deepwater grouper and tilefish quotas are met.

In developing the emergency rule, NMFS determined the selected measures were sufficient to meet the legal requirements of the Magnuson-Stevens Act and the ESA. All but one sea turtle observed taken were on sets in waters less than 50 fathoms (91 m) in the eastern Gulf. Restricting bottom longlines to waters greater than 50 fathoms is consistent with regulations in the western Gulf. No sea turtle takes were observed in the western Gulf where reef fish bottom longline gear is restricted to the area seaward of a line approximating 50 fathoms (91 m). Thus, reductions in the potential for interactions between bottom longline gear and sea turtles would be achieved without unduly restricting fishing activity in deeper water where the deepwater grouper and tilefish fisheries are prosecuted. In addition, prohibiting squid as bait was not considered in the emergency rule because it is unclear how much reduction in take would result from such a measure and it is unclear what effect this would have on the bait industry if the Council did not adopt a similar long-term measure in Amendment 31.

Response to Comments

A total of 305 comments were received on the petitions for rulemaking. Of those comments, 232 were in support of the petitions and the remaining comments were against it. One comment in support of the petition was from an NGO that included 49,320 electronic signatories to their letter. Another series of comments in support of the petitions were conducted through a postcard campaign consisting of 220 identical responses. A summary of the comments and NMFS' responses follows.

Comment 1: Several commenters indicated the information used to estimate the level of take by the bottom longline component of the commercial reef fish fishery is highly uncertain. They indicated more research is needed to determine the level of interactions between sea turtles and this gear before action is taken, particularly in light of the adverse economic impacts that would result to the bottom longline component of the fishery if it were closed or moved seaward of 50 fathoms (91 m) in the eastern Gulf. They believed that, in light of the poor national economy, affected fishermen would have a hard time finding alternative fisheries to operate in or other jobs if they were put out of business.

Response: NS 9 of the Magnuson-Stevens Act requires that conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch. The bycatch reduction and monitoring requirements in the Magnuson-Stevens Act apply to a broad range of living marine species, including sea turtles. Additionally, the ESA requires that the Federal government protect and conserve species and populations that are endangered or threatened with extinction, and conserve the ecosystems on which these species depend. Section 7 of the ESA requires all Federal agencies to use their authorities to carry out their programs for the conservation of endangered and threatened species and to ensure any action is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of their critical habitat.

Both the Magnuson-Stevens Act and ESA require NMFS to use the best available scientific information. In addition, ESA case law requires that when faced with data uncertainty, decisions should give the benefit of the doubt to the species (i.e., favor protection of the species). With respect to estimating bycatch, a 2004 NMFS national working group on bycatch reviewed regional issues related to fisheries and bycatch and discussed advantages and disadvantages of various methods for estimating bycatch, including fishery-independent surveys, self-reporting through logbooks, port sampling, recreational sampling, at-sea observation (observers and electronic monitoring), and stranding networks. Although all methods may contribute to useful information for estimating bycatch, the national working group concluded at-sea observation (observers or electronic monitoring) provides the best mechanism to obtain reliable and accurate bycatch estimates for many fisheries.

Given the above, the Southeast Fisheries Science Center (SEFSC) used observer data to estimate the number of loggerhead sea turtle takes for comparison with the anticipated takes specified in the 2005 biological opinion's ITS. This estimate constitutes the best scientific information available and must be used to guide the agency's decision. They found the anticipated take level had been exceeded by the bottom longline component of the reef fish fishery, and even the lower bounds of the 95–percent confidence intervals around the take estimates were above the anticipated takes specified in the ITS.

Comment 2: Some comments suggested factors other than bottom longline fishing are responsible for declines in sea turtle populations and that mortality from the fishery was a fraction of the total. These factors included coastal construction, coastal development, beach renourishment, and hurricanes. Therefore, it is unfair to single out the bottom longline component of the reef fish fishery to attain a reduced sea turtle mortality rate.

Response: Although many factors contribute to hardshell sea turtle mortality, NMFS is obligated to address hardshell sea turtle bycatch in the

fishery because of NS 9 of the Magnuson-Stevens Act and section 7 of the ESA (see above). NMFS has exercised this obligation to reduce take in other fisheries, such as the requirement of turtle excluder devices in Gulf and South Atlantic shrimp fisheries and the requirement of turtle release gear on federally permitted vessels in the Gulf reef fish fishery and the highly migratory species pelagic longline fishery. With respect to other hardshell sea turtle takes from other human activities such as coastal construction, coastal development, and beach renourishment, NMFS consults with other action agencies with respect to endangered and threatened species. Under the ESA, all action agencies are required to conserve endangered and threatened species, including hardshell sea turtles.

Comment 3: Higher numbers of loggerhead sea turtle takes should be seen as an indicator that loggerhead sea turtle populations are increasing rather than decreasing.

Response: Past and current estimates of hardshell sea turtle takes have been derived through different methodologies. Take estimates for the 2005 biological opinion were based on catch and effort reported in the Coastal Fisheries Logbook Program and the Supplementary Discard Data Program. However, it is recognized that extrapolated bycatch estimates still may be inaccurate if there is less than complete compliance with the logbook requirement or if reporting significantly misrepresents actual fishing effort. The take estimates reported by the SEFSC from 2006 through 2008 were derived from observer data applied to effort estimates reported from logbook data for the bottom longline component of the reef fish fishery. Observer data are generally thought to be more reliable than self-reported data (see above), and logbooks are noted as more useful in providing estimates of total effort by area and season. Therefore, because the take estimates were derived through different methodologies, this may account for some of the differences in take estimates between studies.

Other information implies loggerhead sea turtle populations may be declining. For the past 20 years, the Florida Fish and Wildlife Conservation Commission coordinated a detailed sea turtle nesting-trend monitoring program, the Index Nesting Beach Survey (INBS). The INBS counts represent approximately 69 percent of known loggerhead sea turtles nesting in Florida. In addition, Florida accounts for approximately 90 percent of loggerhead sea turtle nesting activity within the southeastern United States nesting population, which is considered the world's second largest population. Loggerhead sea turtle nests were counted annually at core index nesting beaches in Florida from 1989 through 2008 on both the Atlantic and Gulf coasts. Counts of nests indicated a declining trend in loggerhead sea turtle nesting. Many scientists have suggested the observed decline in the annual counts of loggerhead sea turtle nests on index and statewide beaches in peninsular Florida can best be explained by a decline in the number of adult female loggerhead sea turtles in the population.

Comment 4: Comments received on banning squid for bait by the bottom longline component of the reef fish fishery were mixed. Some comments indicated the measure to ban squid should be considered in an emergency rule. Others indicated there is little evidence that using baits other than squid will reduce sea turtle takes, and so this measure should not be considered unless new information suggests otherwise.

Response: Studies of loggerhead sea turtles caught by the pelagic longline fishery and in captive laboratory experiments found loggerhead sea turtles preferred dead squid over finfish. Researchers have suggested captive loggerhead sea turtles were more likely to swallow whole squid than finfish because squid has a more flexible and tough muscle texture. Finfish baits were bitten off in smaller pieces and loggerhead sea turtles were able to avoid the hook. Although these studies suggest prohibiting the use of squid or squid parts in the bottom longline component of the reef fish fishery could reduce loggerhead sea turtle interactions with gear, it is unknown by what percentage loggerhead sea turtle hooking incidents would be reduced. Therefore, further research is needed to predict the extent of take reduction from a prohibition of squid for bait for the bottom longline component of the reef fish fishery.

Comment 5: One comment suggested that because the information on interactions between the reef fish bottom longline gear and sea turtles is uncertain, the fishery should be allowed to continue under an exempted fishing permit (EFP)to collect this information. Participants in the fishery would then be allowed to operate as long as they collected data for use in assessing interactions between sea turtles and longline gear.

Response: For this information to be used to examine sea turtle interactions with bottom longline gear, the work would need to be performed within a scientific research program. NMFS and other agencies do sponsor research on fisheries and species listed under the ESA. For example, NMFS' Cooperative Research Program specifically encourages fishermen be included in the data collection process. Should research be funded on the interaction of reef fish bottom longlines with sea turtles and the proposal includes the involvement of commercial reef fish vessels landing their catch, an EFP could be issued to participating vessel(s) subject to the requirements under 50 CFR 600.745.

Comment 6: Some comments indicated if the bottom longline component of the reef fish fishery is to be closed, the closure be for as short of a time period as possible. They pointed out sea turtle takes appear to be highest in the late spring to summer, and suggested a closure be targeted for those seasons.

Response: Immediate reductions in hardshell sea turtle takes are needed to reduce takes by the bottom longline component of the reef fish fishery. NMFS has taken short-term action to reduce this bycatch through an emergency rule. The rule, effective May 18, 2009, expires on October 28, 2009, may be extended for up to another 186 days. During this time, NMFS will be preparing a new biological opinion for the fishery, which will assess the impacts on listed species. NMFS will be monitoring sea turtle take to evaluate the reductions. While the rule is in effect, the Council is developing long-term measures to reduce bottom longline takes by the reef fish fishery. Alternatives being considered by the Council to reduce takes includes season-area closures. The Council will be taking public comment on these measures as it develops Amendment 31. Comments on closures, the timing of closures, and the duration of the closures should be submitted to the Council during appropriate comment periods. Additionally, should the Council approve and submit Amendment 31 for approval by the Secretary of Commerce, NMFS will provide additional opportunities for public comment.

Agency Decision

After considering the assertions and proposed management measures set forth in the petitions and all public comments, NMFS has determined the specific measures requested in the petitions should not be addressed via emergency rulemaking at this time. NMFS agrees that hardshell sea turtle takes need to be reduced and has taken action at the request of the Council to implement an emergency rule to achieve

short-term reductions. The emergency rule implemented by NMFS satisfies the legal mandates of the Magnuson-Stevens Act and ESA for protecting sea turtles. Therefore, the specific actions requested in the petitions for rulemaking by the NGOs are denied.

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

Dated: May 26, 2009

Samuel D. Rauch III,

Deputy Assistant Administrator For Regulatory Programs, National Marine Fisheries Service.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 090508897–9896–01]

RIN 0648–AX85

Atlantic Highly Migratory Species; Atlantic Bluefin Tuna and Swordfish Management Measures and HMS Permit Requirements

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

ACTION: Advance notice of proposed rulemaking; request for comments.

SUMMARY: NMFS issues this advance notice of proposed rulemaking (ANPR) to request public comment on potential adjustments to the regulations governing the U.S. Atlantic bluefin tuna (BFT), north Atlantic swordfish (SWO), and shark fisheries to enable more thorough utilization of the available U.S. quotas for BFT and SWO and to improve highly migratory species (HMS) permit structure. Potential action(s) taken may to increase opportunities for U.S. fisheries to fully harvest the U.S. quotas recommended by the International Commission for the Conservation of Atlantic Tunas (ICCAT) while balancing continuing efforts to end BFT overfishing by 2010 and rebuild the stock by 2019; to continue efforts to revitalize the SWO fishery while minimizing bycatch to the extent practicable; and to clarify and simplify the current HMS permit structure. NMFS is also requesting public comment regarding the potential implementation of catch shares, limited access privilege programs (LAPPs), and individual bycatch caps (IBCs) in highly migratory species fisheries. This ANPR provides background information to inform the public on several actions that NMFS is considering to accomplish these objectives.

DATES: Written comments regarding the potential BFT management measures discussed in Section II of the **SUPPLEMENTARY INFORMATION** section of this ANPR must be received no later than June 30, 2009.

Written comments regarding pelagic longline (PLL) incidental catch requirements, HMS permits, LAPPs, and IBCs as discussed in Sections III and IV of the **SUPPLEMENTARY INFORMATION** section of this ANPR must be received no later than August 31, 2009.

Public meetings to obtain additional comments on the items discussed in this ANPR will be held in June and July 2009. Please see the **SUPPLEMENTARY INFORMATION** section of this ANPR for specific dates, times, and locations.

ADDRESSES: You may submit comments, identified by ''0648–AX85'', by any one of the following methods:

- Electronic submissions: Submit all electronic public comments via the Federal e-Rulemaking Portal: *http://www.regulations.gov*.
- Fax: 301–713–1917, Attn: Margo Schulze-Haugen.
- Mail: NMFS SF1, 1315 East-West Highway, Silver Spring, MD 20910.

Instructions: All comments received are part of the public record and will generally be posted to portal *http://www.regulations.gov* without change. All personal identifying information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information. NMFS will accept anonymous comments. Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Related documents, including the 2006 Consolidated HMS Fishery Management Plan (Consolidated HMS FMP) and the 2008 Stock Assessment and Fishery Evaluation (SAFE) Report are available upon request at the mailing address noted above or on the HMS Management Division's webpage at: *http://www.nmfs.noaa.gov/sfa/hms/*. In addition, the primary resource legislation that guides NMFS can be found at *www.nmfs.noaa.gov/legislation.htm*.

Public meetings to obtain additional comments on the items discussed in this ANPR will be held in North Carolina, New Jersey, Massachusetts, Florida, and Louisiana. Please see the **SUPPLEMENTARY INFORMATION** section of this ANPR for specific dates, times, and locations.

FOR FURTHER INFORMATION CONTACT: Sarah McLaughlin at 978–281–9260 or Randy Blankinship at 727–824–5399.

SUPPLEMENTARY INFORMATION: The U.S. Atlantic tunas, SWO, and billfish fisheries are managed under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and the Atlantic Tunas Convention Act (ATCA), and implemented through the Consolidated HMS FMP. Atlantic sharks are managed under the authority of the Magnuson-Stevens Act. ATCA authorizes the Secretary of Commerce (Secretary) to promulgate regulations, as may be necessary and appropriate, to implement recommendations by ICCAT. The authority to issue regulations under the Magnuson-Stevens Act and ATCA has been delegated from the Secretary to the Assistant Administrator for Fisheries, NOAA. The implementing regulations for Atlantic HMS are at 50 CFR part 635. Atlantic HMS fisheries are also subject to the requirements of the Endangered Species Act (ESA), Marine Mammal Protection Act (MMPA), National Environmental Policy Act (NEPA), Administrative Procedures Act (APA), Coastal Zone Management Act (CZMA), and other domestic regulations.

I. Background

A. Need for Action

In recent years, a combination of factors has contributed to a decline in domestic landings of north Atlantic SWO and western Atlantic BFT, to the point where U.S. landings are now below their respective ICCAT-recommended quotas. NMFS has implemented several management measures in the U.S. PLL fishery to meet legal mandates to reduce the bycatch and bycatch mortality of sea turtles, marine mammals, undersized and spawning fish, Atlantic billfish, and some shark species. These include time and area closures, a requirement to use only large circle hooks with specific baits, a prohibition on the use of live bait in the Gulf of Mexico, incidental catch limits, and a reduction in large coastal shark quotas and retention limits. Some of these measures have also contributed to lower catches of north Atlantic SWO and western Atlantic BFT in the PLL fishery. In addition to regulatory factors, increased fuel prices, low ex-vessel prices, and less expensive imports of SWO may have contributed to reduced landings in the SWO fishery. Factors that may have played a role in the underharvest of the

domestic BFT fishery since 2004 include reduced availability of BFT for harvest, possibly due to recent changes in BFT regional availability and/or a reduced BFT population level.

The reduction of bycatch and bycatch mortality, and the continuing need to rebuild overfished stocks in Atlantic HMS fisheries, remain important management priorities for NMFS as mandated under the Magnuson-Stevens Act. However, because domestic landings of north Atlantic SWO and western Atlantic BFT have been below ICCAT-recommended U.S. quotas, there is an ongoing concern among many HMS constituents that a portion of the U.S. quota for these species could be reallocated to other countries during future ICCAT negotiations.

In 2007, NMFS addressed persistent underharvests of the domestic SWO quota by increasing SWO retention limits for incidental SWO permit holders, modifying recreational SWO retention limits for HMS Charter/Headboat and Angling category permit holders, and modifying HMS limited access vessel upgrading restrictions for PLL vessels (72 FR 31688; June 7, 2007). Since then, NMFS has continued to receive comments suggesting changes that could increase domestic BFT and SWO landings, as well as public input regarding HMS permitting issues. These suggestions were received by NMFS during HMS Advisory Panel (AP) meetings in 2008 and 2009, during the 2009 BFT quota specifications public hearings, and in recent constituent and congressional correspondence.

NMFS prepared this ANPR in response to suggestions that have been received from the public regarding the underharvest of domestic SWO and BFT quotas. Additionally, this ANPR outlines some management strategies that NMFS is considering to improve HMS management, particularly regarding permitting issues, and enforcement of HMS regulations. In light of the recent underharvest of domestic BFT and SWO fisheries, the current status of HMS stocks, continuing bycatch and bycatch mortality concerns, market factors that may affect fishery performance and Agency efforts to address HMS permitting issues, NMFS formally requests comments on the potential regulatory changes described in this ANPR. All comments received in response to this ANPR will be considered in any potential future rulemakings.

B. Stock Status

1. Western Atlantic BFT

The most recent stock assessment conducted by ICCAT's Standing Committee on Research and Statistics (SCRS) for western Atlantic BFT (2008) indicated that the 2007 spawning stock biomass was between 14 percent and 57 percent of the biomass required to support maximum sustainable yield (MSY) and that fishing mortality was between 1.27 and 2.18 of that that would produce MSY, depending upon the recruitment scenario assumed within the assessment. The western Atlantic BFT stock is considered to be overfished with overfishing occurring.

2. North Atlantic SWO

The SCRS stock assessment in 2006 indicated that the north Atlantic SWO biomass had improved (B_{2006} = 0.99 B_{msy}, F_{2006} = 0.86 F_{msy}). It is currently considered to be rebuilding with no overfishing occurring. The SCRS will be conducting a new stock assessment from September 7–11, 2009, and considering the 2006 results, NMFS expects the 2009 stock assessment to indicate that north Atlantic SWO is fully rebuilt.

3. Atlantic Sharks

The stock status of Atlantic sharks varies by species. Several species of sharks are considered to be overfished with overfishing occurring, including sandbar sharks, dusky sharks, and blacknose sharks. Conversely, some shark species are not overfished and overfishing is not occurring, including Gulf of Mexico blacktip sharks, Atlantic sharpnose sharks, and bonnethead sharks. The current status of the blacktip shark population in the South Atlantic region as well as several other shark species is unknown.

II. Underharvest of Atlantic BFT Quota

As noted in ''DATES'' section, the comment period on issues in this section is open through June 30, 2009.

A. General Category

To provide background information, this section describes some of the current HMS regulatory requirements for the General category.

The current default General category daily retention limit is one large medium or giant BFT (measuring 73 inches (185 cm) or greater). To provide for maximum utilization of the quota for BFT, NMFS may increase or decrease the daily retention limit of large medium and giant BFT over a range from zero to a maximum of three per vessel, based on the consideration of several criteria. Regardless of the length of a trip, no more than a single day's retention limit of large medium or giant BFT may be possessed or retained aboard a vessel that has a General category Atlantic Tunas permit. When the General category is open, no person aboard such vessel may continue to fish, and the vessel must immediately proceed to port once the applicable limit for large medium or giant BFT has been attained. For the last several fishing seasons, NMFS has maintained a three-fish General category daily retention limit, with the exception of the January 2009 fishery, for which NMFS set a two-fish limit given the available January subquota.

The BFT General category season currently is open from January 1 through January 31, and from June 1 through December 31. The current time period quota allocations are as follows: 5.3% for January; 50% for June-August; 26.5% for September; 13% for October-November; and 5.2% for December. Through in-season authority, NMFS takes action to close the coastwide General category fishery when it determines that the subquota for a given time period is reached, or is projected to be reached. NMFS may also adjust each time period's quota based on overharvest or underharvest in the prior time period. NMFS may reopen the fishery at a later date if it determines that reasonable fishing opportunities are available, e.g., BFT have migrated into the area or weather is conducive for fishing.

From 2000 through 2007, the BFT fishery was managed on a June through May fishing year basis versus a calendar year basis (January through December), and in 2003, NMFS extended the General category season to include the month of January (68 FR 74504, December 24, 2003). However, since January 2004, NMFS has not needed to close the January fishery (i.e., the available General category quota has not been fully exhausted). In 2008, the BFT fishery returned to a calendar year fishery, such that the January sub-period is now the first period of the January through December fishing year.

Under current regulations, NMFS considers several criteria when applying underharvest of BFT from one fishing year to the next. These criteria include the usefulness of information obtained from catches in the particular category for biological sampling and monitoring of the status of the stock, the effects of the adjustment on BFT rebuilding and overfishing, and the effects of the adjustment on accomplishing the objectives of the fishery management plan.

1. Potential Management Options and Issues

Daily Retention Limit. NMFS has received comments requesting that the maximum daily retention limit for the BFT General category be increased or eliminated. A related suggestion is for NMFS to allow the daily retention limit to apply for each day of a multi-day trip so that it is more economical for vessels to make trips to offshore BFT fishing grounds (*e.g.,* the northern edge of Georges Bank) since they would not be limited to the maximum daily limit.

A change to, or the elimination of, the daily retention limit could potentially be implemented via a regulatory amendment. If NMFS were to change or eliminate the maximum daily retention limit, it would still maintain the authority to establish the daily retention limit using an in-season action by filing an adjustment with the Office of the Federal Register.

The potential advantages of eliminating the maximum limit (three BFT/vessel/day) include: (1) positive socio-economic impacts for General category and HMS Charter/Headboat category vessels due to the ability to retain and sell more commercial-sized BFT per day/trip; (2) related positive impacts for dealers; (3) greater incentive for vessels to take offshore, multi-day trips, which could increase fishing opportunities and revenues on for-hire trips by Charter/Headboats; (4) decreased discard mortality of commercial sized BFT (that previously would have been in excess of daily retention limit); and, (5) fuller use of the U.S. BFT quota through increased General (quota) category landings.

The potential disadvantages of eliminating the maximum limit include: (1) increased discard mortality of undersized BFT (by General category vessels) due to potential increased fishing effort; and, (2) increased bycatch of non-target species, including protected species, and/or other biological and ecological impacts.

Fishing Season. NMFS has received comments suggesting that the General category fishing season should be extended to increase fishing opportunities, particularly during the winter fishery that has developed off North and South Carolina in the last several years. Two different options have been suggested: extend the General category season year-round, from January 1–December 31; and, extend the General category season until the adjusted January subquota is filled. Either of these options could potentially be implemented through a regulatory amendment.

The potential advantages of extending the General category season include: (1) increased use of the U.S. BFT quota through increased General (quota) category landings; (2) positive socio-economic impacts for General category and HMS Charter/Headboat category vessels and dealers able to participate in the winter/spring fishery due to extended opportunities to make trips and land commercial-sized BFT; and , (3) positive socio-economic impacts for coastal communities in which winter/spring fishing opportunities exist.

The potential disadvantages of extending the General category season could include: (1) negative socio-economic impacts on General category vessels that traditionally have fished during June through December (*e.g.,* in more northern waters) if allocations or fishing opportunities for those periods are reduced; (2) increased discard mortality of undersized BFT (by General category vessels) and BFT in excess of daily retention limit (by General category and HMS Charter/Headboat category vessels) during open seasons and during periods when the fishery has traditionally been closed; and, (3) increased bycatch of non-target species, including protected species.

2. Request for Comments

NMFS requests comments on the potential adjustment of regulations governing the BFT General category daily retention limits and fishing season. The preceding section provided background information regarding these topics. The public is encouraged to submit comments related to any aspect of these topics. NMFS is also specifically seeking comments to the following questions.

Daily Retention Limit. What, if any, maximum daily retention limit should be established? What bycatch concerns or other biological and ecological impacts might there be (i.e., due to a potential increase in fishing effort)? If Harpoon category participants switch into the General category due to the lack of maximum daily retention limit, would there be negative impacts on General category participants?

Fishing Season. Should the BFT General category fishery be extended until available quota for January is reached, to some other date beyond January 31, or year-round? If the fishery is extended beyond January 31, should the existing time period quota allocations change?

How should NMFS distribute General category underharvest to the time periods for the following year (e.g., by FMP allocation—50 percent for June-August; by applying all of any underharvest available for the General category to the first time period and rolling the unused portion forward throughout the calendar year; or by another method)?

Given that the underharvest carried forward from one year to the next cannot exceed 50 percent of the initial U.S. quota (10 percent beginning in 2011 per ICCAT recommendations), NMFS may not be able to apply the exact amount of General category underharvest to the following year's General category quota. Additionally, in the last few years, NMFS has applied underharvest to the subsequent year to meet several management needs (particularly ensuring that the Longline category has sufficient quota to operate during the fishing year while also accounting for BFT discards) rather than distributing the allowable amount of underharvest according to the FMP percentages. Should NMFS revise over/underharvest adjustment criteria for the General category or all categories in the future?

The closed season (February through May) has, in effect, served as a time/area closure both for BFT and potential bycatch species. What bycatch concerns or other biological/ecological impacts might there be?

B. Harpoon Category—Daily Retention Limit

Under current HMS regulations, persons aboard a Harpoon category permitted vessel may retain, possess, or land an unlimited number of giant BFT (81 inches (206 cm) or greater), but may retain, possess, or land only two large medium BFT (73 to less than 81 inches) per vessel per day (i.e., there is an incidental limit of two large medium BFT while targeting giant BFT).

1. Potential Management Options and Issues

Daily Retention Limit. NMFS has received comments requesting to eliminate the incidental retention limit on large medium BFT, so that Harpoon category permitted vessels may keep an unlimited number of large medium and giant BFT. This regulation could potentially be changed through a regulatory amendment.

The potential advantages of eliminating the large medium incidental daily retention limit for the Harpoon category include: (1) positive socio-economic impacts for Harpoon category vessels due to the ability to retain and sell more commercial-sized BFT per day/trip; (2) related positive impacts for dealers; (3) decreased discard mortality of large medium BFT that previously would have been in excess of the

incidental daily retention limit; and, (4) increased use of the U.S. BFT quota through increased Harpoon category landings.

The potential disadvantages of eliminating the large medium incidental daily retention limit for the Harpoon category include increased potential discard mortality of BFT under 73 inches due to increased fishing effort on smaller commercial-sized BFT and the low likelihood of survival after a harpoon strike.

2. Request for Comments

NMFS requests comments on the potential adjustment of the daily retention limit for BFT Harpoon category permitted vessels. The public may submit comments related to any aspect of this topic. NMFS is also specifically seeking comments addressing the following questions.

Daily Retention Limit. Would the Harpoon category still be needed if the General category maximum daily retention limit is eliminated (i.e., would Harpoon category participants choose to obtain a General category permit instead of a Harpoon category permit if retention of BFT measuring 73 inches or greater is unlimited)? What other potential advantages and/or disadvantages could result from eliminating the incidental restriction on large medium BFT for the Harpoon category? Should NMFS consider this or other potential actions for the Harpoon category?

C. General and Harpoon Category—Commercial Minimum Size

Current HMS regulations specify that both General category and Harpoon category vessels may retain, possess, or land only large medium and giant BFT (73 inches or greater), under the retention limits described above. The current regulations do not specify a general ''commercial minimum size'' in inches but instead manage allowable commercial retention by specifying allowed size classes for retention by the various commercial permit categories. These allowed size classes are based on the best available information regarding the size associated with the age at first maturity for western Atlantic BFT (73 inches or greater), and on the type of authorized gear. For example, harpoon gear is more selective than rod and reel and can be used to target larger BFT. BFT stock assessments, conducted by ICCAT's SCRS, assume 8 years as the age at 50 percent maturity (i.e., age at which 50 percent of all individuals are sexually mature).

1. Potential Management Options and Issues

Commercial Minimum Fish Size. NMFS has received comments requesting a decrease in the ''commercial minimum size'' for BFT. Most of the comments have suggested a 65-inch (165-cm) minimum size, although others have suggested a size between 65 and 73 inches (e.g., 66 inches (168 cm) or 68 inches (173 cm)). Commenters have also suggested that only one BFT smaller than 73-inches should be allowed per day, in addition to some amount of BFT greater than 73 inches (for example, one fish 65 to less than 73 inches plus unlimited (or maximum allowed under inseason daily retention limit) BFT greater than 73 inches per day). In combination with a requested decrease in commercial minimum fish size, some commenters suggested that NMFS should also reallocate quota within the applicable category in a ''conservation neutral'' way so as not to impact stock rebuilding. This would involve the conversion of a portion of the existing General and Harpoon category subquotas to an amount of quota that would be specifically for the retention of BFT that measure between the new ''minimum size'' and less than 73 inches. According to the current regulations, these BFT would fall within the current small medium BFT size class (i.e., 59 inches (149 cm) to less than 73 inches).

NMFS believes that reducing the BFT size that commercial vessels may retain would likely change future patterns of fishing mortality (*e.g.,* fish caught at each age). This could potentially impact the projected stock recovery trajectory due to changes in assumptions used in stock status projections (*i.e.,* regarding the reproductive potential of the stock). Increased landings of smaller BFT could reduce projected spawning stock biomass and slow the rate of stock rebuilding.

A reduction in the ''commercial minimum size'' would result in both recreational and commercial handgear vessels pursuing the same size class of fish (small medium BFT). As described below, NMFS has noted some recent changes in the pattern of BFT catches and landings that merit further consideration when making management decisions regarding this issue. Prior to 2007, recreational BFT fishing activity largely revolved around fishing opportunities for school BFT (27 to less than 47 inches (69 to less than 119 cm)) and resulted in substantial school BFT landings. Large Pelagic Survey size frequency data reveal a trend in the last several years toward larger recreational-size fish, particularly within the large school (47 to less than 59 inches) and small medium size classes (59 to less than 73 inches). Availability and landings of the recreational size classes have been high, and the 2007 and 2008 Angling category quotas were estimated to have been exceeded. In reviewing the available data, NMFS notes that the availability of recreational size fish is now limited to a narrow size range (or cohort), approximately age 4 in 2007 and age 5 in 2008. Thus, last year, the majority of recreationally caught BFT last year were in the large school size range. However, in 2009, NMFS anticipates that these BFT will be approximately age 6 and will enter the small medium size class. NMFS manages the recreational BFT quota by size class, so as this cohort of fish grows in weight but remains under 73 inches, NMFS expects the large school/small medium subquota to be attained with fewer, but larger, fish landed. Potentially allowing increased commercial effort by General and Harpoon fishermen to harvest small medium BFT would put additional pressure on these age 6 fish. For these reasons, NMFS believes that modification of the size of BFT allowed for commercial retention likely would need to be made via an FMP amendment that would include a thorough environmental impact assessment.

The potential advantages of reducing the ''commercial minimum size'' for retention by General and Harpoon category vessels (and HMS Charter/Headboat category vessels when fishing commercially) include: (1) increased use of the U.S. BFT quota through increased General and Harpoon (quota) category landings; (2) positive socio-economic impacts for General category, Harpoon category, and HMS Charter/Headboat category vessels due to the ability to retain and sell more commercial-sized BFT per day/trip; (3) related positive impacts for dealers; and , (4) decreased discard mortality of small medium BFT above a new ''commercial minimum size'' (that previously would have been caught incidentally to directed fishing for BFT 73 inches or greater).

The potential disadvantages of reducing the ''commercial minimum size'' for retention by General and Harpoon category vessels (and HMS Charter/Headboat category vessels when fishing commercially) include: (1) negative socio-economic impacts for recreational BFT fishermen due to increased competition and gear conflicts with the commercial handgear categories; (2) negative biological and

ecological impacts on BFT due to increased fishing effort and landings of small medium BFT (with potential impacts on the spawning stock and stock rebuilding); (3) increased discard mortality of BFT under the new ''commercial minimum size'' due to increased effort on smaller commercial-sized BFT and the low likelihood of survival after a harpoon strike if harpoon gear is used; and, (4) implications for data collection regarding BFT caught and landed by both commercial and recreational vessels (e.g., BFT measuring 65 to 73 inches, landings of which previously would have been recreational only).

2. Request for Comments

NMFS requests comments related to any aspect of this topic, and is specifically seeking comments that address the following questions.

Commercial Minimum Fish Size. Would user conflicts result from the recreational and commercial handgear fisheries pursuing the same size BFT? For the sustainability of the fishery, what should NMFS do to protect certain BFT year classes? Should NMFS implement slot limits (i.e., establish both a minimum and a maximum size limit)? Should NMFS make a change to the commercial minimum size, but revert to the 73 inch minimum size when a certain percentage of the General and Harpoon category is reached (e.g., 75 percent) by in-season action? How should NMFS manage the Angling, General, and Harpoon categories as the availability and distribution of size classes changes and particularly as the current cohort reaches maturity? How would a potential change in commercial minimum size alter market demand for imported BFT?

D. Charter/Headboat Category

Under current regulations, persons aboard a vessel issued an HMS Charter/Headboat category permit may retain and land BFT under the daily limits and quotas applicable to the Angling category or the General category, except when fishing in the Gulf of Mexico (in which case only the annual limit of one (recreational ''trophy'') large medium or giant BFT may be retained, possessed, and landed). Specifically regarding retention limits, the size category of the first BFT retained determines the fishing category applicable to the vessel that day. For instance, if the first BFT retained is a large school BFT, the vessel may fish only under the Angling category daily retention limit that day and may not retain a commercial-sized BFT on that same day. Gear currently authorized for use on Charter/Headboat category vessels includes rod and reel, bandit gear, handline, and green-stick gear, as well speargun when recreationally fishing for non-bluefin Atlantic tunas. The current FMP quota allocations are as follows: 19.7 percent for the Angling category; 47.1 percent for the General category; 3.9 percent for the Harpoon category; 18.6 percent for the Purse Seine category; 8.1 percent for the Longline category; 0.1 percent for the Trap category; and 2.5 percent for the Reserve.

1. Potential Management Options and Issues

Counting of Landings and Quota Allocations. NMFS received two suggestions regarding landings and quota allocation in the HMS Charter/Headboat category. These include: (1) allow persons aboard HMS Charter/Headboat category vessels to fill both the commercial and recreational daily retention limit on the same day (*i.e.,* fish commercially and recreationally on the same day); and, (2) reallocate BFT subquotas to create a separate BFT Charter/Headboat category quota.

The suggested change to the daily retention limit could be implemented via a regulatory amendment, but changes to FMP quota allocations of BFT would require an FMP amendment.

The potential advantages of allowing commercial and recreational BFT fishing on the same day include: (1) increased use of the U.S. BFT quota through increased landings, particularly of commercial BFT counted against the underharvested General category quota; (2) positive socio-economic impacts for HMS Charter/Headboat category vessels due to the ability to retain and sell commercial-sized BFT on the same day as making a trip with paying passengers for recreational-sized BFT; (3) related positive impacts for dealers; and, (4) decreased discard mortality of BFT if fish were retained that previously would have exceeded the daily retention limit.

The potential disadvantages of allowing commercial and recreational BFT fishing on the same day include: (1) the removal of clear distinction between commercially and recreationally caught BFT; (2) increased difficulty of monitoring recreational BFT catch and landings through the Large Pelagics Survey; (3) increased difficulty enforcing the daily retention limits and reporting requirements; and (4) increased discard mortality of undersized BFT (in excess of recreational daily retention limit) due to potential increased effort on commercial-sized fish, particularly if implemented in conjunction with raising or eliminating the commercial retention limit.

The potential advantages of creating a separate Charter/Headboat quota would include positive socio-economic impacts for HMS Charter/Headboat vessels associated with a dedicated quota for that permit category. Conversely, potential disadvantages would include negative socio-economic impacts for vessels in other existing quota categories, due to reallocation.

Authorized Gears. NMFS received a suggestion to allow the use of harpoon gear on HMS Charter/Headboat category vessels. This potential change to the allowable gear regulations could be implemented using a regulatory amendment.

NMFS proposed to authorize harpoon gear for the harvest of Atlantic tunas, including BFT, in the HMS Charter/Headboat category on May 6, 2008 (73 FR 24922), but did not finalize the change in the final rule (73 FR 54721, September 23, 2008). At that time, NMFS decided to maintain the status quo regarding authorized harpoon use, (*i.e.,* by the General and Harpoon categories only), after noting a relative lack of support for this issue, and because of concerns about bycatch, enforcement, safety at sea, and BFT stock status.

The potential advantages of authorizing harpoon gear use on Charter/Headboat category vessels would include increased opportunities to retain and land commercial sized BFT, thus making increased use of the U.S. BFT quota through increased General category landings.

The potential disadvantages of authorizing harpoon gear include: (1) increased discard mortality from inadvertent harpoon strikes on undersized BFT; and, (2) difficulty with enforcement if harpoons are authorized on non-for-hire trips only.

2. Request for Comments

NMFS requests comments related to any aspect of this topic, and is specifically seeking comments that address the following questions.

Counting of Landings and Quota Allocations. Should HMS Charter/Headboat category vessels be allowed to fish commercially and recreationally on the same day? How should NMFS monitor HMS Charter/Headboat effort, landings, and bycatch? Should these vessels be required to maintain and submit logbooks?

Authorized Gears. Should harpoon gear be authorized for use on HMS Charter/Headboat category vessels? If so, should harpoon gear be authorized on

both for-hire and non-for-hire trips or only on non-for-hire trips?

E. All Categories—Landing Form

Under current HMS regulations, persons that own or operate a fishing vessel that possesses or lands an Atlantic tuna (bigeye, albacore, yellowfin, and skipjack tunas) must maintain such tuna through offloading either in round form or eviscerated with the head and fins removed, provided one pectoral fin and the tail remain attached. For a whole or round tuna (head on), the sole criterion for determining the size and/or size class of a whole or round (head on) Atlantic tunas is a curved fork length measurement (CFL). The CFL measurement is determined by the length of a fish measured from the tip of the upper jaw to the fork of the tail along the contour of the body in a line that runs along the top of the pectoral fin and the top of the caudal keel. When the head of an Atlantic tuna is removed, a pectoral fin curved fork length (PFCFL) is the legal means of measuring the fish. The PFCFL is determined by the length of a fish with the head removed from the dorsal insertion of the pectoral fin to the fork of the tail measured along the contour of the body in a line that runs along the top of the pectoral fin and the top of the caudal keel. Both of these measurements require the tail to be naturally attached to attain a proper measurement.

The PFCFL is converted to CFL using a conversion factor of 1.35. The resulting CFL is the sole criterion for determining the size class of a BFT with the head removed. Applying the conversion factor from PFCFL to CFL for a BFT with the head removed currently means that no person shall retain or possess a BFT, with the head removed, measuring less than 20 inches (51 cm) PFCFL. For yellowfin and bigeye tuna, both of which have a minimum size of 27 inches CFL, the regulations state that no person shall remove the head of the fish if the remaining portion would be less than 27 inches from the fork of the tail to the forward edge of the cut.

1. Potential Management Options and Issues

Atlantic Tunas Landing Form. NMFS has been requested to allow the tail of Atlantic tunas to be removed at sea, provided that the remaining carcass length exceeds the minimum CFL measurement that is applicable to the species and permit category of the vessel. Although this request stems primarily from a desire to make storage of Atlantic tunas more efficient on PLL vessels, the issue is applicable to all vessels fishing for and retaining Atlantic tunas. The regulations regarding Atlantic tunas landing form could be changed via a regulatory amendment.

The potential advantages of allowing the removal of Atlantic tuna tails include: (1) allowing for more efficient storage of harvested Atlantic tunas; (2) increased options for preserving the quality of harvested Atlantic tunas; and, (3) harmonization of Atlantic tunas minimum size limits, carcass condition regulations, and preferred fishery practices.

The potential disadvantages of allowing the removal of Atlantic tuna tails include: (1) may indirectly change the allowable minimum size of an Atlantic tuna; (2) may complicate analyses and require the generation of a conversion factor for comparison to historical fish length data; (3) may necessitate changes to reporting forms and reporting requirements; and (4) would likely necessitate changes to current terms and definitions in the regulations.

2. Request for Comments

NMFS requests comments related to any aspect of this topic, and is specifically seeking comments that address the following questions.

Atlantic Tunas Landing Form. Should this potential change in landing form be considered for all regulated Atlantic tuna species? Should this potential change be considered for all permit categories? Should NMFS standardize where the tail is cut for analytical purposes? How would this potential change affect current fishing practices? Are there other means of allowing more efficient storage of Atlantic tunas without removing the tail?

III. North Atlantic SWO, Atlantic Shark, and Atlantic BFT Fishery Issues

As noted in the ''DATES'' section, the comment period on issues in this section is open through August 31, 2009.

This section of the ANPR addresses issues which may overlap several HMS fishery sectors.

A. Modification of PLL BFT Incidental Catch Requirements

Under current HMS regulations, persons aboard a vessel permitted in the Atlantic Tunas Longline category may retain, possess, land, and sell large medium and giant BFT taken incidentally when fishing for other species, as follows: One large medium or giant BFT per vessel per trip may be landed, provided that at least 2,000 lb (907 kg) of species other than BFT are legally caught, retained, and offloaded from the same trip and are recorded on the dealer weighout slip as sold; two large medium or giant BFT may be landed incidentally to at least 6,000 lb (2,727 kg) of species other than BFT; and three large medium or giant BFT may be landed incidentally to at least 30,000 lb (13,620 kg) of species other than BFT.

1. Potential Management Options and Issues

Commenters have suggested that NMFS should increase the incidental BFT retention limits for the PLL fishery in order to reduce regulatory discards of commercial-sized BFT and thus, increase profitability of PLL trips, which may result in increased SWO fishing effort and potentially increase landings of SWO.. Specifically, NMFS has received the suggestion to allow two large medium or giant BFT for 3,000 lb (1,361 kg) of target catch; 3 BFT for 6,000 lb (2,722 kg); 4 BFT for 9,000 lb (4,082 kg); and 5 BFT for 12,000 lb (5,443 kg).

Modifications to BFT incidental catch limits would need to be thoroughly analyzed and could potentially be made via a regulatory amendment assuming Longline landings remain consistent with the baseline allocation. If modifications were to result in Longline landings inconsistent with the baseline allocation, an FMP amendment may be required.

The potential advantages of increasing the PLL incidental retention limit include: (1) decreased regulatory discards of BFT caught incidentally while targeting other species; and, (2) increased profitability of PLL trips, which may result in increased SWO fishing effort, contributing to the revitalization of the SWO fishery and the increased utilization of the U.S. SWO quota.

Potential disadvantages associated with increasing the PLL incidental retention limit include: 1) Pursuant to the 2006 ICCAT BFT Recommendation, the United States must count BFT dead discards along with landings against the U.S. BFT quota. As a result, the Longline category BFT quota has been fully utilized. It is possible that increasing the incidental retention limits could result in increased PLL effort, which may necessitate NMFS closing the PLL fishery prior to the end of the fishing year. Such a closure would be disruptive to PLL fishing activities for target species and have negative economic impacts. 2) Second, there is a possibility of increased bycatch of undersized BFT and non-target species, including protected species, due to increased PLL fishing

effort, particularly on trips targeting other HMS which have high bycatch rates. 3) Changes in fishing behavior (fishing location and effort) could occur, including the potential targeting of BFT which is in contravention to the Longline category's incidental nature and of ICCAT prohibitions on directed fishing for BFT on their spawning grounds.

2. Request for Comments

NMFS requests comments related to any aspect of this topic, and is specifically seeking comments that address the following questions. What factors should NMFS consider in any potential PLL incidental retention limit analyses to prevent potential targeting of BFT? Should NMFS consider adjustments in the PLL incidental retention limits in the Atlantic Ocean only and not include the Gulf of Mexico because it is the spawning ground or should NMFS consider adjustments in all areas where BFT are bycatch in the PLL fishery? Should NMFS consider revisions to the Longline category's incidental nature and/or baseline allocation?

B. Establishment of a HMS General Commercial Handgear Permit

NMFS, with input from the HMS AP, evaluated the HMS permit structure over the past couple of years to determine if changes could be made that would add flexibility for fishermen and fishery managers, address existing HMS management needs, and simplify the permit structure for the public and for NMFS. Current HMS limited access permits include: SWO Directed, Incidental, and Handgear permits; Shark Directed and Incidental permits; and, the Atlantic Tunas Longline category permit. In general, the current HMS permit structure is complicated and sometimes burdensome on the public, especially with regard to obtaining and transferring limited access permits. For example, in order to retain tunas and SWO caught with PLL gear, a vessel must be issued an Atlantic Tunas Longline category permit, a shark limited access permit, and a SWO limited access permit (except Handgear).

Limited access permits were implemented in 1999 to rationalize harvesting capacity with available quotas, and to reduce latent effort in SWO and shark fisheries. A consequence of having limited access and not issuing new permits is that some of these permits are now valued at tens of thousands of dollars. Limitations on vessel size and horsepower upgrades have further affected their value and use.

The primary commercial gear currently used to catch SWO and tunas is PLL. Bottom longline (BLL) gear is primarily used to catch sharks. These gears generally catch larger numbers of target and non-target species than does handgear. The potential to issue new or lapsed/expired limited access permits to use PLL gear to harvest SWO has been restricted by bycatch concerns (including protected resources), gear conflict issues, and the poor condition of several Atlantic shark stocks, several of which are also caught on PLL gear. Given these restrictions on increasing effort of fishermen using longline gears, a potential option is the expansion of the Atlantic Tunas General category permit to allow for the retention of SWO and possibly the retention of sharks.

Currently, the Atlantic Tunas General category permit is an open access permit which authorizes the commercial harvest of Atlantic tunas with handgear. Potentially expanding the permit to allow for the retention of SWO and sharks would add flexibility for fishery managers and fishermen by allowing for the harvest of these species according to size and retention limits that are commensurate with the health of fish stocks. Potentially allowing for the commercial harvest of north Atlantic SWO with handgear by Atlantic Tunas General category permit holders could benefit fishermen, and address HMS management needs by providing additional opportunities to harvest SWO and achieve the domestic north Atlantic SWO quota by using a gear with generally low bycatch. The following sections describe some of the options and issues associated with potentially expanding the species allowed to be retained by Atlantic Tunas General category permit holders to include Atlantic SWO and sharks, thus converting the permit to an Atlantic HMS General commercial handgear permit, and establish size and retention limits for those species under the permit commensurate with the health of fish stocks.

1. Potential Management Options and Issues

Expand the Species Allowed to be Retained by Atlantic Tunas General Category Permit Holders and Convert the Permit to an Atlantic HMS General Commercial Handgear Permit. This potential modification would expand the species allowed to be retained by Atlantic Tunas General category permit holders to include Atlantic SWO and sharks, thus converting the permit to an Atlantic HMS General commercial handgear permit, and establish size and retention limits for those species under the permit commensurate with the health of fish stocks. As of May 2008, there were 4,031 Atlantic Tunas General category permit holders. Since these permits were purchased to commercially harvest Atlantic tunas, it is unknown how many would be used to commercially harvest SWO or sharks; however, NMFS does not anticipate that all Atlantic Tunas General category permits would be used in this manner. The options described below discuss various other aspects that would need to be considered in potentially expanding the species allowed and changing the permit name.

Open Access or Limited Access. The existing Atlantic Tunas General category permit is an open access permit. A potentially expanded Atlantic HMS General Commercial Handgear permit could either remain under the existing open access regulations (as per the Atlantic Tunas General category permit) or become a limited access permit. North Atlantic SWO are almost fully rebuilt, overfishing is not occurring, and the U.S. SWO quota is underharvested; therefore, an open access HMS General Commercial Handgear permit may be a possibility. The limited access permit system for SWO was established in 1999 (when SWO were overfished with overfishing occurring) and, if proposed and adopted, an HMS General Commercial Handgear permit—potentially with low retention limits (see below)—would be the first time open access is allowed commercially in the domestic SWO fishery since the stock has improved. Implementing either an open access or a limited access HMS General Commercial Handgear permit would have important implications on permit availability, fishing effort, commercial landings, ex-vessel prices, and the value of existing permits, among others.

The implications of a potential open access HMS General Commercial Handgear permit for sharks is not the same as for SWO. Several shark populations are overfished with overfishing occurring, thus if shark harvest with the HMS General Commercial Handgear permit were allowed, retention limits and other harvest restrictions may be necessary to facilitate continued rebuilding of overfished shark populations.

Authorized Species. Many shark species are overfished, subject to overfishing, or have an unknown stock status. Recent and proposed actions by NMFS have addressed or may address overfishing in shark fisheries. Sharks are caught incidentally by hook and line

gear used by Atlantic Tunas General category permitted vessels, but sharks are currently not authorized to be retained by these permit holders unless they also hold a directed or incidental shark limited access permit. The authorization of shark harvest under this potential modification could allow for retention of some sharks to account for incidental catch; however, allowing shark harvest could also result in targeting of sharks.

Retention Limits. If the harvest of sharks were authorized, a possible option to prevent targeted fishing would be to establish a retention limit equivalent to or less than recreational retention limits. Depending on the status of specific shark species and the ability of permit holders to correctly identify species and release species with minimal injury, retention limits could be modified over time to allow retention of incidental catches of sharks commensurate with stock status. This option may provide desired flexibility for fishery managers while continuing to allow rebuilding of shark stocks and increasing the knowledge of shark incidental catches in this fishery. If the harvest of SWO were authorized for a potential HMS General Commercial Handgear permit, it could potentially impact current limited access permit holders by increasing the volume of SWO on the market and decreasing the demand (and therefore price) of the current permits. This potential modification to the Atlantic Tunas General Category permit could also impact recreational anglers by increasing the overall amount of commercial fishing effort in some areas. However, a relatively low SWO retention limit could mitigate these impacts by tempering the amount of swordfish that enters the market and the commercial benefit of the permit. Also a relatively low SWO retention limit could mitigate concerns about impacts to the values of SWO limited access permits.

Tournament Participation. Currently, Atlantic Tunas General category permit holders may participate in Atlantic HMS registered tournaments and, when fishing in an HMS tournament, may land Atlantic billfish. Under a potential Atlantic HMS General Commercial Handgear permit, participation in HMS tournaments and landing of billfish in those tournaments could be modified. The provision that allows Atlantic Tunas General category permit holders to participate in a registered HMS tournament and land billfish could be maintained or that provision could be eliminated. If it were eliminated, existing Atlantic Tunas General category permit holders would potentially lose the ability to participate in registered HMS tournaments. It is possible that some current HMS Angling category permit holders may want to change permit types and purchase the expanded HMS General Commercial Handgear permit. If permit holders of the expanded HMS General Commercial Handgear permit could not participate in tournaments, historical HMS Angling category permit holders that obtain the expanded HMS General Commercial Handgear permit could potentially lose the ability to participate in tournaments and land billfish if this provision were eliminated.

Bycatch and Bycatch Mortality. FMPs and regulations promulgated under the Magnuson-Stevens Act must be consistent with National Standard 9 which states that conservation and management measures shall, to the extent practicable, minimize bycatch and to the extent bycatch cannot be avoided, minimize the mortality of such bycatch. NMFS has implemented numerous management measures to reduce the bycatch of undersized SWO, non-target species, and protected species in the PLL fishery, and prohibited some sharks, non-target species, and protected species in the BLL fishery. For instance, in accordance with National Standard 9 of the Magnuson-Stevens Act, time/area closures were implemented in the PLL fishery in 1999, 2001, and 2002. Management measures to reduce interactions of HMS fishing gears with protected resources are prescribed by the Biological Opinions (BiOps) for HMS fisheries, PLL fishery, and shark fisheries in 2001, 2004, and 2008 respectively, under the authority of the Endangered Species Act. The 2001 BiOp on HMS fisheries concluded that continued operation of handgear fisheries in the Atlantic may adversely affect, but are not likely to jeopardize the continued existence of protected species. Under the authority of the MMPA, the Pelagic Longline Take Reduction Team (PLTRT) was formed and the final rule implementing the Pelagic Longline Take Reduction Plan (PLTRP) published on May 19, 2009 (74 FR 23349). Any potential expansion of fishing effort in HMS fisheries, including handgear fisheries, must consider the continuing need to minimize bycatch and bycatch mortality.

HMS Reporting Requirements. Commercially landed HMS may only be sold to HMS permitted dealers, and HMS permitted dealers are required to report their purchases to NMFS. Reporting mechanisms are also in place via state trip ticket programs in the South Atlantic and Gulf of Mexico, dealer reporting to the NMFS Northeast Regional Office, and through cooperation with the Commonwealths of Puerto Rico and the U.S. Virgin Islands. NMFS has the authority to require logbook reporting of Atlantic tunas, shark, or SWO permitted vessels and the authority to require Atlantic HMS, tunas, shark, or SWO permitted vessels to carry observers; however, these mechanisms are currently not exercised in all categories. This is due, in part, to the difficulty in handling large numbers of logbook reports and the cost of observer programs. NMFS is interested in improving data collection capabilities in the HMS General category fishery, especially if additional species are authorized under an Atlantic HMS General Commercial Handgear Permit.

2. Request for Comments Regarding a HMS General Commercial Handgear Permit

NMFS requests comments on the potential adjustment of regulations governing Atlantic HMS fishing permits that would amend the species allowed to be retained by the Atlantic Tunas General category permit to include SWO and sharks, and establish size and retention limits for the permit. The preceding section provided information on some options and issues regarding the potential expansion of the HMS General Commercial Handgear permit. The public is encouraged to submit comments related to any aspect of this topic. NMFS is also specifically seeking comments to the following questions.

What are the benefits of an open versus limited access HMS General Commercial Handgear permit? If SWO are authorized to be harvested with a HMS General Commercial Handgear permit, what retention limit should apply? If sharks are authorized to be harvested with a HMS General Commercial Handgear permit, what retention limit should apply? Under a potential Atlantic HMS General Commercial Handgear permit, should participation in HMS tournaments and landing of billfish in those tournaments be allowed? How can impacts to the value of existing SWO or shark limited access permits be minimized? Would low retention limits for SWO and shark aid in minimizing potential impacts to limited access permit values? Are there additional bycatch concerns regarding commercial handgear fishing for HMS? What methods might be utilized to collect data in commercial HMS handgear fisheries? If fish are caught by a HMS General Commercial Handgear

permitted vessel, but not sold, what mechanism might be most appropriate for reporting the landing?

C. Squid Trawl Vessel Exemption from Multi-Permit Requirement to Retain SWO

Current HMS regulations specify that three limited access permits (SWO Directed or Incidental, Shark Directed or Incidental, and Atlantic Tunas Longline) are required to commercially harvest and sell SWO, unless the vessel has been issued a limited access SWO Handgear permit. This regulation was originally intended to address PLL vessels, which are likely to have a bycatch of any of these species when targeting SWO or tunas. However, the regulation applies to any vessel which commercially captures and sells SWO. Therefore, squid trawl vessels must be issued all three permits, including an Atlantic Tunas Longline category permit, to sell their incidentally caught SWO. NMFS has received comments requesting reconsideration of the three permit requirement for squid trawl vessels. Commenters have indicated that this requirement is burdensome, confusing, and unnecessary since squid trawl vessels do not fish with PLL gear.

1. Potential Management Options and Issues

Eligibility. To consider an exemption from the three permit requirement for squid trawl vessels to retain SWO, NMFS would need to determine which vessels are eligible for the exemption. This could potentially be accomplished by exempting any vessel which is issued an *Illex* squid and/or *Loligo* squid moratorium permit, by exempting only squid trawl vessels which are currently issued the three required HMS permits, or by creating a new HMS incidental catch permit for some or all squid trawl moratorium vessels. Expanding the exemption to include all squid trawl moratorium vessels and/or creating new incidental catch permit for some or all squid trawl vessel would likely require more extensive analysis and, possibly, an FMP amendment.

Authorized Gear. SWO is oftentimes an unavoidable bycatch species in the midwater trawl (squid trawl) fishery and NMFS has established retention limits for the incidental catch of SWO by squid trawl vessels. The existing regulations at 50 CFR 635.24(b)(2) state that a vessel is considered to be in the squid trawl fishery when it has no commercial fishing gear other than trawls on board and when squid constitutes not less than 75 percent by weight of the total fish on board or offloaded from the vessel. Gears with which HMS are allowed to be harvested have been authorized in the regulations for that purpose. Midwater trawl is currently not an authorized gear for any HMS, however it may be advantageous to authorize midwater trawl in order to maintain consistency in the regulations. Authorizing midwater trawl gear for SWO may create the perception that targeting SWO with midwater trawl gear is allowable. NMFS is requesting information from the public regarding whether midwater trawl gear should be authorized in SWO and other HMS fisheries.

Species Retention. NMFS has established retention limits for the incidental catch of SWO by squid trawl vessels. However, some squid trawl vessels have also reported landing tunas or other HMS. NMFS is requesting information from the public regarding the degree to which tunas or other HMS are an unavoidable bycatch in the squid trawl fishery.

2. Request for Comments Regarding a Squid Trawl Exemption from Multi-Permit Requirement to Retain SWO

NMFS requests comments on a potential exemption for squid trawl vessels from the multi-permit requirement to retain SWO. The preceding section provided information on options and issues. The public is encouraged to submit comments related to any aspect of this topic. NMFS is also specifically seeking comments to the following questions.

Should a potential exemption apply only to squid trawl vessels currently issued the three required HMS permits to retain SWO? Should a potential exemption apply to all squid trawl vessels currently issued *Illex* and/or *Loligo* moratorium permits? Should midwater trawl gear be authorized for SWO or other HMS fisheries? Should a potential exemption apply to other HMS species, or only to SWO? How should a potential exemption be implemented (no permit(s) required, a trawl permit only, retention limits)?

IV. Catch Share Programs

As noted in the ''DATES'' section, the comment period on issues in this section is open through August 31, 2009.

Catch share programs generally refer to a variety of fishery management regimes which may allocate fishing privileges to permit holders, groups of permit holders, fishing communities, or other entities. In this ANPR, NMFS is considering the feasibility and applicability of two types of catch share programs in HMS fisheries, namely Limited Access Privilege Programs (LAPPs) and Individual Bycatch Caps (IBCs), both of which are briefly described below.

A. LAPPs

1. Potential Management Options and Issues

Applicability. LAPPs are authorized by Magnuson-Stevens Act and are a type of catch share program. In a LAPP, privileges to harvest part of a total allowable catch (TAC) or quota are distributed to fishery participants through permits. By ensuring each LAPP participant an opportunity to harvest a specific amount of TAC or quota, LAPPs have the potential to: eliminate the incentive to over-invest in fishing capacity; provide increased operational flexibility; increase harvest timing flexibility; increase fishing efficiency; and increase the overall profitability of fishing fleets. Even in a fishery that is not achieving its quota, such as BFT and SWO, LAPPs provide an opportunity for fishery participants to ''lock-in'' a share of the quota which may prove valuable if the fishery becomes quota-limited in the future. LAPPs represent a significant change from the way that most HMS fisheries are managed because fishing quotas would be assigned to individual participants or groups of participants. The biological, social, or economic impacts associated with such a change in the management of quotas and quota shares could vary greatly, depending on the specifics of the LAPP provisions implemented. All such impacts would be analyzed in a separate rulemaking with appropriate supporting documentation should such programs be further considered.

2. Request for Comments Regarding LAPPs

The preceding section provided information on the options and issues regarding LAPPs in HMS fisheries. The public is encouraged to submit comments related to any aspect of this topic. NMFS is also specifically seeking comments to the following questions.

For HMS fisheries, what aspects of LAPPs have the most potential to increase operational flexibility, harvest timing flexibility, and fishing efficiency? Would LAPPs in HMS fisheries result in increased profitability for fishermen? What social or biological, social, or economic impacts might be associated with implementation of LAPPs in HMS fisheries? What criteria should NMFS consider when evaluating LAPPs for HMS fisheries?

B. IBCs

1. Potential Management Options and Issues

Applicability. IBCs refer to a part of a total allowable amount of interaction with bycatch species (which may include both non-target and protected species) that may be encountered during fishing activity. The total allowable amount of interaction with bycatch species may be established through mechanisms such as stock assessments that establish a TAC for overfished species, incidental take statements issued under the ESA, or other mechanisms. Examples of bycatch species may be an overfished species for which overfishing is occurring or a listed species. By distributing the allowable amount of interaction with bycatch species to vessels, either individually or grouped, or on a regional basis, the ability to individually or regionally manage interactions may be achieved. The advantages of this management approach may include: increased individual responsibility for interactions in a fishery; increased ability for individuals that avoid interactions to continue to fish; and more regionally applicable consequences of interactions if bycatch caps are applied on a regional basis. IBCs represent a significant change from the way that bycatch issues in most HMS fisheries are managed because allowable limits of bycatch would be assigned to individual participants, groups of participants, or regions. The biological, social or economic impacts associated with such a change in the management of bycatch in HMS fisheries could vary greatly, depending on the specifics of the provisions implemented. All such impacts would be analyzed in a separate rulemaking with appropriate supporting documentation should such provisions be further considered.

2. Request for Comments Regarding IBCs

The preceding section provided information on the options and issues regarding IBCs in HMS fisheries. The public is encouraged to submit comments related to any aspect of this topic. NMFS is also specifically seeking comments to the following questions.

How might an IBC system in HMS fisheries affect the status of bycatch species? What aspects of an IBC system in HMS fisheries might be advantageous to fishery participants? What aspects of an IBC system would not be advantageous to fishery participants? What efficient and effective ways of monitoring IBCs are there? What social, biological, or economic impacts might be associated with implementation of IBCs in HMS fisheries? What should NMFS consider when evaluating IBCs for HMS fisheries?

V. Submission of Public Comments

NMFS reminds the public that there are two deadlines for the submission of written comments. The comment period for items discussed in Section II of this ANPR closes on June 30, 2009. The comment period for items discussed in Sections III and IV of this ANPR closes on August 31, 2009. Please see the ADDRESSES section of this ANPR for additional information regarding the submission of written comments.

All written comments received by the due dates will be considered in drafting proposed changes to the HMS regulations. In developing any proposed regulations, NMFS must consider and analyze ecological, social, and economic impacts. Therefore, NMFS encourages comments that would contribute to the required analyses, and respond to the questions presented in this ANPR.

Public Meetings

NMFS will hold five public meetings to receive comments from fishery participants and other members of the public regarding this ANPR. These meetings will be physically accessible to people with disabilities. Request for sign language interpretation or other auxiliary aids should be directed to Sarah McLaughlin at 978–281–9260 or Randy Blankinship at 727–824–5399, at least 7 days prior to the meeting. For individuals unable to attend a meeting, NMFS also solicits written comments on the ANPR (see **DATES** and **ADDRESSES**).

The meeting dates, times, and locations follow. All meetings will be held from 5:00 p.m. to 9:00 p.m. All meetings will begin with an opportunity for individuals to view information on the issues raised in this ANPR and ask questions at 5:00 p.m. followed by a presentation and opportunity for public comment beginning at 6:00 p.m.

1. June 23, 2009, Holiday Inn, 151 Route 72 East, Manahawkin, NJ 08050

2. June 25, 2009, Roanoke Island Festival Park, 1 Festival Park, Manteo, NC 27954

3. June 29, Radisson Hotel Plymouth Harbor, 180 Water Street, Plymouth MA 02360

4. July 21, Belle Chasse Auditorium, 8398 Hwy. 23, Belle Chasse, LA 70037

5. July 28, Broward County Main Library, 100 S. Andrews Ave., Fort Lauderdale, FL 33301

Classification

This action is not significant pursuant to Executive Order 12866.

Authority: 16 U.S.C. 971 *et seq.* and 1801 *et seq.*

Dated: May 26, 2009.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. E9–12652 Filed 5–29–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

RIN 0648–XL60

Fisheries of the Exclusive Economic Zone Off Alaska; Loan Program for Crab Quota Share; Amendment 33

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

ACTION: Notice of availability of a proposed amendment to a fishery management plan; request for comments.

SUMMARY: The North Pacific Fishery Management Council (Council) has submitted Amendment 33 to the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs (FMP). If approved, Amendment 33 would allow NMFS to reduce the amount of fees collected under the Crab Rationalization Program to the amount needed to finance the Federal loan program for quota share purchase. The amendment would allow NMFS to reserve only the amount of fees necessary to support the loan program, including no fees if none are needed. This action is necessary to ensure that fishery participants do not pay fees for loan program financing in excess of the fees needed to support the loan program. This FMP amendment would not result in modifications to Federal regulations.

DATES: Comments on Amendment 33 must be received on or before July 31, 2009.

ADDRESSES: Send comments to Sue Salveson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by ''RIN 0648–XL60'', by any one of the following methods:

• Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal website at *http://www.regulations.gov.*

• Mail: P. O. Box 21668, Juneau, AK 99802.

• Fax: (907) 586–7557.

• Hand delivery to the Federal Building: 709 West 9th Street, Room 420A, Juneau, AK.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All personal identifying information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (ENTER ''N/A'' in the required fields, if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe portable document file (pdf) formats only.

FOR FURTHER INFORMATION CONTACT: Jeff Hartman, 907–586–7442.

SUPPLEMENTARY INFORMATION: The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requires that each regional fishery management council submit any fishery management plan or fishery management plan amendment that it prepares to NMFS for review and approval, disapproval, or partial approval by the Secretary of Commerce.

In 2005, NMFS implemented the Crab Rationalization Program (Program) for Bering Sea/Aleutian Islands (BSAI) crab fisheries by allocating exclusive fishing and processing privileges (March 25, 2005, 70 FR 10174). Programs that allocate exclusive fishing privileges are commonly known as limited access privilege programs (LAPPs). At its most basic, the Program recommended by the Council: (1) allocated long term harvest privileges known as quota share (QS) that were based on the catch history of vessel owners and captains during a specific period, and can yield exclusive annual harvest privileges for QS holders, (2) allocated long term processing privileges known as processor quota share (PQS) to processors that were based on their processing history during a specific time period, and can yield exclusive annual processing privileges from PQS holders, and (3) included provisions to limit the delivery of much of the catch to specific geographic regions and required linkages with communities that have been historically dependent on the crab fisheries. The Program also includes a suite of other measures limiting the amount of QS and PQS a person can hold, specific catch accounting and monitoring requirements, mechanisms for transferring QS and PQS, price and delivery negotiation standards, economic data collection provisions, and other measures.

The Program recommended by the Council included provisions for a fee collection program consistent with the Magnuson-Stevens Act. The Magnuson-Stevens Act requires that NMFS collect fees on all LAPPs of not greater than 3 percent of the exvessel value of a fishery to recover the actual direct management, enforcement, and data collection costs in the fishery. NMFS may reimburse itself and other agencies for the actual direct costs of Program administration. The Magnuson-Stevens Act also allows NMFS to set aside a portion of LAPP cost recovery fees to aid in loan financing if such a set aside is recommended by the Council. The Council adopted a provision under the Program for a loan program to aid QS purchases by entry-level and small boat captains and crew who are active in the fishery. The Council recommended that 25 percent of the fees collected should be set aside to provide for financing a loan program. The Council also provided that NMFS should collect 133 percent of its actual direct costs to ensure that NMFS could fully recover actual management costs and set aside 25 percent of the fees collected, provided the sum of all fees collected does not exceed 3 percent of the exvessel value of the fishery. The funds collected for the crew and captains loan program were intended to compensate the government for the costs such as delinquencies, defaults, servicing fees, and penalties not covered by payments to comply with the Federal Credit Reform Act (FCRA) of 1990 (2 U.S.C. 661). This amount of funds that may be required is referred to as the FCRA loan subsidy cost.

The fee collection provisions required by the Magnuson-Stevens Act and included in the Program were implemented in the March 2, 2005 final rule (70 FR 10174). However, NMFS did not include a loan program for QS purchase as part of the March 2005 final rule because Congress had not provided NMFS with the necessary appropriation authority to grant a specific amount of Federal loans, or provided for an appropriation to subsidize any anticipated defaults or costs for administering a loan program that may not be recovered by the interest payments on the loans. The Magnuson-Stevens Act requires NMFS to administer loan programs under the credit authority of Title XI of the Merchant Marine Act, 1936.

The FCRA requires that NMFS not issue loans unless specific authority is granted by Congress. In addition, the FCRA requires any new loan obligation with estimated net loan losses (FCRA subsidy costs) be appropriated at the time Congress authorizes the amount of the loans that can be provided (i.e., the annual loan ceiling). Under the Magnuson-Stevens Act, a portion of the LAPP cost recovery fees, up to 25 percent of the amount collected and set aside for a loan program, could be used to provide the FCRA subsidy costs for the loan program. Alternatively, it may not be necessary to set aside any appropriation for the FCRA costs could be met through a direct appropriation, or may not be necessary if the net loan losses (i.e., the FCRA subsidy costs) are zero or negative. NMFS withheld the development of a loan program until Congress granted NMFS the necessary authority to provide for loans through the Consolidated Appropriations Act of 2008 (Pub. L. 110–161), and the appropriate FCRA loan subsidy cost could be determined.

Beginning in June 2006, NMFS began collecting fees in accordance with the Magnuson-Stevens Act and set aside 25 percent of the fees collected for purposes of a loan program as required by the Program. NMFS had presumed that a portion of the fees that had been set aside for the loan program would be used to provide for any required loan subsidy as required by FCRA once NMFS received the necessary authority to grant the loans.

During the process of developing the definitions of the loan program terms, it became clear to NMFS Financial Services Division (FSD) that because of the anticipated low default rate of loans, it is highly likely that the amount need to be set aside to provide for the FCRA loan subsidy coverage will not be the full 25 percent required by the program. NMFS FSD bases this assessment on the fact that under the existing halibut and sablefish IFQ program, the default rate on loans has been less than the revenue received from interest on the loans, and fees collected have not been required for loan program financing. NMFS FSD has indicated that it does not anticipate using fees collected under the Program to provide for loan financing because it anticipates a repayment history under the Program similar to that of the halibut and sablefish IFQ fishery with a zero or negative FCRA subsidy cost. If the loan program does not have a

subsidy cost, fees would not need to be set aside for that purpose.

However, the FMP requires that 133 percent of the actual direct costs must be collected with 25 percent of the fees collected set aside for loan subsidization. Given recent trends of increasing crab total allowable catches (TACs) and exvessel values, it is possible that direct management costs could represent less than 3 percent of the exvessel value of the rationalized crab fisheries. In that case, NMFS would collect more than 100 percent of the management costs to fund the mandatory 25 percent set-aside for the loan program subsidization, up to 133 percent of the actual management costs, as long as the total fee is under 3 percent of the exvessel value in the rationalized crab fisheries. In April 2008, NMFS recommended that the Council amend its FMP to avoid collecting LAPP cost recovery fees beyond the amount required to reimburse agency costs and provide for a loan program.

To resolve this issue, in June 2008, the Council recommended that Amendment 33 be prepared and submitted to the Secretary for approval. The proposed FMP amendment authorizes NMFS to collect fees up to the amount needed to support the projected FCRA loan subsidy cost. If NMFS determines that no additional funds would be required to offset the FCRA loan subsidy, it would be authorized not to collect fees for the subsidy. The FMP text would be amended to authorize NMFS to collect a variable amount of ''up to'' 133 percent of the actual direct cost of management for loan subsidies and ''up to'' 25 percent of the loan funds collected for loans, to offset the cost of subsidies for these loans. This variable amount authority in the FMP will replace the fixed amount requirement. This change would ensure that NMFS has the necessary flexibility to collect fees commensurate with the subsidy costs of the loan program. Amendment 33 would not effect the funds appropriated by Congress to initiate and support crew and captains loans under the Program, only the amount of fees collected to pay for the estimated subsidy on those loans.

Approval of Amendment 33 would not require amendment of regulations at 50 CFR 680.2 that implement the general fee collection provisions of the program.

The Council also considered and rejected two additional alternatives for addressing the assignment of fees to low-interest loans for crew and captains in the Program. One alternative was to make no amendment to the low-interest loan program in the FMP. That alternative was rejected by the Council because excess fees would be collected from the participants in the Program and that would not assist in meeting the goals of the low-interest loan program. The second alternative was to remove all references in the FMP that require a portion of the fees collected to be dedicated to a loan program set-aside. If no fees are set aside to offset potential FCRA subsidy costs, NMFS FSD would have to meet any FCRA subsidy cost requirements by receiving a direct appropriation from Congress. This alternative was rejected because it would effectively preclude NMFS from collecting fees to provide any necessary FCRA subsidy cost, if they were required.

Public comments are being solicited on Amendment 33. Comments received by the closing date will be considered in the approval/disapproval decision on the amendment. To be considered, written comments must be received by NMFS, not just postmarked or otherwise transmitted, by the close of business on the last day of the comment period.

Authority: 16 U.S.C. 773 *et seq.,* 1801 *et seq.,* 3631 *et seq.;* Pub. L. 108–447.

Dated: May 26, 2009.

Kristen C. Koch,

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

[FR Doc. E9–12644 Filed 5–29–09; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register

Vol. 74, No. 103

Monday, June 1, 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

Agricultural Research Service

Notice of Intent To Seek OMB Approval To Collect Information: Forms Pertaining to the Peer Review of ARS Research Projects

AGENCY: Agricultural Research Service (ARS), USDA.

ACTION: Notice and request for comments.

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 of 1995 and OMB implementing regulations. The Department is soliciting public comments on the subject proposal.

DATES: Written comments on this notice must be received by August 5, 2009.

ADDRESSES: Address all comments concerning this notice to: Michael S. Strauss, Peer Review Program Coordinator, Office of Scientific Quality Review, Agricultural Research Agency, USDA, 5601 Sunnyside Avenue, Beltsville, Maryland 20705; Phone: 301–504–3283; Fax: 301–504–1251.

FOR FURTHER INFORMATION CONTACT: Michael S. Strauss, 301–504–3283.

SUPPLEMENTARY INFORMATION: The Office of Scientific Quality Review will seek approval from OMB to update six existing forms that will allow the ARS to efficiently manage data associated with the peer review of agricultural research. All forms are transferred and received in an electronic storage format that does not include on-line access.

Abstract: The Office of Scientific Quality Review (OSQR) was established in September of 1999 as a result of the Agricultural Research, Extension, and Education Reform Act 1998 (''The Act'') (Pub. L. 105–185). The Act included mandates to perform scientific peer reviews of all research activities conducted by the USDA. The OSQR manages the ARS peer review system by centrally planning peer panel reviews for ARS research projects on a five-year cycle.

Each set of reviews is assigned a chairperson to govern the review process. The majority of the peer reviewers are non-ARS scientists. Peer review panels are convened to provide in-depth discussion and review of the research project plans. Each panel reviewer receives information on between 1 and 20 ARS research projects.

On average, 220 research projects are reviewed annually by an estimated 100 reviewers; whereby approximately 200 are reviewed by panel and approximately 20 are reviewed through an ad hoc process. The organization and management of this peer review system, particularly panel reviews, is highly dependent on the use of forms.

The Office of Scientific Quality Review will seek OMB approval of the following forms:

1. *Confidentiality Agreement Form*—USDA uses this form to document that a selected reviewer is responsible for keeping confidential any information learned during the subject peer review process. The Confidentiality Agreement is signed prior to the reviewer's involvement in the peer review process. This form requires an original signature. USDA's collection of information on the Confidentiality Agreement Form is needed to document that a selected reviewer is responsible for keeping confidential any information learned during the subject peer review process. The Confidentiality Agreement would be signed prior to the reviewer's involvement in the peer review process.

2. *Panelist Information Form*—USDA uses this form to gather up-to-date background information about the reviewer. Reviewers often include sensitive information on this form. This form requires an original signature. Collection of information on the Panelist Information Form is needed to gather up-to-date background information about the reviewer and essential information needed for reimbursement of travel expenses and/or payment of an honorarium. It contains sensitive personally identifiable information.

3. *Peer Review of an ARS Research Project Forms (Peer Review Forms)*—USDA uses these forms to guide the reviewer's comments on the subject project. The forms contain the reviewing criteria and space for the reviewer's narrative comments and evaluation. For Ad Hoc Reviewers, who are not members of a review panel, a check-off listing of the Action Classes is added at the end to allow the individual also to provide an overall rating of the plan. Collection of information on the Peer Review Forms is needed to guide the reviewer comments on the subject project. The forms contain the reviewing criteria and space to insert comments, and for Ad Hoc reviewers a place to register an overall Action Class.

4. *Recommendations for ARS Research Project Form* (*Recommendations Form*)—USDA uses this form to guide the panel's evaluation and critique of the review process. The form contains the recommendations of the panel for the subject research project. Collection of information on the Recommendations Form is needed to provide the panel's critique of the reviewed research project plan. It contains the consensus recommendations of the panel for the subject research project.

5. *Panel Expense Report Form (Expense Report)*—USDA uses this form to document a panel reviewer's expense incurred traveling to and attending a peer review meeting. The Expense Report includes lodging, meals, and transportation expenses. When completed, the form contains sensitive information. Collection of information on the Expense Report Form is needed to document the travel expense incurred by a panel reviewer in attending a peer review meeting. The Expense Report includes lodging, meals, and transportation expenses, as well as personal information. It includes sensitive information.

6. *Panel Invoice Form (Honorarium Form)*—USDA uses this form to document the transfer of an honorarium to a peer reviewer. Reviewers receive honoraria as compensation for serving as peer review panelists. This form requires an original signature. It is used only in special circumstances where reviewers cannot accept a direct bank transfer of the honorarium. In such cases this is used in lieu of the SF–1034 to provide the OSQR a written record of the honorarium payment. Collection of information on the Honorarium Form is needed to document the transfer of an

honorarium to the peer reviewer in those rare cases where an SF–1034 is not completed. It contains personally identifiable information.

Estimate of Burden: The burden associated with this approval process is the minimum required to achieve program objectives. The information collection frequency is the minimum consistent with program objectives. The following estimates of time required to complete the forms are based on OSQR's experience in working with reviewers and accepting their input into our procedures.

1. *Confidentiality Agreement Form:* This form takes 10–15 minutes to complete. It only requires a signature and date, but the reviewer must read the terms of the agreement.

2. *Panelist Information Form:* This form takes about 20 minutes to complete. It resembles a typical request for personal information; many reviewers provide the same data as grant reviewers in other peer review programs.

3. *Peer Review of an ARS Research Project Form (Peer Review Form):* This form takes 5–7 hours to complete. Because this is a review, the page length significantly varies. Reviewers are free to write as much as they wish, but to complete the form they must thoroughly read and evaluate a research project plan that may exceed 50 pages in length.

4. *Recommendations for ARS Research Project Form (Recommendations Form):* This form takes 1–2 hours to complete. Because this is a review, the page length significantly varies. Reviewers are free to write as much as they wish. The form is prepared by one reviewer combining comments from two of the reviewers as found on the Peer Review Form as well as adding further analyses derived from discussion with other reviewers.

5. *Panel Expense Report Form (Expense Report):* This form takes 10–12 minutes to complete.

6. *Panel Invoice Form (Honorarium Form):* This form takes 3–5 minutes to complete. This form has the reviewer's personal information pre-filled and the reviewer only verifies its accuracy and signs.

Respondents and Estimated Number of Respondents: Scientific experts, currently working in the same discipline as the research projects under review, are selected to review research projects. These experts are notable peers within and external to the ARS. Annually, about 150 peer reviewers complete these forms. Ad hoc reviewers are paid a modest honorarium but generally do not travel to meet with other reviewers; and thus they do not complete Expense Report and Invoice Forms. On occasion, ad hoc reviewers may participate in a Web-based panel, thus necessitating completion of an either an SF–1034 or an Honorarium Form. Ad hoc reviewers, retained for special situations, will make up about 20 percent of all the reviewers retained annually.

Frequency of Response:

Form	Number of respondents	Annual frequency
Confidentiality Agreement	130	1 per respondent (Total of 130).
Peer Review Form (Required for all reviewers and they have 1–4 review assignments on average.)	130	3–4 per panel respondent and 1 per Ad Hoc Respondent (Total of 450).
Expense Report	100	1 per respondent (Total of 100).
Honorarium Form	20	1 per respondent (Total of 20).
Panelist Information Forms	130	1 per respondent for each form (Total of 130).
Recommendations Form (Required on panel reviews, whereby comments from the peer review form are combined into one file.)	75	2.5 per respondent (Total of 200).

Estimated Total Annual Burden on Respondents:

Form (Estimate of time required to complete)	Number completed annually	Total burden (hr.)
Confidentiality Agreement (12 min.)	130	26
Peer Review Forms (5 hrs)	450	2250
Panelist Information Forms (20 min.)	150	50
Recommendations Form (1 hr)	220	220
Honorarium Form (3 min.)	20	1
Expense Report (10 min.)	150	25

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C. chap. 35.

Comments: The 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 ARS functions, including whether the information will have practical utility; (2) Evaluate the accuracy of the estimated burden from 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. All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

Dated: May 5, 2009.

Antoinette Betschart,

Associate Administrator, Research, Management and Operations, Agricultural Research Service, USDA.

[FR Doc. E9–12597 Filed 5–29–09; 8:45 am]

BILLING CODE 3410–03–P

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers, and Stockyards Administration

Designation for Topeka, KS; Cedar Rapids, IA; Minot, ND; and Cincinnati, OH

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Notice.

SUMMARY: GIPSA is announcing the designation of the following organizations to provide official services under the United States Grain Standards Act, as amended (USGSA): Kansas Grain Inspection Service, Inc. (Kansas); Mid-Iowa Grain Inspection, Inc. (Mid-Iowa); Minot Grain Inspection, Inc. (Minot); and Tri-State Grain Inspection Service, Inc. (Tri-State).

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

ADDRESSES: USDA, GIPSA, Karen Guagliardo, Chief, Review Branch, Compliance Division, STOP 3604, Room 1647–S, 1400 Independence Avenue, SW., Washington, DC 20250–3604.

FOR FURTHER INFORMATION CONTACT: Karen Guagliardo at 202–720–7312, e-mail *Karen.W.Guagliardo@usda.gov.*

Read Applications: All applications and comments will be available for public inspection at the office above during regular business hours (7 CFR 1.27(b)).

SUPPLEMENTARY INFORMATION: In the December 1, 2008, **Federal Register** (73 FR 72762), GIPSA requested applications for designation to provide official services in the geographic area named above. Applications were due by January 2, 2009.

Kansas, Mid-Iowa, Minot, and Tri-State were the sole applicants for designation to provide official services in the areas currently assigned to them, so GIPSA did not ask for additional comments on them.

GIPSA evaluated all available information regarding the designation criteria in section 7(f)(l) of the USGSA (7 U.S.C. 79(f)) and determined Kansas, Mid-Iowa, Minot, and Tri-State are able to provide official services in the geographic areas specified in the December 1, 2008, **Federal Register**, for which they applied. This designation action to provide official services in the specified area is effective July 1, 2009 and terminates on June 30, 2012.

Interested persons may obtain official services by calling the telephone numbers listed below.

Official agency	Headquarters location and telephone	Designation start	Designation end
Kansas	Topeka, KS (785–233–7063); Additional Location(s): Colby, CO; Dodge City, KS; Hutchinson, KS; Kansas City, KS; Salina, KS; Wichita, KS; and Sidney, NE.	7/1/2009	6/30/2012
Mid-Iowa	Cedar Rapids, IA (319–363–0239); Additional Location(s): Clayton, IA and Clinton, IA	7/1/2009	6/30/2012
Minot	Minot, ND (701–838–1734)	7/1/2009	6/30/2012
Tri-State	Cincinnati, OH (513–251–6571)	7/1/2009	6/30/2012

Section 7(f)(1) of the USGSA authorizes GIPSA's Administrator to designate a qualified applicant to provide official services in a specified area after determining that the applicant is better able than any other applicant to provide such official services (7 U.S.C. 79 (f)(1)).

Under section 7(g)(1) of the USGSA, designations of official agencies are effective for 3 years unless terminated by the Secretary but may be renewed according to the criteria and procedures prescribed in section 7(f) of the Act.

Authority: 7 U.S.C. 71–87k.

J. Dudley Butler,

Administrator, Grain Inspection, Packers, and Stockyards Administration.

[FR Doc. E9–12634 Filed 5–29–09; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[FDMS Docket No. FSIS–2009–0005]

International Standard-Setting Activities

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice.

SUMMARY: This notice informs the public of the sanitary and phytosanitary standard-setting activities of the Codex Alimentarius Commission (Codex), in accordance with section 491 of the Trade Agreements Act of 1979, as amended, and the Uruguay Round Agreements Act, Public Law 103–465, 108 Stat. 4809. This notice also provides a list of other standard-setting activities of Codex, including commodity standards, guidelines, codes of practice, and revised texts. This notice, which covers the time periods from June 1, 2008, to May 31, 2009, and June 1, 2009, to May 31, 2010, seeks comments on standards under consideration and recommendations for new standards.

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

- *Federal eRulemaking Portal:* This Web site provides the ability to type short comments directly into the comment field on this Web page or attach a file for lengthier comments. Go to *http://www.regulations.gov.* Follow the online instructions at that site for submitting comments.
- *Mail, including floppy disks or CD–ROMs, and hand- or courier-delivered items:* Send to Docket Clerk, U.S. Department of Agriculture, Food Safety and Inspection Service, 1400 Independence Avenue, SW., Room 2534, South Agriculture Building, Washington, DC 20250–3700.

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2009–0005. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to *http://www.regulations.gov.*

Docket: For access to comments received, go to the FSIS Docket Room at the address listed above between 8:30 a.m. and 4:30 p.m., Monday through Friday.

Please state that your comments refer to Codex and, if your comments relate to specific Codex committees, please identify those committees in your comments and submit a copy of your comments to the delegate from that particular committee.

FOR FURTHER INFORMATION CONTACT: Karen Stuck, United States Manager for Codex, U.S. Department of Agriculture, Office of the Under Secretary for Food Safety, Room 4861, South Agriculture Building, 1400 Independence Avenue, SW., Washington, DC 20250–3700; Phone: (202) 205–7760; Fax: (202) 720–3157.

USCodex@fsis.usda.gov. For information pertaining to particular committees, the delegate of that committee may be contacted. (A complete list of U.S. delegates and alternate delegates can be found in

Attachment 2 to this notice.) Documents pertaining to Codex are accessible via the World Wide Web at the following address: *http://www.codexalimentarius.net/current.asp.* The U.S. Codex Office also maintains a Web site at *http://www.fsis.usda.gov/Regulations_&_Policies/Codex_Alimentarius/index.asp.*

SUPPLEMENTARY INFORMATION:

Background

The World Trade Organization (WTO) was established on January 1, 1995, as the common international institutional framework for the conduct of trade relations among its members in matters related to the Uruguay Round Trade Agreements. The WTO is the successor organization to the General Agreement on Tariffs and Trade (GATT). U.S. membership in the WTO was approved and the Uruguay Round Agreements Act was signed into law by the President on December 8, 1994. The Uruguay Round Agreements became effective, with respect to the United States, on January 1, 1995. Pursuant to section 491 of the Trade Agreements Act of 1979, as amended, the President is required to designate an agency to be ''responsible for informing the public of the sanitary and phytosanitary (SPS) standard-setting activities of each international standard-setting organization.'' The main organizations are Codex, the World Organisation for Animal Health, and the International Plant Protection Convention. The President, pursuant to Proclamation No. 6780 of March 23, 1995 (60 FR 15845), designated the U.S. Department of Agriculture as the agency responsible for informing the public of SPS standard-setting activities of each international standard-setting organization. The Secretary of Agriculture has delegated to the Administrator, Food Safety and Inspection Service (FSIS), the responsibility to inform the public of the SPS standard-setting activities of Codex. The FSIS Administrator has, in turn, assigned the responsibility for informing the public of the SPS standard-setting activities of Codex to the U.S. Codex Office, FSIS.

Codex was created in 1962 by two U.N. organizations, the Food and Agriculture Organization (FAO) and the World Health Organization (WHO). Codex is the principal international organization for encouraging fair international trade in food and protecting the health and economic interests of consumers. Through adoption of food standards, codes of practice, and other guidelines developed by its committees and by promoting their adoption and implementation by governments, Codex seeks to protect the health of consumers, ensure fair trade practices in the food trade, and promote coordination of food standards work undertaken by international governmental and non-governmental organizations. In the United States, the United States Department of Agriculture (USDA); the Food and Drug Administration (FDA), Department of Health and Human Services (HHS); and the Environmental Protection Agency (EPA) manage and carry out U.S. Codex activities.

As the agency responsible for informing the public of the SPS standard-setting activities of Codex, FSIS publishes this notice in the **Federal Register** annually. Attachment 1 (Sanitary and Phytosanitary Activities of Codex) sets forth the following information:

1. The SPS standards under consideration or planned for consideration; and

2. For each SPS standard specified:

a. A description of the consideration or planned consideration of the standard;

b. Whether the United States is participating or plans to participate in the consideration of the standard;

c. The agenda for United States participation, if any; and

d. The agency responsible for representing the United States with respect to the standard.

To obtain copies of those standards listed in Attachment 1 that are under consideration by Codex, please contact the Codex Delegate or the U.S. Codex Office. This notice also solicits public comment on those standards that are currently under consideration or planned for consideration and recommendations for new standards. The delegate, in conjunction with the responsible agency, will take the comments received into account in participating in the consideration of the standards and in proposing matters to be considered by Codex.

The United States delegate will facilitate public participation in the United States Government's activities relating to Codex Alimentarius. The United States delegate will maintain a list of individuals, groups, and organizations that have expressed an interest in the activities of the Codex committees and will disseminate information regarding United States delegation activities to interested parties. This information will include the status of each agenda item; the United States Government's position or preliminary position on the agenda items; and the time and place of planning meetings and debriefing meetings following Codex committee sessions. In addition, the U.S. Codex Office makes much of the same information available through its Web page, *http://www.fsis.usda.gov/Regulations_&_Policies/Codex_Alimentarius/index.asp.* Please visit the Web page or notify the appropriate U.S. delegate or the Office of U.S. Codex Alimentarius, Room 4861, South Agriculture Building, 1400 Independence Avenue, SW., Washington, DC 20250–3700, if you would like to access or receive information about specific committees.

The information provided in Attachment 1 describes the status of Codex standard-setting activities by the Codex Committees for the time periods from June 1, 2008, to May 31, 2009, and June 1, 2009, to May 31, 2010. Attachment 2 provides the list of U.S. Codex Officials (includes U.S. delegates and alternate delegates). A list of forthcoming Codex sessions Codex sessions may be found at: *http://www.codexalimentarius.net/web/current.jsp?lang=en.*

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to ensure that minorities, women, and persons with disabilities are aware of this notice, FSIS will announce it online through the FSIS Web page located at *http://www.fsis.usda.gov/regulations/2009_Notices_Index/.* FSIS will also make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to constituents and stakeholders. The Update is communicated via Listserv, a free electronic mail subscription service for industry, trade groups, consumer interest groups, health professionals, and other individuals who have asked to be included. The Update is also available on the FSIS Web page. Through the Listserv and Web page, FSIS is able to provide information to a much broader and more diverse audience. In addition, FSIS offers an e-mail subscription service which provides automatic and customized access to selected food safety news and information. This service is available at *http://www.fsis.usda.gov/news_and_events/email_subscription/.* Options range from recalls to export information to regulations, directives

and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

Done at Washington, DC on May 27, 2009.

Karen Stuck,

United States Manager for Codex.

Attachment 1: Sanitary and Phytosanitary Activities of Codex

Codex Alimentarius Commission and Executive Committee

The Codex Alimentarius Commission will hold its Thirty-Second Session June 29–July 4, 2009, in Rome, Italy. At that time, it will consider standards, codes of practice, and related matters brought to its attention by the general subject committees, commodity committees, *ad hoc* Task Forces, and member delegations. It will also consider options to implement recommendations from the review of Codex committee structure and mandates of Codex committees and task forces, the management of the Trust Fund for the Participation of Developing Countries and Countries in Transition in the Work of the Codex Alimentarius, as well as budgetary and strategic planning issues. At this Session, the Commission will elect a Chairperson and three Vice Chairpersons.

Prior to the Commission meeting, the Executive Committee will have met at its Sixty-second Session on June 23–26, 2009. It is composed of the chairperson, vice-chairpersons, and seven members elected from the Commission, one from each of the following geographic regions: Africa, Asia, Europe, Latin America and the Caribbean, Near East, North America, and South-West Pacific. Additionally, regional coordinators from the six regional committees serve as members of the Executive Committee. It will consider the Codex Strategic Plan 2008–2013; review the Codex committee structure and mandate of Codex committees and task forces; review matters arising from reports of Codex Committees, proposals for new work, and standards management issues; and review the Trust Fund.

Responsible Agency: USDA/FSIS.

U.S. Participation: Yes.

Codex Committee on Residues of Veterinary Drugs in Foods

The Codex Committee on Residues of Veterinary Drugs in Foods determines priorities for the consideration of residues of veterinary drugs in foods and recommends Maximum Residue Limits (MRLs) for veterinary drugs. The Committee also develops codes of practice as may be required and considers methods of sampling and analysis for the determination of veterinary drug residues in food. A veterinary drug is defined as any substance applied or administered to a food producing animal, such as meat or milk producing animals, poultry, fish or bees, whether used for therapeutic, prophylactic or diagnostic purposes, or for modification of physiological functions or behavior.

A Codex Maximum Limit for Residues of Veterinary Drugs (MRLVD) is the maximum concentration of residue resulting from the use of a veterinary drug (expressed in mg/kg or ug/kg on a fresh weight basis) that is recommended by the Codex Alimentarius Commission to be permitted or recognized as acceptable in or on a food. An MRLVD is based on the type and amount of residue considered to be without any toxicological hazard for human health as expressed by the Acceptable Daily Intake (ADI) or on the basis of a temporary ADI that utilizes an additional safety factor. The MRLVD also takes into account other relative public health risks as well as food technological aspects.

When establishing an MRLVD, consideration is also given to residues that occur in food of plant origin or the environment. Furthermore, the MRLVD may be reduced to be consistent with good practices in the use of veterinary drugs and to the extent that practical analytical methods are available.

An Acceptable Daily Intake (ADI) is an estimate by the Joint FAO/WHO Expert Committee on Food Additives (JECFA) of the amount of a veterinary drug, expressed on a body weight basis, that can be ingested daily over a lifetime without appreciable health risk (standard man = 60 kg).

The 18th Session of the Codex Committee on Residues of Veterinary Drugs in Foods met in Natal, Brazil, on May 11–15, 2009. The reference document is ALINORM 9/32/31. The following items will be considered by the Commission at its 32nd Session in July 2009.

To be considered at Step 8:

- Draft MRL for Melengestrol Acetate in cattle.
- Guidelines for the Design and Implementation of National Regulatory Food Safety Assurance Programs Associated with the Use of Veterinary Drugs in Food Producing Animals.
- Draft MRLs for Ractopamine in pigs and cattle.

To be considered at Step 5/8:

- Draft MRLs for Avilamycin in pigs, chicken, turkey, and rabbits.
- Draft MRLs for Dexamethasone in cattle, pigs, and horses.
- Draft MRLs for Monensin in cattle, sheep, goats, chicken, turkey, and quail.
- Draft MRLs for Narasin in chicken.
- Draft MRLs for Triclabendazole in cattle and sheep.
- Draft MRLs for Tylosin in cattle, pigs, and chicken.

At the 18th CCRVDF, the Committee completed a Priority List of Veterinary Drugs Requiring Evaluation or Re-evaluation by JECFA. These drugs are Monepantel (establishment of ADI and recommended MRLs in sheep), Monensin (re-evaluation of MRL in cattle), Derquantel (establishment of ADI and recommended MRLs in sheep), and Ractopamine (review of depletion data in pig tissues).

The Committee will continue work on the following:

- Draft MRLs for Narasin in cattle and pigs.
- Draft MRLs for Tilmicosin in chicken and turkey.
- A project document on risk management recommendations for veterinary drugs for which no ADI or MRL has been recommended by JECFA. The United States will lead an electronic Working Group to define the scope for the work.

Responsible Agencies: HHS/FDA/CVM; USDA/FSIS.

U.S. Participation: Yes.

Codex Committee on Contaminants in Foods

The Codex Committee on Contaminants in Foods (CCCF) establishes or endorses permitted maximum levels, and, where necessary, revises existing guidelines levels for contaminants and naturally occurring toxicants in food and feed; prepares priority lists of contaminants and naturally occurring toxicants for risk assessment by the Joint FAO/WHO Expert Committee on Food Additives; considers and elaborates methods of analysis and sampling for the determination of contaminants and naturally occurring toxicants in food and feed; considers and elaborates standards or codes of practice for related subjects; and considers other matters assigned to it by the Commission in relation to contaminants and naturally occurring toxicants in food and feed.

The Committee held its Third Session in Rotterdam, the Netherlands, from March 23–27, 2009. The relevant document is ALINORM 09/32/41. The following items are to be considered by the 32nd Session of the Commission in July 2009.

To be considered for adoption at step 8:

- Draft Code of Practice for the Reduction of Acrylamide in Foods.
- Draft Code of Practice for the Reduction of Contamination of Food

with Polycyclic Aromatic Hydrocarbons (PAH) from Smoking and Direct Drying Processes.

• Proposed Draft Revision to the Preamble of the GSCTF.

• Proposed Draft Code of Practice for the Prevention and Reduction of Ochratoxin A Contamination in Coffee.

The Committee is continuing to work on:

• Amendments to Paragraph 10, Sample Preparation in the Sampling Plans for Aflatoxin Contamination in Ready-to-Eat Treenuts and Treenuts Destined for Further Processing: Almonds, Hazelnuts and Pistachos.

• Proposed Draft Maximum Levels for Total Aflatoxins in Brazil Nuts.

• Proposed Draft Maximum Levels for Fumonisins in Maize and Maize-Products and Associated Sampling Plans (new work).

• Proposed Draft Code of Practice for the Reduction of Ethyl Carbamate in Stone Fruit Distillates (new work).

• Proposed Draft Revision of the Code of Practice for the Prevention and Reduction of Aflatoxin in Tree Nuts (additional measures for Brazil Nuts).

• Proposed Draft Maximum Levels for Melamine in Food and Feed (new work).

• Priority List of Contaminants and Naturally Occurring Toxicants Proposed for Evaluation by JECFA.

• Discussion Paper on Mycotoxins in Sorghum.

Responsible Agencies: HHS/FDA; USDA/FSIS.

U.S. Participation: Yes.

Codex Committee on Food Additives

The Codex Committee on Food Additives was re-established by the 29th Session of the Commission, which split the former Codex Committee on Additives and Contaminants into two committees. The Committee is to establish or endorse acceptable maximum levels for individual food additives, prepare a priority list of food additives for risk assessment by the Joint FAO/WHO Expert Committee on Food Additives, assign functional classes to individual food additives, recommend specifications of identity and purity for food additives for adoption by the Commission, consider methods of analysis for the determination of additives in food, and consider and elaborate standards or codes for related subjects such as the labeling of food additives when sold as such. The Committee met in Shanghai, China, on March 16–20, 2009. The relevant document is ALINORM 9/32/12. The following items will be considered by the 32nd Session of the Commission in July 2009.

To be considered for adoption:

• Amendment to the Annex to Table 3 of the GFSA.

• Amendments to the names and descriptors of the Food Category System of the GSFA.

• Priority List of Food Additives Proposed for Evaluation by JECFA.

To be considered at Step 5/8:

• Draft and proposed draft Food Additive Provisions of the General Standard for Food Additives (GSFA).

• Proposed draft amendments to the International Numbering System (INS) for Food Additives.

• Specifications for the Identity and Purity of Food Additives arising from the 69th JECFA meeting.

The Committee will continue to work on (step 1/2/3):

• Proposed draft Guidelines and Principles for the Use of Substances Used as Processing Aids (N04–2008).

• Amendments to the INS List.

• Specifications for the Identity and Purity of Food Additives arising from the 71st JECFA meeting.

• Food Additive provisions to be considered by the physical Working Group on the GSFA.

• Discussion Paper on identification of problems and recommendations related to the inconsistent presentation of food additive provisions in Codex commodity standards.

• Discussion Paper on the updating of the Standard for Food Grade Salt (CODEX STAN 150–1985).

• Discussion paper on innovative proposals to expedite the work on the GSFA.

• Discussion paper on principles regarding the need for justification for proposals of changes to the INS.

• Inventory of Substances used as Processing Aids (IPA), (updated list).

• Discussion Paper on mechanisms for re-evaluation of substances by JECFA.

• Proposal for the revision of the food category system.

• Working Document for Information and Support to the Discussion on the GSFA.

Discontinued work:

• Draft and proposed draft food additive provisions of the General Standard for Food Additives (GSFA).

Responsible Agency: HHS/FDA.

U.S. Participation: Yes.

Codex Committee on Pesticide Residues

The Codex Committee on Pesticide Residues recommends to the Codex Alimentarius Commission establishment of maximum limits for pesticide residues for specific food items or in groups of food. A Codex Maximum Residue Limit for Pesticide (MRLP) is the maximum concentration of a pesticide residue (expressed as mg/kg) recommended by the Codex Alimentarius Commission to be legally permitted in or on food commodities and animal feeds. Foods derived from commodities that comply with the respective MRLPs are intended to be toxicologically acceptable. That is, consideration of the various dietary residue intake estimates and determinations, both at the national and international level, in comparison with the Acceptable Daily Intake (ADI), should indicate that foods complying with Codex MRLPs are safe for human consumption. Codex MRLPs are primarily intended to apply in international trade and are derived from reviews conducted by the Joint Meeting on Pesticide Residues (JMPR).

The 41st Session of the Committee met in Beijing, China, on April 20–25, 2009. The relevant document is ALINORM 09/32/24. The following items will be considered by the Commission at its 32nd Session in July 2009.

To be considered at Step 8:

• Draft and Revised Draft Maximum Residue Limits for Carbaryl (on 1 commodity), Triadimefon (on 4 commodities), Flusilazole (4 commodities), and Triadimefon (4).

To be considered at Step 5/8:

• Proposed Draft and Revised Draft Maximum Residue Limits for Dimethoate (3 commodities), Diphenylamine (2), Ethoxyquin (1), Malathion (2), Methomyl (6), Cypermethrin (37), Profenofos (10), Buprofezin (8), Tebuconazole (9), Chloropropham (2), Imidacloprid (20), Azoxystrobin (52), Chloroantraniliprole (19), Mandipropamid (15), Prothioconazole (16), Spinetoram (21), and Spirotetramate (21) (*see* ALINORM 09/32/24, appendices II & III for lists of the commodities).

Responsible Agencies: EPA; USDA/AMS.

U.S. Participation: Yes.

Codex Committee on Methods of Analysis and Sampling

The Codex Committee on Methods of Analysis and Sampling defines the criteria appropriate to Codex Methods of Analysis and Sampling; serves as a coordinating body for Codex with other international groups working in methods of analysis and sampling and quality assurance systems for laboratories; specifies, on the basis of final recommendations submitted to it by the other bodies referred to above, Reference Methods of Analysis and Sampling appropriate to Codex Standards which are generally

applicable to a number of foods; considers, amends if necessary, and endorses as appropriate methods of analysis and sampling proposed by Codex (Commodity) Committees, except that methods of analysis and sampling for residues of pesticides or veterinary drugs in food, the assessment of microbiological quality and safety in food, and the assessment of specifications for food additives do not fall within the terms of reference of this Committee; elaborates sampling plans and procedures, as may be required; considers specific sampling and analysis problems submitted to it by the Commission or any of its Committees; and defines procedures, protocols, guidelines or related texts for the assessment of food laboratory proficiency, as well as quality assurance systems for laboratories.

The 30th Session of the Committee met in Balatonalmadi, Hungary, on March 9–13, 2009. The relevant document is ALINORM 09/32/23. The following items will be considered for adoption by the 32nd Session of the Commission in July 2009:

- Draft Guidelines for Settling Disputes on Analytical (Test) Results (at step 8).
- Draft Guidelines on Analytical Terminology (at step 8).
- Consequential Amendment to the General Criteria for the Selection of Methods of Analysis (terminology).
- Endorsed or updated status of several methods of analysis in Codex standards.
- Amendment to the *Working Instructions for the Implementation of the Criteria Approach in Codex* in the Procedural Manual.

The Committee will continue to work on:

- Endorsement of Methods of Analysis in Codex Standards.
- Proposed Draft Guidelines on Criteria for Methods for the Detection and Identification of Foods Derived from Biotechnology (returned to step 2/3).
- Proposed Draft Revision of the Guidelines on Measurement Uncertainty (returned to step 2/3).
- Guidance on Uncertainty from Sampling.
- Methods of Analysis for Natural Mineral Waters.

Responsible Agencies: HHS/FDA; USDA/GIPSA.

U.S. Participation: Yes.

Codex Committee on Food Import and Export Inspection and Certification Systems

The Codex Committee on Food Import and Export Inspection and Certification Systems is charged with developing principles and guidelines for food import and export inspection and certification systems, with a view to harmonizing methods and procedures that protect the health of consumers, ensure fair trading practices, and facilitate international trade in foodstuffs. Additionally, the Committee develops principles and guidelines for the application of measures by the competent authorities of exporting and importing countries to provide assurances, where necessary, that foodstuffs comply with requirements, especially statutory health requirements; develops guidelines for the utilization, as and when appropriate, of quality assurance systems to ensure that foodstuffs conform with requirements and promotes the recognition of these systems in facilitating trade in food products under bilateral/multilateral arrangements by countries; develops guidelines and criteria with respect to format, declarations, and language of such official certificates as countries may require with a view towards international harmonization; makes recommendations for information exchange in relation to food import/export control; consults as necessary with other international groups working on matters related to food inspection and certification systems; and considers other matters assigned to it by the Commission in relation to food inspection and certification systems.

The 17th Session of the Committee met in Cebu, Philippines, on November 24–28, 2008. The reference document is ALINORM 09/32/30. The following will be considered by the Commission at its 32nd Session in July 2009.

To be considered at step 5/8:

- Proposed Draft Generic Model Official Certificate (Annex to Guidelines for Design, Production, Issuance and Use of Generic Official Certificate).

The committee is continuing work on:

- Proposed Draft Principles and Guidelines for the Conduct of Foreign On-site Audits and Inspections.
- Proposed Draft Principles and Guidelines for National Food Control Systems.

Responsible Agencies: HHS/FDA; USDA/FSIS.

U.S. Participation: Yes.

Codex Committee on General Principles

The Codex Committee on General Principles deals with procedures and general matters as are referred to it by the Codex Alimentarius Commission. Such matters have included the establishment of the General Principles, which define the purpose and scope of the Codex Alimentarius, the nature of Codex standards, and the development of a mechanism for examining any economic impact statements submitted by governments concerning possible implications for their economies of some of the individual standards or some of the provisions thereof, and the establishment of a Code of Ethics for International Trade in Food.

The Committee held its 25th Session in Paris, France, on March 30–April 3, 2009. The reference document is ALINORM 09/32/33. The following will be considered by the Commission at its 32nd Session in July 2009:

- Proposed amendment to the Guidelines to Chairpersons of Codex Committees and Ad Hoc Intergovernmental Task Forces.
- Proposed Amendment to the Terms of Reference of the Committee on General Principles.
- Proposed inclusion of an information footnote to the fourth paragraph of the Statements of Principle Concerning the Role of Science in the Codex Decision-Making Process and the Extent to Which Other Factors are Taken into Account indicating that the acceptance procedure had been abolished in 2005.

To be considered at step 5/8:

- Proposed Draft Code of Ethics for International Trade in Food Including Concessional and Food Aid Transactions.

Responsible Agency: USDA/FSIS, HHS/FDA.

U.S. Participation: Yes.

Codex Committee on Food Labelling

The Codex Committee on Food Labelling drafts provisions on labelling applicable to all foods; considers, amends, and endorses draft specific provisions on labelling prepared by the Codex Committees drafting standards, codes of practice and guidelines; and studies specific labeling problems assigned by the Codex Alimentarius Commission. The Committee also studies problems associated with the advertisement of food with particular reference to claims and misleading descriptions.

The Committee held its 37th Session in Calgary, Canada, on May 4–8, 2009. The reference document is ALINORM 09/32/22. The following items are to be considered by the 32nd Session of the Commission in July 2009.

To be considered at Step 5/8:

- Proposed Draft Amendment to the *Guidelines for the Production, Processing, Labelling and Marketing of Organically Produced Food (CAC/GL 32–1999), Annex 2, Table 2, modifying the use provisions for Rotenone.*

• Editorial Amendments to Several Standards, specifically: (a) Section 4.3.1 of the *General Standard for the Labelling of and Claims for Prepackaged Foods for Special Dietary Uses* (Codex Standard 146–1985); (b) Section 3.4 (a) of the *General Guidelines on Claims* (CAC/GL 1–1979); (c) Purpose, Section 2.3, Section 3.2.6.2, Section 3.2.7, Footnote 4, Footnote 5, and Section 5 of the *Guidelines on Nutritional Labelling* (CAC/GL 2–1985); and (d) Section 8 of the *Guidelines for the Production, Processing, Labelling and Marketing of Organically Produced Food* (CAC/GL 32–1999).

The Committee will continue to work on:

• Proposed Draft Revision of the *Guidelines on Nutrition Labelling* (CAC/GL 2–1985) concerning the list of nutrients that are always declared on a voluntary or mandatory basis (at Step 3 of the Procedure).

• Proposed Draft Recommended Principles and Criteria for the Legibility of Nutritional Labelling (at Step 3 of the Procedure).

• Proposed Draft recommendations for the labelling of foods obtained through certain techniques of genetic modification/genetic engineering (at Step 3 of the Procedure).

• Draft Amendment to the *General Standard for the Labelling of Prepackaged Foods* (Codex Standard 1–1985): Definitions for ''Food and food ingredients obtained through certain techniques of genetic modification/genetic engineering,'' ''Organism,'' ''Genetically modified/engineered organism,'' and ''Modern biotechnology'' (at Step 7 of the Procedure).

• Draft Amendment to the *Guidelines for the Production, Processing, Labelling and Marketing of Organically Produced Food* (CAC/GL 32–1999), Section 5.1 relating to other uses of ethylene.

Responsible Agencies: HHS/FDA; USDA/FSIS.

U.S. Participation: Yes.

Codex Committee on Food Hygiene

The Codex Committee on Food Hygiene drafts basic provisions on food hygiene application to all food; considers, amends if necessary and endorses provision on hygiene prepared by Codex commodity committees and contained in Codex commodity standards; considers, amends if necessary, and endorses provisions on hygiene prepared by Codex commodity committees and contained in Codex codes of practice unless, in specific cases, the Commission has decided otherwise; drafts provisions on hygiene applicable to specific food items or food groups, whether coming within the terms of reference of a Codex commodity committee or not; considers specific hygiene problems assigned to it by the Commission; suggests and prioritizes areas where there is a need for microbiological risk assessment at the international level and develops questions to be addressed by the risk assessors; and considers microbiological risk management matters in relation to food hygiene, including food irradiation, and in relation to the risk assessment of FAO and WHO.

The 40th Session of the Committee met in Guatemala City, Guatemala, on December 1–5, 2008. The relevant document is ALNORM 09/32/13. The following items related to the activities of the Codex Committee on Food Hygiene will be considered by the Commission at its 32nd Session in July 2009.

To be considered for adoption at Step 5/8:

• Proposed Draft Microbiological Criteria for *Listeria Monocytogenes* in Ready-to-Eat Foods.

• Microbiological Criteria for Powdered Follow-up Formulae and Formulae for Special Medical Purposes for Young Children (Annex II to the Code of Hygiene Practice for Powdered Formulae for Infants and Young Children.

The committee is continuing work on:

• Proposed Draft Guideline for the Control of *Campylobacter* and *Salmonella* spp. in Chicken Meat.

• Proposed Draft Annex on Leafy Green Vegetables Including Leafy Herbs to the Code of Hygiene Practice for Fresh Fruit and Vegetables.

• Proposed Draft Code of Hygienic Practice for *Vibrio spp.* in Seafood.

• Annex on Control Measures for *Vibrio parahaemolyticus* and *Vibrio vulnificus* in Molluscan Shelfish to the Proposed Draft Code of Hygienic Practice for *Vibrio* spp. in Seafood.

• Risk Analysis Policy of the CCFH.

• Possible Revision of the Recommended International Code of Hygienic Practice for Collecting, Processing and Marketing of Natural Mineral Waters.

• Possible Elaboration of the Code of Hygienic Practice for Cocoa and Chocolate Production and Processing.

New Work:

• Proposed Draft Code of Hygienic Practice for Control of Viruses in Food.

Responsible Agencies: HHS/FDA; USDA/FSIS.

U.S. Participation: Yes.

Codex Committee on Fresh Fruits and Vegetables

The Codex Committee on Fresh Fruits and Vegetables is responsible for elaborating world-wide standards and codes of practice for fresh fruits and vegetables. The Committee has not met since the conclusion of the 31st Session of the Commission. Therefore, it has no recommended draft standards being considered for adoption at the 32nd Session of the Commission in June 2009. The next session of the Committee will be in October 2009 in Mexico City.

Responsible Agencies: USDA/AMS; HHS/FDA.

U.S. Participation: Yes.

Codex Committee on Nutrition and Foods for Special Dietary Uses

The Codex Committee on Nutrition and Foods for Special Dietary Uses (CCNFSDU) is responsible for studying nutrition issues referred to it by the Codex Alimentarius Commission. The Committee also drafts general provisions, as appropriate, on nutritional aspects of all foods and develops standards, guidelines or related texts for foods for special dietary uses, in cooperation with other committees where necessary; considers, amends if necessary, and endorses provisions on nutritional aspects proposed for inclusion in Codex standards, guidelines and related texts.

The Committee held its 30th Session in Cape Town, South Africa, on November 3–7, 2008. The relevant document is ALINORM 09/32/26. The following items will be considered by the Commission at its 32nd Session in July 2009.

To be considered at Step 8:

• Guidelines for Use of Nutrition and Health Claims: Table of Conditions for Nutrient Contents (Part b: Provisions on Dietary Fibre).

• Advisory Lists of Nutrient Compounds for Use in Foods for Special Dietary Uses Intended for Infants and Young Children: Section D Advisory List of Food Additives for Special Nutrient Forms: Provisions on Gum Arabic (Gum acacia).

• Draft Nutritional Risk Analysis Principles and Guidelines for Application to the Work of the Committee on Nutrition and Foods for Special Dietary Uses.

• Proposed Draft Recommendations on the Scientific Substantiation of Health Claims.

The Committee will continue work on:

• Methods of Analysis for Dietary Fibre.

• Proposed Draft Additional or Revised Nutrient Reference Values (NRVs) for Vitamins and Minerals.

• Proposal for New Work to Amend the Codex General Principles for the

Addition of Essential Nutrients to Foods.

• Proposal for New Work to Establish a Standard for Processed Cereal-based Foods for Underweight Infants and Young Children.

• Proposal to Revise the Codex Guidelines on Formulated Supplementary Foods for Older Infants and Young Children.

• Nutrient Reference Values (NRVs) for Nutrients Associated with Risk of Non-Communicable Disease.

Responsible Agencies: HHS/FDA; USDA/ARS.

U.S. Participation: Yes.

Codex Committee on Fish and Fishery Products

The Fish and Fishery Products Committee is responsible for elaborating standards for fresh, frozen and otherwise processed fish, crustaceans, and mollusks. The Committee has not met since the conclusion of the 31st Session of the Commission. Therefore, it has no recommended draft standards being considered for adoption at the 32nd Session of the Commission in June 2009. The next session of the Committee will be in September 2009 in Agadir, Morocco.

Responsible Agencies: HHS/FDA; USDC/NOAA/NMFS.

U.S. Participation: Yes.

Codex Committee on Milk and Milk Products

The Codex Committee on Milk and Milk Products is responsible for establishing international codes and standards for milk and milk products. The Committee has not met since the 31st Session of the Commission. Therefore, it has no recommended draft standards being considered for adoption at the 32nd Session of the Commission. The Committee will hold its next session in 2010 in New Zealand. The Committee will continue work on:

• Proposed Draft Amendment to the Codex Standard for Fermented Milks pertaining to Fermented Milk Drinks at Step 6.

• Proposed Draft Standard for Processed Cheese—discussion on working group outcome and discontinuation of current processed cheese standards.

• Maximum Levels for Annatto Extracts in Codex individual cheese standards.

• Methods of Analysis and Sampling for Milk and Milk Products Standards, including AOAC standards.

Responsible Agencies: USDA/AMS; HHS/FDA.

U.S. Participation: Yes.

Codex Committee on Fats and Oils

The Codex Committee on Fats and Oils is responsible for elaborating standards for fats and oils of animal, vegetable, and marine origin. The Committee held its 21st Session in Kota Kinabalu, Malaysia, on February 16–20, 2009. The Committee is working on:

• Proposed Draft List of Acceptable Previous Cargoes.

• Proposed Draft Criteria (Code of Practice for the Storage and Transport of Fats and Oils in Bulk).

• Proposed Draft Amendments to the Standard for Named Vegetable Oils: total carotenoids in unbleached palm oil.

• Proposed Draft Amendment to the Standard for Olive Oils and Olive Pomace Oils: linolenic acid.

• Proposed Draft Amendments to the Standard for Named Vegetable Oils: inclusion of palm kernel olein and palm kernel stearin.

Responsible Agencies: HHS/FDA; USDA/ARS.

U.S. Participation: Yes.

Codex Committee on Processed Fruits and Vegetables

The Codex Committee on Processed Fruits and Vegetables is responsible for elaborating worldwide standards for all types of processed fruits and vegetables including dried products, canned dried peas and beans, and jams and jellies, but not dried prunes, and fruit and vegetable juices. The Commission has also allocated to this Committee the work of revising standards for quick frozen fruits and vegetables.

The Committee held its 24th Session in Washington, DC, on September 15–20, 2008. The reference document is ALINORM 09/32/27. The following will be considered by the Commission at its 32nd Session in July 2009.

To be considered at step 8:

• Draft Codex for Jams, Jellies and Marmalades.

• Proposed Draft Codex Standard for Certain Canned Vegetables (General Provisions).

To be considered at step 5/8:

• Proposed Draft Provisions for Packing Media for Certain Canned Vegetables: Section 3.1.3 (Draft Codex Standard for Certain Canned Vegetables).

• Proposed Draft Annexes specific to Certain Canned Vegetables (Draft Codex Standard for Certain Canned Vegetables).

The Committee is continuing work on:

• Proposed Draft Sampling Plans including Metrological Provisions for Controlling Minimum Drained Weight of Canned Fruits and Vegetables in Packing Media.

• Methods of Analysis for Processed Fruits and Vegetables—Aqueous Coconut Products: Coconut Cream and Coconut Milk.

• Food Additive Provisions for Processed Fruits and Vegetables.

• Proposals for Amendments to the Priority List for Standardization of Processed Fruits and Vegetables.

Responsible Agencies: USDA/AMS; HHS/FDA.

U.S. Participation: Yes.

Codex Committee on Natural Mineral Waters

The Codex Committee on Natural Mineral Waters is responsible for elaborating standards for all types of natural mineral water products. The Committee was reactivated by the 30th Session of the Codex Alimentarius Commission to address discrepancies of the health-related limits of certain substances between the Codex Standard for Natural Mineral Waters (CODEX STAN 108–1981) and the current version of the WHO Guidelines for Drinking Water Quality. The Committee should complete the task in no more than two sessions and should propose a revised Section 3.2, ''Health-related limits for certain substances,'' of the Codex Standard for Natural Mineral Waters for final adoption by the Commission at its Session in 2009.

The 8th Session of the Committee for Natural Mineral Waters was held February 11–15, 2008, in Lugano, Switzerland. The Committee noted that it had completed the work assigned to it by the 30th Session of the Commission, therefore, no further sessions are planned.

Responsible Agencies: HHS/FDA.

U.S. Participation: Yes.

Certain Codex Commodity Committees

Several Codex Alimentarius Commodity Committees have adjourned *sine die.* The following Committees fall into this category:

Cocoa Products and Chocolate

Responsible Agency: HHS/FDA.

U.S. Participation: Yes.

Meat Hygiene

Responsible Agency: USDA/FSIS.

U.S. Participation: Yes.

Sugars

Responsible Agencies: USDA/ARS; HHS/FDA.

U.S. Participation: Yes.

Vegetable Proteins

Responsible Agencies: USDA/ARS; HHS/FDA.

U.S. Participation: Yes.

Cereals, Pulses and Legumes

Responsible Agencies: HHS/FDA; USDA/GIPSA.

U.S. Participation: Yes.

Ad hoc Intergovernmental Task Force on Antimicrobial Resistance

The *ad hoc* Intergovernmental Task Force on Antimicrobial Resistance was created by the 29th Session of the Commission.

The Task Force, hosted by the Republic of Korea, has a time frame of four sessions, which started with its first meeting in October 2007. Its objective is to develop science-based guidance to be used to assess the risks to human health associated with the presence in food and feed, including aquaculture, and the transmission through food and feed of antimicrobial resistant microorganisms and antimicrobial resistance genes and to develop appropriate risk management advice based on that assessment to reduce such risk. In this process, work undertaken in this field at national, regional, and international levels should be taken into account.

The Second Session of the Committee met in Seoul, Republic of Korea, on October 20–24, 2008. The relevant document is Alinorm 09/32/42.

The Committee is continuing work on:

- Proposed Draft Guidelines for Risk Analysis of Foodborne Antimicrobial Resistance (N01–2008, N02–2008, N03/2008).

Responsible Agencies: HHS/FDA; USDA/FSIS.

U.S. Participation: Yes.

Ad Hoc Intergovernmental Task Force on Foods Derived from Biotechnology

The *ad hoc* Intergovernmental Task Force on Foods Derived from Biotechnology completed its work and was dissolved in July 2008 by the 31st Session of the Commission.

Ad Hoc Intergovernmental Task Force on the Processing and Handling of Quick Frozen Foods

The *ad hoc* Intergovernmental Task Force on the Processing and Handling of Quick Frozen Foods completed its work and was dissolved in July 2008 by the 31st Session of the Commission.

FAO/WHO Regional Coordinating Committees

The FAO/WHO Regional Coordinating Committees define the problems and needs of each of the regions concerning food standards and food control; promote within the Committee contacts for the mutual exchange of information on proposed regulatory initiatives and problems arising from food control and stimulate the strengthening of food control infrastructures; recommend to the Commission the development of worldwide standards for products of interest to the region, including products considered by the Committees to have an international market potential in the future; develop regional standards for food products moving exclusively or almost exclusively in intra-regional trade; draw the attention of the Commission's work of particular significance to each region; promote coordination of all regional food standards work undertaken by international governmental and non-governmental organizations within each region; exercise a general coordinating role for each of the regions and such other functions as may be entrusted to them by the Commission; and promote the use of Codex standards and related texts by members.

Coordinating Committee for Africa

The Committee (CCAfrica) held its 18th session in Accra, Ghana, from February 24–27, 2009. The relevant document is ALINORM 09/32/18. The Committee did not refer any draft standards for action at the 32nd Session of the Codex Alimentarius Commission, June 29 to July 4, 2009.

Responsible Agencies: USDA/FSIS.

U.S. Participation: Yes (as observer).

Coordinating Committee for Asia

The Committee (CCAsia) held its 16th session in Denpasar, Indonesia, from November 17–21, 2008. The relevant document is ALINORM 09/32/15. The Committee referred the following items for action at the 32nd Session of the Codex Alimentarius Commission, June 29 to July 4, 2009.

To be considered at step 8:

- Draft Regional Standard for Gochujang.
- Draft Regional Standard for Ginseng Products.
- Proposed Draft Regional Standard for Fermented Soybean Paste.
- Proposed Draft Regional Standard for Edible Sago Flour.

The Committee is continuing to work on:

- Proposed Draft Standard for Non-fermented Soybean Products.
- Proposed Draft Regional Standard for Chili Sauce.
- Status of Implementation of the Strategic Plan for the Coordinating Committee for Asia 2009–2014.
- Discussion Paper on tempe and tempe products.

Responsible Agencies: USDA/FSIS.

U.S. Participation: Yes (as observer).

Coordinating Committee for Europe

The Committee (CCEurope) held its 26th session in Warsaw, Poland, from October 7–10, 2008. The relevant document is ALINORM 09/32/19. The Committee did not refer any draft standards for action at the 32nd Session of the Codex Alimentarius Commission, June 29 to July 4, 2009.

Responsible Agencies: USDA/FSIS.

U.S. Participation: No.

Coordinating Committee for Latin America and the Caribbean

The Committee (CCLAC) held its 16th session in Acapulco, Mexico, from November 10–14, 2008. The relevant document is ALINORM 09/32/36. The Committee did not refer any draft standards for action at the 32nd Session of the Codex Alimentarius Commission, June 29 to July 4, 2009.

The Committee is continuing to work on:

- Draft proposed regional standards for:
- Culantro.
- Lucuma.
- Project Document on the Standardization of Quinoa.

Responsible Agencies: USDA/FSIS.

U.S. Participation: Yes (as observer).

Coordinating Committee for the Near East

The Committee (CCNEA) held its 5th session in Tunis, Tunisia, from January 26–29, 2009. The relevant document is ALINORM 09/32/40. The Committee did not refer any draft standards for action at the 32nd Session of the Codex Alimentarius Commission, June 29 to July 4, 2009. The Committee is continuing to work on:

- Proposed Draft Regional Code of Practice for Street-Vended Foods.
- Project Document for a Regional Standard for Pomegranate.
- Project Document for a Regional Standard for Harissa (hot pepper paste).
- Project Document for a Regional Standard for Halwa Tehenia.
- Discussion Paper on the Difficulties Faced in the Region when Implementing Codex Standards.
- Project Document for a Regional Standard for Camel Milk.
- Project Documents for Regional Standards for Date Paste and Date Molasses.
- Discussion Paper on the Classification of Foods Based on Risks.

Responsible Agencies: USDA/FSIS.

U.S. Participation: Yes (as observer).

Coordinating Committee for North America and the South West Pacific

The Committee held its 10th session in Nuku'alofa, Tonga, from October 28–31, 2008. The relevant document is ALINORM 09/32/32. The Committee will not refer any draft standards for action at the 32nd Session of the Codex Alimentarius Commission, June 29 to July 4, 2009. The Committee continues to work on:

- Implementation of the Codex Strategic Plan and Adoption of the Regional Strategic Plan.
- Discussion Paper on Kava.

Responsible Agencies: HHS/FDA; USDA/FSIS.

U.S. Participation: Yes.

Attachment 2

U.S. Codex Alimentarius Officials; Codex Chairpersons

Codex Committee on Food Hygiene

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Codex Committee on Processed Fruits and Vegetables

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Codex Committee on Residues of Veterinary Drugs in Foods

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Codex Committee on Cereals, Pulses and Legumes (Adjourned Sine Die)

VACANT.

Listing of U.S. Delegates and Alternates

Worldwide General Subject Codex Committees

Codex Committee on Residues of Veterinary Drugs in Foods (Host Government—United States)

U.S. Delegate

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Codex Committee on Food Additives (Host Government—China)

U.S. Delegate

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Alternate Delegate

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Codex Committee on Contaminants in Foods (Host Government—the Netherlands)

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Alternate Delegate

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Codex Committee on Pesticide Residues (Host Government—China)

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Codex Committee on Methods of Analysis and Sampling (Host Government—Hungary)

U.S. Delegate

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Alternate Delegate

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Codex Committee on Food Import and Export Inspection and Certification Systems (Host Government—Australia)

U.S. Delegate

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Codex Committee on General Principles (Host Government—France)

U.S. Delegate

Note: A member of the Steering Committee heads the delegation to meetings of the General Principles Committee.

Codex Committee on Food Labeling (Host Government—Canada)

U.S. Delegate

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Codex Committee on Food Hygiene (Host Government—United States)

U.S. Delegate

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Codex Committee on Nutrition and Food for Special Dietary Uses (Host Government—Germany)

U.S. Delegate

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Worldwide Commodity Codex Committees

Codex Committee on Fresh Fruits and Vegetables (Host Government—Mexico)

U.S. Delegate

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Codex Committee on Fish and Fishery Products (Host Government—Norway)

U.S. Delegate

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Codex Committee on Cereals, Pulses and Legumes (Adjourned—Sine Die) (Host Government—United States)

U.S. Delegate

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Codex Committee on Milk and Milk Products (Host Government—New Zealand)

U.S. Delegate

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Codex Committee on Fats and Oils (Host Government—United Kingdom)

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Codex Committee on Cocoa Products and Chocolate (Host Government—Switzerland)

U.S. Delegate

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Codex Committee on Sugars (Host Government—United Kingdom)

U.S. Delegate

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Codex Committee on Processed Fruits and Vegetables (Host Government—United States)

U.S. Delegate

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Codex Committee on Vegetable Proteins (Adjourned—Sine Die) (Host Government—Canada)

U.S. Delegate

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Codex Committee on Meat Hygiene (Adjourned—Sine Die) (Host Government—New Zealand)

U.S. Delegate

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Codex Committee on Natural Mineral Waters (Host Government—Switzerland)

U.S. Delegate

Lauren Robin, PhD, Review Chemist, Office of Plant and Dairy Foods, Center for Food Safety and Applied Nutrition, Food and Drug Administration, Harvey W. Wiley Federal Building, 5100 Paint Branch Parkway, College Park, MD 20740–3835.
Phone: (301) 436–1639.
Fax: (301) 436–2651.
E-mail: Lauren.Robin@fda.hhs.gov.

Ad Hoc Intergovernmental Task Forces

Ad Hoc Intergovernmental Task Force on Antimicrobial Resistance (Host Government—Republic of Korea)

U.S. Delegate

David G. White, D.V.M., Director, National Antimicrobial Resistance, Monitoring System (NARMS), U.S. Food and Drug Administration, Center for Veterinary Medicine, Office of Research, 8401 Muirkirk Road, Laurel, MD 20708.
Phone: (301) 210–4181.
Fax: (301) 210–4685.
E-mail: David.White@fda.hhs.gov.

Alternate Delegate

Neena Anandaraman, D.V.M., Veterinary Medical Officer, Zoonotic Diseases & Residue Surveillance Division, Office of Public Health Science, Food Safety and Inspection Service, U.S. Department of Agriculture, Room 343, Aerospace Center, Washington, DC 20250.
Phone: (202) 690–6429.
Fax: (202) 690–6565.
E-mail: neena.anandaraman@fsis.usda.gov.

Ad Hoc Intergovernmental Task Force on Foods Derived from Modern Biotechnology (Host Government—Japan) (Adjourned—Sine Die)

Ad Hoc Intergovernmental Task Force on Quick Frozen Foods (Host Government—Thailand) (Adjourned—Sine Die)

There are six regional coordinating committees:

Coordinating Committee for Africa.

Coordinating Committee for Asia.

Coordinating Committee for Europe.

Coordinating Committee for Latin America and the Caribbean.

Coordinating Committee for the Near East.

Coordinating Committee for North American and the South-West Pacific.

Contact

Karen Stuck, United States Manager for Codex, U.S. Department of Agriculture, Office of the Under Secretary for Food Safety, Room 4861, South Agriculture Building, 1400 Independence Avenue, SW., Washington, DC 20250–3700.
Phone: (202) 205–7760.
Fax: (202) 720–3157.
E-mail: karen.stuck@osec.usda.gov.

[FR Doc. E9–12647 Filed 5–29–09; 8:45 am]
BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers, and Stockyards Administration

Opportunity for Designation in the California; Frankfort, IN; Indianapolis, IN; and Virginia Areas and Request for Comments on the Official Agencies Serving These Areas

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Notice.

SUMMARY: The designations of the official agencies listed below will end on December 31, 2009. We are asking persons or governmental agencies interested in providing official services in the areas served by these agencies to submit an application for designation. We are also asking for comments on the quality of services provided by these currently designated agencies: California Agri Inspection Company, Inc. (California Agri); Frankfort Grain Inspection, Inc. (Frankfort); Indianapolis Grain Inspection & Weighing Service, Inc. (Indianapolis); and Virginia Department of Agriculture and Consumer Services (Virginia).

DATES: Applications and comments must be received on or before July 1, 2009.

ADDRESSES: We invite you to submit applications and comments on this notice by any of the following methods:

- *To apply for designation,* go to ''FGISonline'' at *https://fgis.gipsa.usda.gov/default_home_FGIS.aspx* then select *Delegations/Designations and Export Registrations (DDR).* You will need a USDA e-authentication, username, password, and a customer number prior to applying.
- *Hand Delivery or Courier:* Karen Guagliardo, Review Branch Chief, Compliance Division, GIPSA, USDA, Room 1647–S, 1400 Independence Avenue, SW., Washington, DC 20250.
- *Fax:* (202) 690–2755, to the attention of: Karen Guagliardo.
- *E-mail: Karen.W.Guagliardo@usda.gov.*
- *Mail:* Karen Guagliardo, Review Branch Chief, Compliance Division, GIPSA, USDA, STOP 3604, 1400 Independence Avenue, SW., Washington, DC 20250–3604.
- *Internet:* Go to *http://www.regulations.gov*. Follow the online instructions for submitting and reading comments online.

Read Applications and Comments: All applications and comments will be available for public inspection at the office above during regular business hours (7 CFR 1.27(b)).

FOR FURTHER INFORMATION CONTACT: Karen Guagliardo at 202–720–7312, e-mail *Karen.W.Guagliardo@usda.gov*.

SUPPLEMENTARY INFORMATION: Section 7(f)(1) of the United States Grain Standards Act (USGSA or Act) (7 U.S.C. 71–87k) authorizes GIPSA's Administrator to designate a qualified applicant to provide official services in a specified area after determining that the applicant is better able than any other applicant to provide such official services.

Under section 7(g)(1) of the USGSA, designations of official agencies are effective for 3 years unless terminated by the Secretary, but may be renewed according to the criteria and procedures prescribed in section 7(f) of the Act.

Areas Open for Designation

California Agri

Pursuant to Section 7(f)(2) of the Act, the following geographic area, in the State of California, is assigned to this official agency.

Bounded on the North by the northern California State line east to the eastern California State line;

Bounded on the East by the eastern California State line south to the southern San Bernardino County line;

Bounded on the South by the southern San Bernardino and Orange County lines west to the western California State line; and

Bounded on the West by the western California State line north to the northern California State line.

California Agri's assigned geographic area does not include the export port locations inside California Agri's area which are serviced by GIPSA.

Frankfort

Pursuant to Section 7(f)(2) of the Act, the following geographic area, in the State of Indiana, is assigned to this official agency:

Bounded on the North by the northern Fulton County line;

Bounded on the East by the eastern Fulton County line south to State Route 19; State Route 19 south to State Route 114; State Route 114 southeast to the eastern Fulton and Miami County lines; the northern Grant County line east to County Highway 900E; County Highway 900E south to State Route 18; State Route 18 east to the Grant County line; the eastern and southern Grant County lines; the eastern Tipton County line; the eastern Hamilton County line south to State Route 32;

Bounded on the South by State Route 32 west to the Boone County line; the eastern and southern Boone County lines; the southern Montgomery County line; and

Bounded on the West by the western and northern Montgomery County lines; the western Clinton County line; the western Carroll County line north to State Route 25; State Route 25 northeast to Cass County; the western Cass and Fulton County lines.

Frankfort's assigned geographic area does not include the following grain elevators inside Frankfort's area which have been and will continue to be serviced by the following official agency: Titus Grain Inspection, Inc.: The Andersons, Delphi, Carroll County; Frick Services, Inc., Leiters Ford, Fulton County; and Cargill, Inc., Linden, Montgomery County.

Indianapolis

Pursuant to Section 7(f)(2) of the Act, the following geographic area, in the State of Indiana, is assigned to this official agency:

Bartholomew; Brown; Hamilton, south of State Route 32; Hancock; Hendricks; Johnson; Madison, west of State Route 13 and south of State Route 132; Marion; Monroe; Morgan; and Shelby Counties.

Virginia

Pursuant to Section 7(f)(2) of the Act, the following geographic area, the entire State of Virginia, except those export port locations within the State, is assigned to this official agency.

Opportunity for Designation

Interested persons or governmental agencies, including California Agri, Frankfort, Indianapolis, and Virginia may apply for designation to provide official services in the geographic areas specified above under the provisions of section 7(f) of the USGSA and 7 CFR 800.196(d). Designation in the specified geographic areas is for the period beginning January 4, 2010, and ending December 31, 2012. To apply for designation or for more information contact the Compliance Division at the address listed above or visit the GIPSA Web site at *http://www.gipsa.usda.gov*.

Request for Comments

We are publishing this notice to provide interested persons the opportunity to comment on the quality of services provided by the California Agri, Frankfort, Indianapolis, and Virginia official agencies. In the designation process, we are particularly interested in receiving comments citing reasons and pertinent data supporting or objecting to the designation of the applicants. Submit all comments to the

Compliance Division at the above address or at *http://www.regulations.gov*.

In determining which applicant will be designated, we will consider applications, comments, and other available information.

Authority: 7 U.S.C. 71–87k.

J. Dudley Butler,

Administrator, Grain Inspection, Packers, and Stockyards Administration.

[FR Doc. E9–12636 Filed 5–29–09; 8:45 am]

BILLING CODE 3410–KD–P

ARCTIC RESEARCH COMMISSION

Meeting Notice

Notice is hereby given that the U.S. Arctic Research Commission will hold its 89th meeting in Washington, DC on June 16–18, 2009. The Business Session, open to the public, will convene at 9:30 a.m., Tuesday, June 16, 2009 in Washington, DC. An Executive Session will follow adjournment of the Business Session.

The Agenda items include:

(1) Call to order and approval of the Agenda.

(2) Approval of the Minutes of the 88th Meeting.

(3) Commissioners and Staff Reports.

(4) Discussion of USARC Goals and Activities.

The focus of the meeting will be reports and updates on programs and research projects affecting the Arctic.

Any person planning to attend this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs.

Contact Person for More Information: John Farrell, Executive Director, U.S. Arctic Research Commission, 703–525–0111 or TDD 703–306–0090.

John Farrell,

Executive Director.

[FR Doc. E9–12519 Filed 5–29–09; 8:45 am]

BILLING CODE 7555–01–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: American Fisheries Act: Vessel and Processor Permit Applications.

OMB Control Number: 0648–0393.

Form Number(s): None.

Type of Request: Regular submission.

Burden Hours: 157.

Number of Respondents: 44.

Average Hours Per Response: Application for permit for replacement vessel, 30 minutes; application for inshore catcher vessel cooperative permit, 2 hours; and application for contract fishing by non-cooperative vessels, 4 hours.

Needs and Uses: Under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*) National Marine Fisheries Service (NMFS) manages the groundfish fisheries in the exclusive economic zone (EEZ) off Alaska through fishery management plans. The regulations that implement those fishery management plans appear at 50 CFR part 679. The American Fisheries Act (AFA), 16 U.S.C. 1851 provided a new program for the Bering Sea and Aleutian Islands (BSAI) Management Area pollock fishery. In response to the AFA, NMFS developed a management program for BSAI pollock to include a set of permits for AFA catcher/processors, AFA catcher vessels, AFA inshore processors, AFA motherships, and AFA cooperatives. Vessels and processors in the BSAI pollock fishery are required to have valid AFA permits on board the vessel or at the processing plant, in addition to any other Federal or State permits. With the exceptions of the inshore vessel cooperatives, replacement vessel, and inshore vessel contract fishing applications, the AFA permit program had a one-time application deadline of December 1, 2000.

Affected Public: Business or other for-profit organizations; individuals or households.

Frequency: Annually and on occasion.

Respondent's Obligation: Required to obtain or retain benefit.

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

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 7845, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, FAX number (202) 395–7285, or *David_Rostker@omb.eop.gov*.

Dated: May 27, 2009.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E9–12606 Filed 5–29–09; 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: Southeast Region Vessel Monitoring System (VMS) and Related Requirements.

OMB Control Number: 0648–0544.

Form Number(s): None.

Type of Request: Regular submission.

Burden Hours: 2,348.

Number of Respondents: 882.

Average Hours per Response: Fishing activity reports, 1 minute; VMS activation checklists, 15 minutes; and power-down exemption request, 10 minutes.

Needs and Uses: Under Amendment 18A to the Fishery Management Plan for Reef Fish Fisheries in the Gulf of Mexico, codified in 50 U.S.C. 622, owners of vessels with valid permits were required to install vessel monitoring systems (VMS) on their vessels. VMS units automatically send periodic reports on the position of the vessel. National Marine Fisheries Service (NMFS) uses the reports to monitor the vessel's location and activities while enforcing area closures. When a VMS is installed and turned on, an activation checklist must be sent to NMFS Office for Law Enforcement. Every vessel that is required to have a VMS unit must have that VMS unit on and properly functioning at all times, even when docked, and prior to each fishing trip, or during a trip if activity changes, a report of fishing activity must be submitted to NMFS VMS personnel. A power-down exemption request may be submitted when boats are out of the water, i.e., for maintenance/repairs in drydock.

Affected Public: Business or other for-profit organizations.

Frequency: One time and on occasion.

Respondent's Obligation: Mandatory.

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

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 7845, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, FAX number (202) 395–7285, or *David_Rostker@omb.eop.gov*.

Dated: May 27, 2009.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E9–12607 Filed 5–29–09; 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: U.S. Census Bureau.

Title: 2010 Census Integrated Communication Program (ICP) Evaluation.

Form Number(s): Various.

OMB Control Number: None.

Type of Request: New collection.

Burden Hours: 7.100.

Number of Respondents: 11,200.

Average Hours per Response: 38 minutes.

Needs and Uses: Census 2000 was the first decennial census to use a paid advertising campaign. The campaign featured use of print and broadcast media, as well as outdoor advertising, to emphasize the importance of responding to the census. Five advertising agencies were used—one to create the core message, and the others to tailor it to specific audiences. The Census Bureau also established partnerships with many diverse groups at all levels of government, both to publicize the census and to encourage participation. Numerous promotions and special events were held across the country. The available evidence suggests that the Census 2000 Partnership and Marketing Program along with other efforts aimed at improving census participation, succeeded in reversing a long-term decline in mail response rates (especially in traditionally hard-to-enumerate groups), and may also have improved cooperation with Census Bureau enumerators, helping to shorten and reduce the costs of Nonresponse Followup (NRFU) efforts.

The 2010 Census Integrated Communications Campaign (ICC) is intended to build on the success of the Census 2000 Partnership and Marketing Program. For 2010, the Census Bureau will use an approach that integrates a mix of mass media advertising, targeted media outreach to specific populations, national and local partnerships, grassroots marketing, school-based programs, and special events. By integrating these elements with each other and with the Census Bureau's 2010 operations, the campaign's goal is to more effectively help ensure that everyone, especially the hard to enumerate, is reached.

The Census Bureau will use an independent evaluation of the 2010 Census ICC to determine if the campaign is achieving its goals. The purpose of the evaluation is to assess the impact of the entire campaign for paid media/advertising, partnerships, Census in Schools program, and other campaign activities. The evaluation will allow stakeholders to determine if the significant investment in the 2010 Census ICC was justified by such outcomes as reduced NRFU burden, reduced differential undercount, and increased cooperation with enumerators. The 2010 Census Integrated Communications Program (ICP) Evaluation is designed as a multi-method approach that will increase the depth and breadth of the evidence available for the assessment and will support valid, robust, and actionable conclusions about the impact of the 2010 Census ICC. The Census Bureau has contracted with the National Opinion Research Center (NORC) at the University of Chicago to design, conduct, and analyze the 2010 Census ICP Evaluation.

Complimentary to the NORC evaluation is the Paid Advertising Heavy-Up Experiment (PAHUE). For this experiment, pairs of DMA's will be matched on indicators such as hard to count scores, mail return rates in Census 2000, race/ethnic populations, poverty rates, urban/rural composition, linguistic isolation population, and number of households. Once the DMAs are identified, one-half of each pair will be randomly assigned to receive a 50 percent ''heavy-up'' of paid advertising.

The 2010 Census ICC contract is a major public expenditure and has great potential to affect the quality and overall cost of the 2010 Census. For these reasons, a rigorous and independent evaluation of the 2010 Census ICC is essential for assessing the success of the 2010 Census and planning for the 2020 Census.

The 2010 Census ICP Evaluation must answer the critically important questions the Census Bureau has posed about effective communications for Census success, and must do this in a statistically rigorous manner, defensible to all stakeholders and concerned parties—in the Census Bureau; in the U.S. Congress, whose membership, policies, and plans depend on the outcome of the decennial census; in other levels and entities of government; the Census Advisory Committees; and in the research community. Specifically, the evaluation must determine whether the 2010 Census ICC achieved its three primary goals: (1) Increasing the mail response rate; (2) improving the overall accuracy of the 2010 Census by reducing differential undercounting of population by race/ethnicity; and (3) improving cooperation with Census enumerators—all by directly and indirectly influencing public awareness, attitudes, intentions, and ultimate behaviors.

Affected Public: Individuals or households.

Frequency: One time.

Respondent's Obligation: Voluntary.

Legal Authority: Title 13 U.S.C. Sections 141 and 193.

OMB Desk Officer: Brian Harris-Kojetin, (202) 395–7314.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 7845, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dhynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Brian Harris-Kojetin, OMB Desk Officer either by fax (202–395–7245) or e-mail (*bharrisk@omb.eop.gov*).

Dated: May 27, 2009.

Glenna Mickelson,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E9–12624 Filed 5–29–09; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; National Estuaries Restoration Inventory

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

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 31, 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 Perry Gayaldo, (301) 713–0174 or *Perry.Gayaldo@noaa.gov*.

SUPPLEMENTARY INFORMATION:

I. Abstract

Collection of estuary habitat restoration project information (*e.g.*, location, habitat type, goals, status, monitoring information) is in process in order to continue to populate a restoration project database mandated by the Estuary Restoration Act (ERA) of 2000. The National Estuaries Restoration Inventory (NERI) contains information for estuary habitat restoration projects funded through the ERA as well as non-ERA project data that meet quality control requirements and data standards established under the Act. The database provides information to improve restoration methods, provides the basis for required reports to Congress, and tracks estuary habitat acreage restored. It is accessible to the public via the Internet for data queries and project reports. Recipients of ERA funds are required to submit specific information on habitat restoration projects into the NERI database through an interactive Web site available over the Internet (*https://neri.noaa.gov/*). The projects that are not funded through the ERA can be voluntarily entered into the database by project managers. Other Federal agencies and private grant programs may also require recipients to enter project information in the NERI database.

II. Method of Collection

Project managers will electronically submit estuary restoration project information via NOAA's National Estuaries Restoration Inventory (NERI) Web site. The Web site contains a user-friendly data entry interface for project managers to enter and submit project information to the NERI database. To facilitate the collection of information through the data entry interface, NOAA's National Marine Fisheries Service (NMFS) provides worksheets containing database fields that can be downloaded and printed from the Web site. These worksheets can be used by project managers to guide information collection, and can then serve as a reference as project managers enter project information through the Web site. The reporting forms are also available in paper format to be sent to project managers as necessary.

III. Data

OMB Control Number: 0648–0479.

Form Number: None.

Type of Review: Regular submission.

Affected Public: Not-for-profit institutions; State, local, and tribal governments; and businesses or other for-profit organizations.

Estimated Number of Respondents: 115.

Estimated Time per Response: Four hours for new projects submitted, with an estimated 70 new projects to be submitted annually. This includes approximately three hours for collecting project information and writing the project abstract and one hour for entering information into the database. For existing projects, two hours are expected for updates, with an estimated 50 projects to be updated annually. Information originally collected and submitted for a project does not need to be collected again to update the project.

Estimated Total Annual Burden Hours: 380 hours.

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 27, 2009.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E9–12641 Filed 5–29–09; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review

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

FOR FURTHER INFORMATION CONTACT: Sheila E. Forbes, Office of AD/CVD Operations, Customs Unit, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, *telephone:* (202) 482–4697.

Background

Each year during the anniversary month of the publication of an antidumping or countervailing duty order, finding, or suspension of investigation, an interested party, as defined in section 771(9) of the Tariff Act of 1930, as amended (the Act), may request, in accordance with section 351.213 (2008) of the Department of Commerce (the Department) Regulations, that the Department conduct an administrative review of that antidumping or countervailing duty order, finding, or suspended investigation.

Respondent Selection

In the event the Department limits the number of respondents for individual examination for administrative reviews initiated pursuant to requests made for the orders identified below, the Department intends to select respondents based on U.S. Customs and

Border Protection (CBP) data for U.S. imports during the period of review. We intend to release the CBP data under Administrative Protective Order (APO) to all parties having an APO within five days of publication of the initiation notice and to make our decision regarding respondent selection within 20 days of publication of the initiation **Federal Register** notice. Therefore, we encourage all parties interested in commenting on respondent selection to submit their APO applications on the date of publication of the initiation notice, or as soon thereafter as possible. The Department invites comments regarding the CBP data and respondent selection within 10 calendar days of publication of the **Federal Register** initiation notice.

Opportunity to Request a Review: Not later than the last day of June 2009,[1] interested parties may request administrative review of the following orders, findings, or suspended investigations, with anniversary dates in June for the following periods:

	Period
Antidumping Duty Proceedings	
The People's Republic of China:	
Apple Juice Concentrate, Non-Frozen, A–570–855	6/1/08–5/31/09
Artist Canvas, A–570–899	6/1/08—5/31/09
Chlorinated Isocyanurates, A–570–898	6/1/08—5/31/09
Color Television Receivers, A–570–884	6/1/08—5/31/09
Folding Metal Tables and Chairs, A–570–868	6/1/08—5/31/09
Furfuryl Alcohol, A–570–835	6/1/08—5/31/09
Polyester Staple Fiber, A–570–905	6/1/08—5/31/09
Silicon Metal, A–570–806	6/1/08—5/31/09
Sparklers, A–570–804	6/1/08—5/31/09
Tapered Roller Bearings, A–570–601	6/1/08—5/31/09
Japan:	
Carbon and Alloy Seamless Standard, Line Pressure Pipe (Over 4 1/2 Inches), A–588–850	6/1/08—5/31/09
Carbon and Alloy Seamless Standard, Line Pressure Pipe (Under 4 1/2 Inches), A–588–851	6/1/08—5/31/09
Hot-Rolled Carbon Steel Flat Products, A–588–846	6/1/08—5/31/09
South Korea: Polyethylene Terephthalate (PET) Film, A–580–807	6/1/08—5/31/09
Spain: Chlorinated Isocyanurates, A–469–814	6/1/08—5/31/09
Taiwan:	
Helical Spring Lock Washers, A–583–820	6/1/08—5/31/09
Stainless Steel Butt-Weld Pipe Fittings, A–583–816	6/1/08—5/31/09
.	
Countervailing Duty Proceedings	
None.	
Suspension Agreements	
Russia: Ammonium Nitrate, A–821–811	6/1/08—5/31/09

In accordance with section 351.213(b) of the regulations, an interested party as defined by section 771(9) of the Act may request in writing that the Secretary conduct an administrative review. For both antidumping and countervailing duty reviews, the interested party must specify the individual producers or exporters covered by an antidumping finding or an antidumping or countervailing duty order or suspension agreement for which it is requesting a review. In addition, a domestic interested party or an interested party described in section 771(9)(B) of the Act must state why it desires the Secretary to review those particular producers or exporters.[2] If the interested party intends for the Secretary to review sales of merchandise by an exporter (or a producer if that producer also exports merchandise from other suppliers) which were produced in more than one country of origin and each country of origin is subject to a separate order, then the interested party must state specifically, on an order-by-order basis, which) the request is intended to cover.

Please note that, for any party the Department was unable to locate in prior segments, the Department will not accept a request for an administrative review of that party absent new information as to the party's location. Moreover, if the interested party who files a request for review is unable to locate the producer or exporter for which it requested the review, the interested party must provide an explanation of the attempts it made to locate the producer or exporter at the same time it files its request for review, in order for the Secretary to determine if the interested party's attempts were reasonable, pursuant to section 351.303(f)(3)(ii) of the regulations.

As explained in *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003), the Department has clarified its practice with respect to the collection of final antidumping duties on imports of merchandise where intermediate firms are involved. The public should be aware of this clarification in determining whether to request an administrative review of merchandise subject to antidumping findings and orders. *See also* the Import Administration Web site at *http://ia.ita.doc.gov*.

Six copies of the request should be submitted to the Assistant Secretary for Import Administration, International Trade Administration, Room 1870, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW., Washington, DC 20230. The Department also asks parties to serve a copy of their requests to the Office of Antidumping/Countervailing Operations, Attention: Sheila Forbes, in room 3065 of the main Commerce Building. Further, in accordance with section 351.303(f)(l)(i) of the regulations, a copy of each request must be served on every party on the Department's service list.

[1] Or the next business day, if the deadline falls on a weekend, Federal holiday or any other day when the Department is closed.

[2] If the review request involves a non-market economy country and the parties subject to the review request do not qualify for separate rates, all other exporters of subject merchandise from the non-market economy country who do not have a separate rate will be covered by the review as part of the single entity of which the named firms are a part.

The Department will publish in the **Federal Register** a notice of ''Initiation of Administrative Review of Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation'' for requests received by the last day of June 2009. If the Department does not receive, by the last day of June 2009, a request for review of entries covered by an order, finding, or suspended investigation listed in this notice and for the period identified above, the Department will instruct the U.S. Customs and Border Protection to assess antidumping or countervailing duties on those entries at a rate equal to the cash deposit of (or bond for) estimated antidumping or countervailing duties required on those entries at the time of entry, or withdrawal from warehouse, for consumption and to continue to collect the cash deposit previously ordered.

This notice is not required by statute but is published as a service to the international trading community.

Dated: May 26, 2009.

John M. Andersen,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. E9–12653 Filed 5–29–09; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Advance Notification of Sunset Reviews

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

ACTION: Notice of upcoming Sunset Reviews.

Background

Every five years, pursuant to section 751(c) of the Tariff Act of 1930, as amended (''the Act''), the Department of Commerce (''the Department'') and the International Trade Commission automatically initiate and conduct a review to determine whether revocation of a countervailing or antidumping duty order or termination of an investigation suspended under section 704 or 734 of the Act would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) and of material injury.

Upcoming Sunset Reviews for July 2009

The following Sunset Reviews are scheduled for initiation in July 2009 and will appear in that month's Notice of Initiation of Five-Year Sunset Reviews.

Antidumping duty proceedings	Department contact
Barium Chloride from the PRC (A–570–007) (3rd Review)	Matthew Renkey, (202) 482–2312.
Chloropicrin from the PRC (A–570–002) (3rd Review)	Matthew Renkey, (202) 482–2312.
Floor-Standing, Metal-Top Ironing Tables and Parts Thereof from the PRC (A–570–888)	Brandon Farlander, (202) 482–0182.
Polyethylene Retail Carrier Bags from the PRC (A–570–886)	Dana Mermelstein, (202) 482–1391.
Polyethylene Retail Carrier Bags from Malaysia (A–557–813)	Dana Mermelstein, (202) 482–1391.
Polyethylene Retail Carrier Bags from Thailand (A–549–821)	Dana Mermelstein, (202) 482–1391.
Sorbitol from France (A–427–001) (3rd Review)	Dana Mermelstein, (202) 482–1391.
Stainless Steel Wire Rod from Italy (A–475–820) (2nd Review)	Brandon Farlander, (202) 482–0182.
Stainless Steel Wire Rod from Japan (A–588–843) (2nd Review)	Brandon Farlander, (202) 482–0182.
Stainless Steel Wire Rod from South Korea (A–580–829) (2nd Review)	Dana Mermelstein, (202) 482–1391.
Stainless Steel Wire Rod from Spain (A–469–807) (2nd Review)	Brandon Farlander, (202) 482–0182.
Stainless Steel Wire Rod from Taiwan (A–583–828) (2nd Review)	Brandon Farlander, (202) 482–0182.
Tetrahydrofurfuryl Alcohol from the PRC (A–570–887)	Matthew Renkey, (202) 482–2312.

Countervailing Duty Proceedings

No Sunset Reviews of countervailing duty orders are scheduled for initiation in July 2009.

Suspended Investigations

No Sunset Reviews of suspended investigations are scheduled for initiation in July 2009.

The Department's procedures for the conduct of Sunset Reviews are set forth in 19 CFR 351.218. Guidance on methodological or analytical issues relevant to the Department's conduct of Sunset Reviews is set forth in the Department's Policy Bulletin 98.3—*Policies Regarding the Conduct of Five-year (''Sunset'') Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin,* 63 FR 18871 (April 16, 1998). The Notice of Initiation of Five-Year (''Sunset'') Reviews provides further information regarding what is required of all parties to participate in Sunset Reviews.

Pursuant to 19 CFR 351.103(c), the Department will maintain and make available a service list for these proceedings. To facilitate the timely preparation of the service list(s), it is requested that those seeking recognition as interested parties to a proceeding contact the Department in writing within 10 days of the publication of the Notice of Initiation.

Please note that if the Department receives a Notice of Intent To Participate from a member of the domestic industry within 15 days of the date of initiation, the review will continue. Thereafter, any interested party wishing to participate in the Sunset Review must provide substantive comments in response to the notice of initiation no later than 30 days after the date of initiation.

This notice is not required by statute but is published as a service to the international trading community.

Dated: May 26, 2009.

John M. Andersen,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. E9–12651 Filed 5–29–09; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–933]

Notice of Correction to Antidumping Duty Order: Frontseating Service Valves From the People's Republic of China

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

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

FOR FURTHER INFORMATION CONTACT: Eugene Degnan at (202) 482–0414, Import Administration, International Trade Administration, U.S. Department

of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On March 13, 2009, the Department published the final determination of sales at less than fair value of frontseating service valves (''FSVs'') from the People's Republic of China (''PRC''). *See Frontseating Service Valves From the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances*, 74 FR 10886 (March 13, 2009) (''*Final Determination*''). On April 21, 2009, the International Trade Commission (''ITC'') notified the Department of Commerce (''the Department'') of its final determination pursuant to section 735(d) of the Tariff Act of 1930, as amended (''the Act''), that an industry in the United States is materially injured within the meaning of section 735(b)(1)(A)(i) of the Act by reason of less-than-fair-value imports of FSVs from the PRC. *See* Letter from the ITC to the Secretary of Commerce, ''Notification of Final Affirmative Determination of Frontseating Service Valves from the People's Republic of China,'' Investigation No. 731–TA–1148 (April 21, 2009); *see also Frontseating Service Valves From China; Determination*, 74 FR 19107 (April 27, 2009). On April 28, 2009, pursuant to section 736(a) of the Act, the Department published the antidumping duty order on FSVs from the PRC. *See Antidumping Duty Order: Frontseating Service Valves from the People's Republic of China*, 74 FR 19196 (April 28, 2009) (''*Order*'').

Scope of the Order

The merchandise covered by this order is frontseating service valves, assembled or unassembled, complete or incomplete, and certain parts thereof. Frontseating service valves contain a sealing surface on the front side of the valve stem that allows the indoor unit or outdoor unit to be isolated from the refrigerant stream when the air conditioning or refrigeration unit is being serviced. Frontseating service valves rely on an elastomer seal when the stem cap is removed for servicing and the stem cap metal to metal seat to create this seal to the atmosphere during normal operation.[1]

For purposes of the scope, the term ''unassembled'' frontseating service valve means a brazed subassembly requiring any one or more of the following processes: The insertion of a valve core pin, the insertion of a valve stem and/or O ring, the application or installation of a stem cap, charge port cap or tube dust cap. The term ''complete'' frontseating service valve means a product sold ready for installation into an air conditioning or refrigeration unit. The term ''incomplete'' frontseating service valve means a product that when sold is in multiple pieces, sections, subassemblies or components and is incapable of being installed into an air conditioning or refrigeration unit as a single, unified valve without further assembly.

The major parts or components of frontseating service valves intended to be covered by the scope under the term ''certain parts thereof'' are any brazed subassembly consisting of any two or more of the following components: A valve body, field connection tube, factory connection tube or valve charge port. The valve body is a rectangular block, or brass forging, machined to be hollow in the interior, with a generally square shaped seat (bottom of body). The field connection tube and factory connection tube consist of copper or other metallic tubing, cut to length, shaped and brazed to the valve body in order to create two ports, the factory connection tube and the field connection tube, each on opposite sides of the valve assembly body. The valve charge port is a service port via which a hose connection can be used to charge or evacuate the refrigerant medium or to monitor the system pressure for diagnostic purposes.

The scope includes frontseating service valves of any size, configuration, material composition or connection type. Frontseating service valves are classified under subheading 8481.80.1095, and also have been classified under subheading 8415.90.80.85, of the Harmonized Tariff Schedule of the United States (''HTSUS''). It is possible for frontseating service valves to be manufactured out of primary materials other than copper and brass, in which case they would be classified under HTSUS subheadings 8481.80.3040, 8481.80.3090, or 8481.80.5090. In addition, if unassembled or incomplete frontseating service valves are imported, the various parts or components would be classified under HTSUS subheadings 8481.90.1000, 8481.90.3000, or 8481.90.5000. The HTSUS subheadings are provided for convenience and customs purposes, but the written description of the scope of this proceeding is dispositive.

Correction to Antidumping Duty Order

In the *Order*, the Department stated that in accordance with section 736(a)(1) of the Act, it will direct U.S. Customs and Border Protection (''CBP'') to assess, upon further information from the Department, antidumping duties equal to the amount by which the normal value of the merchandise exceeds the export price (or the constructed export price) of the merchandise for all relevant entries of FSVs from the PRC. We further stated that these antidumping duties will be assessed on all unliquidated entries of FSVs entered, or withdrawn from the warehouse, for consumption on or after October 22, 2008, the date on which the Department published its notice of preliminary determination in the **Federal Register**. *See Frontseating Service Valves from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value, Preliminary Negative Determination of Critical Circumstances, and Postponement of Final Determination*, 73 FR 62952 (October 22, 2008) (''*Preliminary Determination*'').

However, the Department inadvertently neglected to state that section 733(d) of the Act states that instructions issued pursuant to an affirmative preliminary determination may not remain in effect for more than four months except where exporters representing a significant proportion of exports of the subject merchandise request the Department to extend that four-month period to no more than six months. At the request of the exporters that account for a significant proportion of FSVs in the PRC, we extended the four-month period to no more than six months. *See* Letter from Zhejiang DunAn Precision Industries Co., Ltd., Zhejiang DunAn Hetian Metal Co., Ltd. (''DunAn Hetian'') (October 7, 2008). In the underlying investigation, the six-month period beginning on the date of the publication of the preliminary determination ended on April 20, 2009. Furthermore, section 737(b) of the Act states that definitive duties are to begin on the date of publication of the ITC's final injury determination.

Publication of the ITC final injury determination took place on April 27, 2009. *See Frontseating Service Valves From China; Determination*, 74 FR

[1] The frontseating service valve differs from a backseating service valve in that a backseating service valve has two sealing surfaces on the valve stem. This difference typically incorporates a valve stem on a backseating service valve to be machined of steel, where a frontseating service valve has a brass stem. The backseating service valve dual stem seal (on the back side of the stem), creates a metal to metal seal when the valve is in the open position, thus, sealing the stem from the atmosphere.

19107 (April 27, 2009). Therefore, in accordance with section 733(d) of the Act and our practice, we will instruct CBP to terminate the suspension of liquidation and to liquidate, without regard to antidumping duties, unliquidated entries of FSVs from the PRC entered, or withdrawn from warehouse, for consumption after April 20, 2009, and through April 26, 2009, the day preceding the date of publication of the ITC's final injury determination in the **Federal Register**. Suspension of liquidation will resume on and after April 27, 2009, the date of publication of the ITC's final injury determination in the **Federal Register**.

Pursuant to section 735(c)(1) of the Act, CBP should continue to require, effective April 27, 2009, a cash deposit equal to the estimated weighted-average dumping margins as listed in the *Order*.

This notice constitutes a correction to the antidumping duty order with respect to FSVs from the PRC. This corrected order is published in accordance with the section 736(a) of the Act and 19 CFR 351.211.

Dated: *May 26, 2009.*

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

[FR Doc. E9–12649 Filed 5–29–09; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket Number: 090306281–9287–01]

Recovery Act Measurement Science and Engineering Research Fellowship Program

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice.

SUMMARY: The National Institute of Standards and Technology (NIST) is establishing a financial assistance program for awardees to develop and implement with NIST a measurement science and engineering fellowship program as part of NIST's activities implementing the American Recovery and Reinvestment Act of 2009 (ARRA, or Recovery Act), Pub. L. 111–5, 123 Stat. 115. The fellowship program is intended to promote training and practical experience in science and engineering, and to advance NIST's mission to promote U.S. innovation and industrial competitiveness by advancing measurement science, standards, and technology in ways that enhance economic security and improve our quality of life.

DATES: All applications must be received no later than 3 p.m. Eastern Daylight Saving Time on Monday, July 27, 2009. Late applications will not be reviewed or considered.

ADDRESSES: Proposals may be submitted in hard copy or in electronic format. Hard copy proposals may be submitted to Dr. Jason Boehm, National Institute of Standards and Technology, 100 Bureau Drive, Stop 1060, Gaithersburg, MD 20899–1060. Electronic proposals may be uploaded to *http://www.Grants.gov*.

FOR FURTHER INFORMATION CONTACT: For complete information about this program and instructions for applying by paper or electronically, read the Federal Funding Opportunity (FFO) Notice at *http://www.grants.gov*. A paper copy of the FFO may be obtained by calling (301) 975–5718. Technical questions should be addressed to Dr. Jason Boehm at the address listed in the **ADDRESSES** section above, or at Tel: (301) 975–8678; E-mail: *jason.boehm@nist.gov*; Fax: (301) 216–0529. Grants Administration questions should be addressed to Grants and Agreements Management Division, National Institute of Standards and Technology, 100 Bureau Drive, Stop 1650, Gaithersburg, MD 20899–1650; Tel: (301) 975–5718; E-mail: *grants@nist.gov*; Fax: (301) 840–5976. For assistance with using Grants.gov contact *support@grants.gov*.

SUPPLEMENTARY INFORMATION:

Authority: 15 U.S.C. 272(b) and (c), 15 U.S.C. 278g–1(a),(b), 15 U.S.C. 278(h), Public Law 111–5, 123 Stat. 115.

Catalog of Federal Domestic Assistance Name and Number: Measurement and Engineering Research and Standards—11.609.

Program Description: The primary program objectives of the NIST Recovery Act Measurement Science and Engineering Fellowship Program are:

1. To provide opportunities for scientists and engineers in training to perform research in broad areas of measurement science at NIST through research fellowships called Research Training Fellowships. Research Training Fellowships will be offered to qualified undergraduate students and graduate students at U.S. universities and colleges, and to postdoctoral researchers, in fields of science and engineering that contribute to NIST's measurement science programs.

2. To provide opportunities for practicing scientists and engineers in the public and private sectors to perform research in broad areas of measurement science at NIST through research fellowships called Senior Research Fellowships. Senior Research Fellowships will be offered to qualified scientists and engineers working at U.S. private firms, U.S. non-profit organizations, U.S. universities and colleges, and other organizations in fields of science and engineering that contribute to NIST's measurement science programs.

NIST intends this financial assistance program to address both types of opportunities listed above through a single cooperative agreement, or through more than one cooperative agreement.

Through the cooperative agreement(s), the program will advance purposes established in Section 3 of the Recovery Act by creating jobs, promoting economic recovery, providing investments needed to increase economic efficiency by spurring technological advances in science, and by making investments in areas of research that will provide long-term economic benefits.

NIST performs a broad range of research, measurements, modeling, and other activities to support its broad measurement science and engineering programs in ten operating units comprising the NIST laboratories. Further details about this program may be found in the Federal Funding Opportunity announcement for this program.

Funding Availability: The funding instrument used in this program will be a cooperative agreement. Proposals will be considered for cooperative agreements with durations between one and three years, subject to the availability of funds, satisfactory progress, and the continuing relevance to the objectives of NIST. The anticipated level of funding is up to $20,000,000 ($20 million) total for the fellowships program for up to three years. NIST anticipates making one to five awards. Projects are expected to start by January 2010.

NIST will determine whether to fund one award for the full amount; to divide available funds into multiple awards of any size, and negotiate scopes of work and budgets as appropriate; or not to select any proposal for funding, upon completing the selection process described below.

Cost Share Requirements: None.

Eligibility: This program is open to U.S. institutions of higher education; U.S. hospitals; U.S. non-profit organizations; U.S. commercial organizations; state, local, and Indian tribal governments.

Evaluation Criteria

The applications will be evaluated and scored on the basis of the following evaluation criteria:

1. *Technical merit of the proposal:* Assesses whether the proposal accurately addresses the program goals and objectives. (40 pts)

2. *Overall qualifications of the applicant:* This assesses whether the applicant possesses the necessary education, experience, training, facilities, and administrative resources to accomplish the project. (30 pts)

3. *Project costs:* The proposal budget is evaluated to determine if it is realistic and commensurate with the project needs and time-frame. (30 pts)

Selection Factors

The Selecting Official shall recommend award based upon the rank order and recommendations of the reviewers and upon one or more of the following selection factors:

a. Availability of Federal funds;

b. Redundancy;

c. Balance/distribution of funds to ensure fellowship opportunities for all types of fellowships and scientific research areas described in the Federal Funding Opportunity for this program;

d. Logistical concerns that would be detrimental to the success or timely completion of the proposal objectives; and

e. Applicant's prior award performance.

Therefore, the highest scoring proposals may not necessarily be selected for an award. If an award is made to an applicant that deviates from the scores of the reviewers, the Selecting Official will justify the selection in writing based on selection factors described above.

Review and Selection Process

Initial Screening of all Applications: All timely submitted applications received in response to this announcement will be reviewed to determine whether they are complete and responsive to the scope of the stated objectives of the Program. Incomplete or non-responsive applications will not be reviewed for technical merit. NIST will retain one copy of each incomplete or non-responsive application for three years for record keeping purposes. The remaining copies will be destroyed.

Each complete and responsive application will be reviewed by at least three independent, objective NIST employee reviewers, who are knowledgeable in the subject matter of this announcement and its objectives and who are able to conduct a review based on the evaluation criteria as described in this notice. The reviewers will reach a consensus score resulting in a rank order of applications and make recommendations for funding to the Selecting Official. In making final selections, the Selecting Official (Chief Scientist, NIST) will select funding recipients based upon the rank order of the proposals and the selection factors. The final award of cooperative agreements will be made by the NIST Grants Officer in Gaithersburg, Maryland, based on compliance with application requirements as published in this notice, compliance with applicable legal and regulatory requirements, and whether the recommended applicants are determined to be responsible. Unsatisfactory performance on any previous Federal award may result in an application not being considered for funding. Applicants may be asked to modify objectives, work plans, or budgets, and provide supplemental information required by the agency prior to award. The decision of the Grants Officer is final.

T*he Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements:* The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements, which are contained in the **Federal Register** Notice of February 11, 2008 (73 FR 7696), are applicable to this solicitation. On the form SF–424, the applicant's 9-digit Dun and Bradstreet Data Universal Numbering System (DUNS) number must be entered in item 8.c. Organizational DUNS. The DUNS number provided MUST be the DUNS number for the entity within the applying institution that will be responsible for drawing down funds from the Automated Standard Application for Payment System (ASAP). Institutions that provide incorrect DUNS numbers may experience significant delays in receiving funds.

Collaborations with NIST Employees: All applications should include a description of any work proposed to be performed by an entity other than the applicant, and the cost of such work should ordinarily be included in the budget.

If an applicant proposes collaboration with NIST, the statement of work should include a statement of this intention, a description of the collaboration, and prominently identify the NIST employee(s) involved. Any collaboration by a NIST employee must be approved by appropriate NIST management and is at the sole discretion of NIST. Prior to beginning the merit review process, NIST will verify the approval of the proposed collaboration. Any unapproved collaboration will be stricken from the proposal prior to the merit review.

Use of NIST Intellectual Property: If the applicant anticipates using any NIST-owned intellectual property to carry out the work proposed, the applicant should identify such intellectual property. This information will be used to ensure that no NIST employee involved in the development of the intellectual property will participate in the review process for that competition. In addition, if the applicant intends to use NIST-owned intellectual property, the applicant must comply with all statutes and regulations governing the licensing of Federal government patents and inventions, described at 35 U.S.C. 200–212, 37 CFR part 401, 15 CFR 14.36, and in Section B.21 of the Department of Commerce Pre-Award Notification Requirements 73 FR 7696 (February 11, 2008). Questions about these requirements may be directed to the Office of the Chief Counsel for NIST, 301–975–2803.

Any use of NIST-owned intellectual property by a proposer is at the sole discretion of NIST and will be negotiated on a case-by-case basis if a project is deemed meritorious. The applicant should indicate within the statement of work whether it already has a license to use such intellectual property or whether it intends to seek one.

If any inventions made in whole or in part by a NIST employee arise in the course of an award made pursuant to this notice, the United States government, acting through NIST, may retain its ownership rights in any such inventions. Disposition of NIST's retained rights in such inventions will be determined solely by NIST, and may include, but is not limited to, the grant of a license(s) to parties other than the applicant to practice such inventions, or placing NIST's retained rights into the public domain.

Collaborations Making Use of Federal Facilities: All applications should include a description of any work proposed to be performed using Federal facilities. If an applicant proposes use of NIST facilities, the statement of work should include a statement of this intention and a description of the facilities. Any use of NIST facilities must be approved by appropriate NIST management and is at the sole discretion of NIST. Prior to beginning the merit review process, NIST will verify the availability of the facilities and approval of the proposed usage.

Any unapproved facility use will be stricken from the proposal prior to the merit review. Examples of some facilities that may be available for collaborations are listed on the NIST Technology Services Web site, *http://ts.nist.gov/*.

Paperwork Reduction Act: The standard forms in the application kit involve a collection of information subject to the Paperwork Reduction Act. The use of Standard Forms 424, 424A, 424B, SF–LLL, and CD–346 have been approved by OMB under the respective Control Numbers 0348–0043, 0348–0044, 0348–0040, 0348–0046, and 0605–0001.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection subject to the requirements of the Paperwork Reduction Act, unless that collection of information displays a currently valid OMB Control Number.

Research Projects Involving Human Subjects, Human Tissue, Data or Recordings Involving Human Subjects: Any proposal that includes research involving human subjects, human tissue, data or recordings involving human subjects must meet the requirements of the Common Rule for the Protection of Human Subjects, codified for the Department of Commerce at 15 CFR part 27. In addition, any proposal that includes research on these topics must be in compliance with any statutory requirements imposed upon the Department of Health and Human Services (DHHS) and other federal agencies regarding these topics, all regulatory policies and guidance adopted by DHHS, the Food and Drug Administration, and other Federal agencies on these topics, and all Presidential statements of policy on these topics.

NIST will accept the submission of proposals containing research activities involving human subjects. The human subjects research activities in a proposal will require approval by Institutional Review Boards (IRBs) possessing a current registration filed with DHHS and to be performed by institutions possessing a current, valid Federal-wide Assurance (FWA) from DHHS that is linked to the cognizant IRB. In addition, NIST as an institution requires that IRB approval documentation go through a NIST administrative review; therefore, research activities involving human subjects are not authorized to start within an award until approval for the activity is issued in writing from the NIST Grants Officer. NIST will not issue a single project assurance (SPA) for any IRB reviewing any human subjects protocol proposed to NIST.

President Obama has issued Executive Order No. 13,505, (74 FR 10667, March 9, 2009), revoking previous Executive Orders and Presidential statements regarding the use of human embryonic stem cells in research. NIST will follow any guidance issued by the National Institutes of Health (NIH) pursuant to the Executive Order and will develop its own procedures based on the NIH guidance before funding research using human embryonic stem cells. NIST will follow any additional polices or guidance issued by the current Administration on this topic.

Research Projects Involving Vertebrate Animals: Any proposal that includes research involving vertebrate animals must be in compliance with the National Research Council's ''Guide for the Care and Use of Laboratory Animals'' which can be obtained from National Academy Press, 2101 Constitution Avenue, NW., Washington, DC 20055. In addition, such proposals must meet the requirements of the Animal Welfare Act (7 U.S.C. 2131 *et seq.*), 9 CFR parts 1, 2, and 3, and if appropriate, 21 CFR part 58. These regulations do not apply to proposed research using pre-existing images of animals or to research plans that do not include live animals that are being cared for, euthanized, or used by the project participants to accomplish research goals, teaching, or testing. These regulations also do not apply to obtaining animal materials from commercial processors of animal products or to animal cell lines or tissues from tissue banks.

Notification of Recovery Act Requirements: Recovery Act limitations are applicable to the projects funded in this Notice. Recipients must comply with the following three provisions of the Recovery Act, as applicable, and any other terms required by the Act or that may be added to the recipient's award pursuant to guidance implemented by the Office of Management and Budget.

Buy American Provisions of the Recovery Act: Unless waived by DOC, none of the funds appropriated or otherwise made available by the Recovery Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States. This provision shall be applied in a manner consistent with United States obligations under international agreements.

Davis Bacon Act: Under Section 1606 of the Recovery Act, projects using Recovery Act funds require the payment of not less than the prevailing wages under the Davis-Bacon Act to ''all laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part by and through the Federal Government.''

False Claims Act: Each recipient or sub-recipient awarded funds under the Recovery Act shall promptly refer to an appropriate inspector general any credible evidence that a principal, employee, agent, contractor, sub-grantee, subcontractor, or other person has submitted a false claim under the False Claims Act or has committed a criminal or civil violation of laws pertaining to fraud, conflict of interest, bribery, gratuity, or similar misconduct involving those funds.

Ensuring Responsible Spending of Recovery Act Funds. The agency expects programs under this notice to be implemented in general compliance with any guidance issued by the Office of Management and Budget regarding the President's Memorandum for the Heads of Executive Departments and Agencies of March 20, 2009, Ensuring Responsible Spending of Recovery Act Funds, 74 FR 12531 (Mar. 25, 2009).

Best Practices to Promote Equality of Opportunity. Pursuant to OMB Guidance (see, ''Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009,'' April 3, 2009) and consistent with the Recovery Act and other applicable laws, DoC encourages recipients to implement best practices to promote equality of opportunity, to provide opportunities for small and disadvantaged businesses, including veteran-owned small businesses and service disabled veteran-owned small businesses, and to follow sound labor practices.

Reporting Requirements: Reporting requirements are described in the Department of Commerce Financial Assistance Standard Terms and Conditions dated March, 2008, found on the Internet at: *http://oamweb.osec.doc.gov/docs/GRANTS/DOC%20STCsMAR08Rev.pdf*.

The references in Sections A.01 and B.01 of the Department of Commerce Financial Assistance Standard Terms and Conditions, dated March, 2008, to ''Financial Status Report (SF–269)'' and ''SF–269'' are hereby replaced with ''Federal Financial Report (SF–425)'' and ''SF–425,'' respectively, as required by the Office of Management and Budget (OMB) (73 FR 61175, October 15, 2008). As authorized under 15 CFR 14.52 and 24.41, the OMB approved SF–

425 shall be used in the place of the SF–269 and SF–272 under the uniform administrative requirements and elsewhere under awards in this program where such forms are referenced.

Programmatic Requirements-Performance (Technical) Reports: Unless otherwise specified in the award provisions, each research or senior fellow shall submit a brief report on his or her experiences and accomplishments during their fellowship within 30 days after the end of the work at NIST.

In addition, as set out in Sec. 1512(c) of the Recovery Act, no later than ten (10) days after the end of each calendar quarter, any recipient that received funds under the Recovery Act from NIST must submit a report to NIST that contains:

a. The total amount of Recovery Act funds received from NIST;

b. The amount of Recovery Act funds received that were expended or obligated to projects or activities;

c. A detailed list of all projects or activities for which Recovery Act funds were expended or obligated; and

d. Detailed information on any subcontracts or subgrants awarded by the recipient to include the data elements required to comply with the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109–282), allowing aggregate reporting on awards below $25,000 or to individuals, as prescribed by the Director of the Office of Management and Budget.

Recipients that must report information in accordance with paragraph (d) above must register with the Central Contractor Registration database (*http://www.ccr.gov/*) or complete other registration requirements as determined by the Director of the Office of Management and Budget. Section 1512(d) further requires that no later than thirty (30) days after the end of each calendar quarter, NIST must make the information in reports submitted under section 1512(c) of the Recovery Act as outlined above publicly available by posting the information on a Web site. OMB Memo M–09–10, ''Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009,'' which can be accessed at *http://www.recovery.gov/*, provides information on requirements for Federal agencies under the Recovery Act. Additional guidance may be forthcoming related to responsibilities of recipients of grants and cooperative agreements under the Recovery Act.

Funding Availability and Limitation of Liability: The funding periods and funding amounts referenced in this notice and request for applications are subject to the availability of funds, as well as to Department of Commerce and NIST priorities at the time of award. The Department of Commerce and NIST will not be held responsible for application preparation costs. Publication of this notice does not obligate the Department of Commerce or NIST to award any specific grant or cooperative agreement or to obligate all or any part of available funds. No funding is anticipated at this time to provide further support beyond the award period to any project that may receive funds under this program.

Executive Order 12866: This funding notice was determined to be not significant for purposes of Executive Order 12866.

Executive Order 13132 (Federalism): It has been determined that this notice does not contain policies with federalism implications as that term is defined in Executive Order 13132.

Executive Order 12372: Applications under this program are not subject to Executive Order 12372, ''Intergovernmental Review of Federal Programs.''

Administrative Procedure Act/ Regulatory Flexibility Act: Notice and comment are not required under the Administrative Procedure Act (5 U.S.C. 553) or any other law, for rules relating to public property, loans, grants, benefits or contracts (5 U.S.C. 553(a)). Because notice and comment are not required under 5 U.S.C. 553, or any other law, for rules relating to public property, loans, grants, benefits or contracts (5 U.S.C. 553(a)), a Regulatory Flexibility Analysis is not required and has not been prepared for this notice, 5 U.S.C. 601 *et seq.*

Dated: May 26, 2009.

Patrick D. Gallagher,

Deputy Director.

[FR Doc. E9–12665 Filed 5–29–09; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket Number: 090306283–9284–01]

Recovery Act Measurement Science and Engineering Research Grants Program

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice.

SUMMARY: The National Institute of Standards and Technology (NIST) is establishing a financial assistance program to award research grants and cooperative agreements to support measurement science and engineering research proposals in the following six focus areas: Energy; environment and climate change; information technology/cybersecurity; biosciences/healthcare; manufacturing; and physical infrastructure, as part of NIST's activities implementing the American Recovery and Reinvestment Act of 2009 (ARRA or Recovery Act).

DATES: All proposals must be received no later than 3 p.m. Eastern Daylight Saving Time on Monday, July 13, 2009. Late proposals will not be reviewed or considered.

ADDRESSES: Proposals may be submitted in hard copy or in electronic format. Hard copy proposals may be submitted to Dr. Jason Boehm, National Institute of Standards and Technology, 100 Bureau Drive, Stop 1060, Gaithersburg, MD 20899–1060. Electronic proposals may be uploaded to *http://www.Grants.gov*.

FOR FURTHER INFORMATION CONTACT: For complete information about this program and instructions for applying by paper or electronically, read the Federal Funding Opportunity Notice (FFO) at *http://www.grants.gov*. A paper copy of the FFO may be obtained by calling (301) 975–5718. Technical questions should be addressed to Dr. Jason Boehm at the address listed in the **ADDRESSES** section above, or at Tel: (301) 975–4455; E-mail: *jason.boehm@nist.gov*; Fax: (301) 216–0529. Grants Administration questions should be addressed to Grants and Agreements Management Division, National Institute of Standards and Technology, 100 Bureau Drive, Stop 1650, Gaithersburg, MD 20899–1650; Tel: (301) 975–5718; E-mail: *grants@nist.gov*; Fax: (301) 840–5976. For assistance with using Grants.gov contact *support@grants.gov*.

SUPPLEMENTARY INFORMATION:

Authority: 15 U.S.C. § 272(b) and (c); Pub. L. 111–5, 123 Stat. 115.

Catalog of Federal Domestic Assistance Name and Number: Measurement and Engineering Research and Standards—11.609

Program Description: In response to the American Reinvestment and Recovery Act (Pub. L. 111–5, 123 Stat. 115), the National Institute of Standards and Technology (NIST) will provide grants and cooperative agreements for measurement science and engineering research in the following six focus areas of critical national importance: Energy; environment and climate change; information technology/cybersecurity; biosciences/healthcare; manufacturing;

and physical infrastructure, with priority funding in areas of special interest to NIST. Please see the FFO for detailed information on each area of critical national importance. The program is intended to advance the state of knowledge and practice in these areas of critical national importance, in support of NIST's mission to promote U.S. innovation and industrial competitiveness by advancing measurement science, standards, and technology in ways that enhance economic security and improve our quality of life. The program will advance purposes established in Section 3 of the Recovery Act by creating jobs, promoting economic recovery, providing investments needed to increase economic efficiency by spurring technological advances in science and health, making investments in research areas such as environmental protection and infrastructure that will provide long-term economic benefits, and will help stabilize state and local government budgets, in order to minimize and avoid reductions in essential services and counterproductive state and local tax increases.

Competitive proposals will also result in achieving commencement of expenditures and activities as quickly as possible consistent with prudent management. Applicants may propose projects that include collaboration between scientific staff and NIST to help advance these program objectives. Please see information below regarding collaborations with NIST employees.

Program Priorities: Proposals submitted to the Recovery Act Measurement Science and Engineering Research Grants Program must address one of the areas of critical national importance described in the FFO. Applicants should clearly note which program area (*e.g.*, energy) the proposal is addressing. Proposals that address the sub-topics listed in the FFO will receive high priority for consideration of funding. Applicants whose proposal addresses a sub-topic listed in the FFO should also clearly note which sub-topic the proposal addresses.

Funding Availability: NIST plans to award up to $35 million in grants and cooperative agreements (20–60 awards expected), as appropriate to support measurement science and engineering research in areas of critical national importance. Where cooperative agreements are used, the nature of NIST's ''substantial involvement'' will generally be collaboration with the recipient by working jointly with a recipient scientist in carrying out the scope of work, or specifying direction or redirection of the scope of work due to inter-relationships with other projects requiring such cooperation.

Proposals for research or other activity under this notice should have a duration lasting between one and three years. All projects approved by NIST, including multiple-year projects, will be fully funded at the time of award. Award terms will describe how recipients with satisfactory performance will draw down funds as needed from a Department of Treasury account.

Individual awards are expected to range between $500,000 and $1,500,000. Projects are expected to start by September of 2009.

Cost Share Requirements: None.

Eligibility: This program is open to U.S. institutions of higher education; U.S. non-profit organizations; U.S. commercial organizations; and state, local, and Indian tribal governments.

Evaluation Criteria: The evaluation criteria the technical reviewers will use in evaluating the proposals are as follows:

1. Technical merit of the proposal. Reviewers will consider the applicant's approach and the extent to which the proposal effectively addresses scientific and technical issues necessary to achieve success.

2. Qualifications of Technical Personnel. Reviewers will consider the ability of the proposed personnel to perform the proposed work as measured by evidence of skills, training and past professional accomplishments.

3. Relevance to NIST Programs. Reviewers will consider the degree to which the proposed work addresses topics of national importance as identified in the solicitation as well as the relevance of the work to advancements in measurement science and engineering of interest to current and future NIST programs.

4. Potential Impact of Proposal. Reviewers will consider the potential technical effectiveness of the proposal, the value it would contribute to the field of research, and its potential to enhance U.S. economic security and quality of life.

Each of these factors will be given equal weight in the evaluation process.

Selection Factors: The Selecting Official anticipates recommending proposals for funding in rank order unless a proposal is justified to be awarded out of rank order based on one or more of the following selection factors:

a. Availability of Federal funds,

b. Redundancy,

c. Balance/distribution of funds by research areas described in the Funding Opportunity Description section of the FFO,

d. Relevance to objectives of Recovery Act and alignment with subtopics described in the Funding Opportunity Description section of the FFO.

Therefore, the highest scoring proposals may not necessarily be selected for an award. If an award is made to an applicant that deviates from the scores of the reviewers, the Selecting Official shall justify the selection in writing based on selection factors described above.

Review and Selection Process: An initial administrative review of timely submitted proposals will be conducted to determine compliance with requirements and completeness of the proposal. Responsive and complete proposals will be considered further. Proposals that are nonresponsive and/or incomplete will be eliminated. Applicants will be notified if their proposal will not receive merit review. Each responsive and complete proposal will receive three independent technical reviews, which will include three individual written evaluations and scores, based on the evaluation criteria. The three scores for each proposal will be averaged. No consensus advice will be given by the technical reviewers. The individual proposal evaluations and average scores of each proposal will be considered by an Evaluation Board (a committee made up of seven (7) Federal employees: one chair and one coordinator for each of the focus areas). This Board will rank the proposals and make funding recommendations based on the selection factors described above to a Selecting Official for further consideration. In making final selections, the Selecting Official (Chief Scientist, NIST) will select funding recipients based upon the Evaluation Board's rank order of the proposals and the selection factors. NIST reserves the right to negotiate the cost and scope of the proposed work with the applicants that have been selected to receive awards. Applicants may be asked to modify work plans or budgets and provide supplemental information required by the agency prior to final approval of an award. NIST also reserves the right to reject a proposal where information is uncovered that raises a reasonable doubt as to the responsibility of the applicant. The final approval of selected proposals and award of grants will be made by the NIST Grants Officer. The award decision of the NIST Grants Officer is final.

The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements:

The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements, which are contained in the **Federal Register** Notice of February 11, 2008 (73 FR 7696), are applicable to this solicitation. On the form SF–424, the applicant's 9-digit Dun and Bradstreet Data Universal Numbering System (DUNS) number must be entered in item 8.c. Organizational DUNS. The DUNS number provided MUST be the DUNS number for the entity within the applying institution that will be responsible for drawing down funds from the Automated Standard Application for Payment System (ASAP). Institutions that provide incorrect DUNS numbers may experience significant delays in receiving funds.

Collaborations with NIST Employees: All proposals should include a description of any work proposed to be performed by an entity other than the applicant, and the cost of such work should be included in the budget.

If an applicant proposes collaboration with NIST, the statement of work should include a statement of this intention, a description of the collaboration, and prominently identify the NIST employee(s) involved, if known. Any collaboration by a NIST employee must be approved by appropriate NIST management and is at the sole discretion of NIST. Prior to beginning the merit review process, NIST will verify the approval of the proposed collaboration. Any unapproved collaboration will be stricken from the proposal prior to the merit review.

Use of NIST Intellectual Property: If the applicant anticipates using any NIST-owned intellectual property to carry out the work proposed, the applicant should identify such intellectual property. This information will be used to ensure that no NIST employee involved in the development of the intellectual property will participate in the review process for that competition. In addition, if the applicant intends to use NIST-owned intellectual property, the applicant must comply with all statutes and regulations governing the licensing of Federal government patents and inventions, described at 35 U.S.C. 200–212, 37 CFR Part 401, 15 CFR 14.36, and in Section B.21 of the Department of Commerce Pre-Award Notification Requirements 73 FR 7696 (February 11, 2008). Questions about these requirements may be directed to the Office of the Chief Counsel for NIST, 301–975–2803.

Any use of NIST-owned intellectual property by an applicant is at the sole discretion of NIST and will be negotiated on a case-by-case basis if a project is deemed meritorious. The applicant should indicate within the statement of work whether it already has a license to use such intellectual property or whether it intends to seek one.

If any inventions made in whole or in part by a NIST employee arise in the course of an award made pursuant to this notice, the United States government, acting through NIST, may retain its ownership rights in any such inventions. Disposition of NIST's retained rights in such inventions will be determined solely by NIST, and may include, but is not limited to, the grant of a license(s) to parties other than the applicant to practice such inventions, or placing NIST's retained rights into the public domain.

Collaborations Making Use of Federal Facilities: All proposals should include a description of any work proposed to be performed using Federal facilities. If an applicant proposes use of NIST facilities, the statement of work should include a statement of this intention and a description of the facilities. Any use of NIST facilities must be approved by appropriate NIST management and is at the sole discretion of NIST. Prior to beginning the merit review process, NIST will verify the availability of the facilities and approval of the proposed usage. Any unapproved facility use will be stricken from the proposal prior to the merit review. Examples of some facilities that may be available for collaborations are listed on the NIST Technology Services Web site, *http://ts.nist.gov/*.

Paperwork Reduction Act: The standard forms in the application kit involve a collection of information subject to the Paperwork Reduction Act. The use of Standard Forms 424, Application for Federal Assistance, 424A, Budget Information Non-Construction, 424B, Assurances Non-Construction, SF–LLL, Certification Regarding Lobbying, and CD–346, Disclosure of Lobbying Activities, has been approved by OMB under the respective Control Numbers 0348–0043, 0348–0044, 0348–0040, 0348–0046, and 0605–0001.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection subject to the requirements of the Paperwork Reduction Act, unless that collection of information displays a currently valid OMB Control Number.

Research Projects Involving Human Subjects, Human Tissue, Data or Recordings Involving Human Subjects: Any proposal that includes research involving human subjects, human tissue, data or recordings involving human subjects must meet the requirements of the Common Rule for the Protection of Human Subjects, codified for the Department of Commerce at 15 CFR Part 27. In addition, any proposal that includes research on these topics must be in compliance with any statutory requirements imposed upon the Department of Health and Human Services (DHHS) and other federal agencies regarding these topics, all regulatory policies and guidance adopted by DHHS, the Food and Drug Administration, and other Federal agencies on these topics, and all Presidential statements of policy on these topics.

NIST will accept the submission of proposals containing research activities involving human subjects. The human subjects research activities in a proposal will require approval by Institutional Review Boards (IRBs) possessing a current registration filed with DHHS and to be performed by institutions possessing a current, valid Federal-wide Assurance (FWA) from DHHS that is linked to the cognizant IRB. In addition, NIST as an institution requires that IRB approval documentation go through a NIST administrative review; therefore, research activities involving human subjects are not authorized to start within an award until approval for the activity is issued in writing from the NIST Grants Officer. NIST will not issue a single project assurance (SPA) for any IRB reviewing any human subjects protocol proposed to NIST.

President Obama has issued Executive Order No. 13,505 (74 FR 10667, March 9, 2009), revoking previous Executive Orders and Presidential statements regarding the use of human embryonic stem cells in research. NIST will follow any guidance issued by the National Institutes of Health (NIH) pursuant to the Executive Order and will develop its own procedures based on the NIH guidance before funding research using human embryonic stem cells. NIST will follow any additional polices or guidance issued by the current Administration on this topic.

Research Projects Involving Vertebrate Animals: Any proposal that includes research involving vertebrate animals must be in compliance with the National Research Council's ''Guide for the Care and Use of Laboratory Animals,'' which can be obtained from National Academy Press, 2101 Constitution Avenue, NW., Washington, DC 20055. In addition, such proposals

must meet the requirements of the Animal Welfare Act (7 U.S.C. 2131 *et seq.*), 9 CFR Parts 1, 2, and 3, and if appropriate, 21 CFR Part 58. These regulations do not apply to proposed research using pre-existing images of animals or to research plans that do not include live animals that are being cared for, euthanized, or used by the project participants to accomplish research goals, teaching, or testing. These regulations also do not apply to obtaining animal materials from commercial processors of animal products or to animal cell lines or tissues from tissue banks.

Notification of Recovery Act Requirements: Recovery Act limitations are applicable to the projects funded in this Notice. Recipients must comply with the following three provisions of the Recovery Act, as applicable, and any other terms required by the Act or that may be added to the recipient's award pursuant to guidance implemented by the Office of Management and Budget.

Buy American Act Provision: Unless waived by DoC, none of the funds appropriated or otherwise made available by the Recovery Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States. This provision shall be applied in a manner consistent with United States obligations under international agreements.

Davis-Bacon Act: Under Section 1606 of the Recovery Act, projects using Recovery Act funds require the payment of not less than the prevailing wages under the Davis-Bacon Act to ''all laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part by and through the Federal Government.''

False Claims Act: Each recipient or sub-recipient awarded funds under the Recovery Act shall promptly refer to an appropriate inspector general any credible evidence that a principal, employee, agent, contractor, sub-grantee, subcontractor, or other person has submitted a false claim under the False Claims Act or has committed a criminal or civil violation of laws pertaining to fraud, conflict of interest, bribery, gratuity, or similar misconduct involving those funds.

Ensuring Responsible Spending of Recovery Act Funds. The agency expects programs under this notice to be implemented in general compliance with any guidance issued by the Office of Management and Budget regarding the President's Memorandum for the Heads of Executive Departments and Agencies of March 20, 2009, Ensuring Responsible Spending of Recovery Act Funds, 74 FR 12531 (March 25, 2009).

Best Practices to Promote Equality of Opportunity. Pursuant to OMB Guidance (see, ''Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009,'' April 3, 2009) and consistent with the Recovery Act and other applicable laws, DoC encourages recipients to implement best practices to promote equality of opportunity, to provide opportunities for small and disadvantaged businesses, including veteran-owned small businesses and service disabled veteran-owned small businesses, and to follow sound labor practices.

Reporting Requirements: Reporting requirements are described in the Department of Commerce Financial Assistance Standard Terms and Conditions, dated March, 2008, found on the Internet at: *http://oamweb.osec.doc.gov/docs/GRANTS/DOC%20STCsMAR08Rev.pdf.* The references in Sections A.01 and B.01 of the Department of Commerce Financial Assistance Standard Terms and Conditions, dated March, 2008, to ''Financial Status Report (SF–269)'' and ''SF–269'' are hereby replaced with ''Federal Financial Report (SF–425)'' and ''SF–425,'' respectively, as required by the Office of Management and Budget (OMB) (73 FR 61175, October 15, 2008). As authorized under 15 CFR 14.52 and 24.41, the OMB-approved SF–425 shall be used in the place of the SF–269 and SF–272 under the uniform administrative requirements and elsewhere under awards in this program where such forms are referenced.

In addition, as set out in Sec. 1512(c) of the Recovery Act, no later than ten (10) days after the end of each calendar quarter, any recipient that receives funds under the Recovery Act from NIST must submit a report to NIST that contains:

a. The total amount of Recovery Act funds received from NIST;

b. The amount of Recovery Act funds received that were expended or obligated to projects or activities;

c. A detailed list of all projects or activities for which Recovery Act funds were expended or obligated; and

d. Detailed information on any subcontracts or subgrants awarded by the recipient to include the data elements required to comply with the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109–282), allowing aggregate reporting on awards below $25,000 or to individuals, as prescribed by the Director of the Office of Management and Budget.

Recipients that must report information in accordance with paragraph (d) above must register with the Central Contractor Registration database (*http://www.ccr.gov/*) or complete other registration requirements as determined by the Director of the Office of Management and Budget. Section 1512(d) further requires that no later than thirty (30) days after the end of each calendar quarter, NIST must make the information in reports submitted under section 1512(c) of the Recovery Act as outlined above publicly available by posting the information on a Web site. OMB Memo M–09–10, ''Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009,'' which can be accessed at *http://www.recovery.gov/*, provides information on requirements for Federal agencies under the Recovery Act. Recipients must also comply with any additional guidance which may be forthcoming related to responsibilities of recipients of grants and cooperative agreements under the Recovery Act.

Funding Availability and Limitation of Liability: The funding periods and funding amounts referenced in this notice and request for proposals are subject to the availability of funds, as well as to Department of Commerce and NIST priorities at the time of award. The Department of Commerce and NIST will not be held responsible for proposal preparation costs. Publication of this notice does not obligate the Department of Commerce or NIST to award any specific grant or cooperative agreement or to obligate all or any part of available funds. No funding is anticipated at this time to provide further support beyond the award period to any project that may receive funds under this program.

Executive Order 12866: This funding notice was determined to be not significant for purposes of Executive Order 12866.

Executive Order 13132 (Federalism): It has been determined that this notice does not contain policies with federalism implications as that term is defined in Executive Order 13132.

Executive Order 12372: Proposals under this program are not subject to Executive Order 12372, ''Intergovernmental Review of Federal Programs.''

Administrative Procedure Act/ Regulatory Flexibility Act: Notice and comment are not required under the Administrative Procedure Act (5 U.S.C. 553), or any other law, for rules relating to public property, loans, grants, benefits or contracts (5 U.S.C. 553 (a)). Because notice and comment are not required under 5 U.S.C. 553, or any

other law, for rules relating to public property, loans, grants, benefits or contracts (5 U.S.C. 553(a)), a Regulatory Flexibility Analysis is not required and has not been prepared for this notice, 5 U.S.C. 601 *et seq.*

Dated: May 26, 2009.

Patrick D. Gallagher,

Deputy Director.

[FR Doc. E9–12667 Filed 5–29–09; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket No.: 090306286–9288–01]

Recovery Act National Institute of Standards and Technology Construction Grant Program

AGENCY: National Institute of Standards and Technology (NIST), Department of Commerce.

ACTION: Notice of availability of funds.

SUMMARY: The National Institute of Standards and Technology (NIST) announces that it will hold a NIST Construction Grant Program competition under the American Recovery and Reinvestment Act of 2009 and is soliciting proposals for financial assistance.

DATES: A Letter of Intent is required and must be received no later than 3 p.m. Eastern Time, Thursday, June 25, 2009. A corresponding full proposal must be received no later than 3 p.m. Eastern Time, Monday, August 10, 2009. Review, selection, and grant award processing is expected to be completed in February 2010.

ADDRESSES: Letters of Intent may only be submitted by paper to: National Institute of Standards and Technology; 100 Bureau Drive, Stop 4701; Gaithersburg, MD 20899–4701. Full proposals may be submitted by paper and electronically. Paper Submissions: National Institute of Standards and Technology; 100 Bureau Drive, Stop 4701; Gaithersburg, MD 20899–4701. Electronic submissions: *www.grants.gov*.

FOR FURTHER INFORMATION CONTACT: Barbara Lambis at 301–975–4447 or by e-mail at *barbara.lambis@nist.gov*.

SUPPLEMENTARY INFORMATION:

Additional Information. The full Federal Funding Opportunity (FFO) announcement for this request for proposals contains detailed information and requirements for the program. Proposers are strongly encouraged to read the FFO in developing proposals. The full FFO announcement text is available at *http://www.grants.gov* and on the NIST Recovery Act Web site at *http://www.nist.gov/recovery*.

Statutory Authority. The statutory authority for this program is the American Recovery and Reinvestment Act of 2009 (Recovery Act) (Pub. L. 111–5, 123 Stat. 115).

CFDA 11.618, NIST Construction Grant Program

Program Description. The American Recovery and Reinvestment Act of 2009 (Recovery Act) (Pub. L. 111–5, 123 Stat. 115) appropriated $180 million to NIST ''for a competitive construction grant program for research science buildings.'' Additional information on the program was provided on page 418 of the Conference Report to accompany House Report 111–16 (Feb. 12, 2009), which indicated that ''* * * $180,000,000 shall be for the competitive construction grant program for research science buildings, including fiscal year 2008 and 2009 competitions.''

Consistent with the Conference Report language NIST intends to issue grant awards for approximately $60 million to unfunded meritorious proposals submitted under the fiscal year 2008 competition and issue grant awards for approximately $120 million under a new fiscal year 2009 competition.

The goals and objectives of the program are to provide competitively awarded grant funds for research science buildings through the construction of new buildings or expansion of existing buildings. For purposes of this program, ''research science building'' means a building or facility whose purpose is to conduct scientific research, including laboratories, test facilities, measurement facilities, research computing facilities, and observatories. In addition, ''expansion of existing buildings'' means that space to conduct scientific research is being expanded from what is currently available for the supported research activities.

Consistent with Section 3 of the Recovery Act, the projects undertaken through this program will result in the preservation of jobs and the promotion of economic recovery; the provision of investments needed to increase economic efficiency by spurring technological advances; and the investment in infrastructure that will provide long-term economic benefits. Activities will be commenced as quickly as possible while ensuring prudent management.

Unallowable/Ineligible Projects

The following projects are unallowable/ineligible under this program:

a. Projects to construct or expand a building not intended for performing research or that will predominately be equipped with routine office equipment and/or lecture/classroom furnishings.

b. Projects to construct facilities that will primarily benefit undergraduate research training programs, rather than the creation of new graduate level research programs, or expanding existing graduate level research programs.

c. Projects to construct facilities that will primarily benefit the education of the general public rather than support research activities.

d. Projects that include tasks for constructing shell space that will not be completed into research space within the grant will have these tasks removed.

Unallowable/Ineligible Costs

The following items, regardless of whether they are allowable under the Federal cost principles, are unallowable under this program:

a. Any equipment used for research or otherwise that is not an integral part of the building's structure, *e.g.*, MRI, portable air conditioners, etc.

b. Costs or charges associated with routine maintenance, operation, interior decorating, or landscaping of any building.

c. Purchase of land.

d. Costs incurred prior to award are not eligible for reimbursement or as cost share.

Limit on Proposals per Applicant. Proposals are limited to one per applicant organization. Distinct academic campuses (that award their own degrees, have independent administrative structures, admission policies, alumni associations, etc.) within multi-campus systems qualify as separate institutions.

Funding Availability. Approximately $120 million is available for new grants for the FY 2009 competition. NIST anticipates funding 8–12 projects with Federal shares in the $10 million–$15 million range with a project period of performance of up to five (5) years, although there is an expectation that most of the projects will be completed prior to five years. The anticipated start date will be one month after the award is made. The period of performance depends on the construction schedule proposed.

Eligibility Criteria. U.S. institutions of higher education and non-profit organizations are eligible to apply.

Cost-Sharing Requirements. Although cost sharing is not required, NIST encourages cost sharing in order for a proposal to be competitive, and it will be considered as part of the Selection Factors. A cost share of 25% would be viewed favorably, 50% even more favorably.

The purchase of land cannot be used as cost sharing. See also section IV.6. Funding Restrictions of the Federal Funding Opportunity.

Evaluation Criteria. The evaluation criteria that will be used in evaluating proposals are as follows:

a. Scientific and technical merit of the proposed use of the facility and the need for Federal funding (50 percent).

This criterion addresses the intellectual merit and broader impacts of the proposed use of the facility; the strategic research directions planned with the facility and how well the plan is conceived and organized; what the facility will enable in terms of the advancement of knowledge and understanding within a specific field(s) or across different fields; the qualifications of the proposed key researchers (individuals or teams) which will use the facility, as well as the management team that will lead them; the potential for targeted impacts resulting from the use of the facility that are unlikely to be achieved with the current infrastructure, such as what transformative or creative concepts may expand the science and technology knowledge base; the extent to which the facility will enhance collaborations within and outside of the institution; and the need for Federal funding due to a lack of alternative funding sources, specifically what other sources were pursued.

b. The quality of the design of the research science building (25 percent).

This criterion addresses the quality of the design information provided for the building/facility to establish that the design has the ability to meet the safety, physical, environmental, experimental/research (*e.g.* unique environmental controls—vibration, humidity, temperature, etc.), and operational (*e.g.* utilities and circulation of people) requirements of the science and technology activities the building/facility is expected to support. It also addresses whether or not preliminary drawings and plans, together with appropriate estimates, of in-house or vendor costs, are complete, in progress, or planned. Furthermore, it addresses the rationale for and summary specifications of the building/facility, including location, size, configuration, environmental controls for research space, utility needs, gross and/or assignable square footage, assignments of square footage to research- and non-research-related activities (*e.g.* routine administrative office space, conference rooms, classrooms etc.), and the assigned purpose by areas.

c. Adequacy of the detailed Project Management Plan for construction of the research science building/facility (25 percent). The program will evaluate the following four aspects of the Project Management Plan:

(1) Project Scope and Requirements:

This criterion addresses the description and organization of project work packages (project tasks/elements) in a clear and complete Work/Task Breakdown Structure (WBS) approach that comprises the total scope of the building/facility project from inception through commissioning of the facility, including descriptions of each work package and its associated subtasks, the relationship between the work packages and their associated subtasks, consolidated into a unified project scope description that will be used by project management key personnel throughout the project management life-cycle to identify and monitor project progress, as well as link and track work packages and subtasks to the budget and schedule plans addressed in c.(2) below. In addition, this criterion addresses which work packages are proposed to be within, before or after the project period. The project period covers only the Federal and the allowable auditable cost share portion of the project.

(2) Adequacy of the Proposed Project Time Schedule and Linkage to the Budget, including the Clarity of the Budget and the Budget Narrative:

This criterion addresses the time schedule for implementing the work packages and associated subtasks described within the WBS addressed in c.(1) above, and how the budget costs associated with the work packages correctly sum up to each of the cost categories of the SF–424C by project year.

(3) Capability to Manage the Project:

This criterion addresses the approach planned for project management monitoring and risk control during the life of the award, from kick-off through close-out, which may include tools, techniques and processes (manual and automated systems). It also addresses an analysis of potential project risks (*e.g.* timing, cost and/or scope changes), where in the schedule risk(s) may be expected, and how the risk(s) may be mitigated through specific control mechanisms, and the planning/control decisionmaking process to implement the control mechanisms. Finally, it addresses the management plan for direction and implementation of the project, including capability descriptions of the performing organizations and experience summaries for the manager with fiduciary project responsibility, the project manager, and other key project personnel as appropriate.

(4) Soundness of the Financial Commitments to Implement the Project Management Plan:

This criterion addresses the current and any pending commitments required for the building/facility to be constructed, commissioned and become fully operational, including any risk(s) associated with finalizing funding commitments and the organizational name/contact that has the fiduciary authority over the funding commitments.

Letters of Intent

Each eligible organization can submit only one Letter of Intent in response to this solicitation. A Letter of Intent, in paper form only, is mandatory and must be received by NIST no later than 3 p.m. Eastern Time, Thursday, June 25, 2009. If a full proposal is submitted to NIST from an applicant who did not submit the required Letter of Intent, the full proposal will be rejected and not reviewed. It is expected that the Letter of Intent, which is to provide an overview of responsible personnel and estimated costs, will be reviewed for eligibility, and whether or not the project complements one or more of the program priorities. NIST will send an acknowledgement of the Letter of Intent to all applicants who timely submit a Letter of Intent. The information required in a Letter of Intent is provided in the full FFO announcement for this request for proposals.

Each applicant organization may only submit one Letter of Intent. Submission of multiple Letters of Intent from one applicant organization is not allowed. If more than one Letter of Intent is received from the same applicant organization, NIST will acknowledge each Letter of Intent received from the same applicant organization and provide notice that if more than one full proposal is received from the same applicant organization at the time of full proposal submission, all full proposals from that same applicant organization will be rejected without review.

Selection Process

An initial administrative review of timely received full proposals will be conducted to determine compliance with requirements and completeness. Responsive and complete proposals will be considered further. Proposals that are

nonresponsive and/or incomplete will be eliminated. Each of the remaining proposals will receive a minimum of three independent reviews, which will include written evaluations and scores, based on the evaluation criteria. Reviews concerning evaluation criteria b. and c. above may be performed by non-Federal Engineers or Architects. No consensus advice will be given by the reviewers. The individual proposal evaluations and scores will be considered by an Evaluation Board(s) (a committee made up of Federal employees). This Board(s) will present rankings in numerical order and funding recommendations based on the evaluation criteria to a Selecting Official for further consideration. In making final selections, the Selecting Official (Chief Facilities Management Officer, NIST) will select funding recipients based upon the Evaluation Board's rank order of the proposals and the selection factors. The selection of proposals by the Selecting Official is final and cannot be appealed. NIST reserves the right to negotiate the cost and scope of the proposed work with the applicants that have been selected to receive awards. This may include requesting that the applicant delete from the scope of work a particular task that is deemed by NIST to be inappropriate for support (or of a lower priority compared with competing uses of funds) against the evaluation criteria or selection factors. NIST also reserves the right to reject a proposal where information is uncovered that raises a reasonable doubt as to the responsibility of the applicant. The final approval of selected proposals and award of grants will be made by the NIST Grants Officer. The award decision of the NIST Grants Officer is final and cannot be appealed.

Applicants may not submit replacement and/or revised pages and/or documents for any portion of a proposal once that portion has been submitted unless specifically requested by NIST.

One copy of each incomplete, nonresponsive, or non-selected proposal will be retained for three (3) years for record keeping purposes and the other two (2) copies will be destroyed. After three (3) years the remaining copy will be destroyed.

Selection Factors. The Selecting Official shall recommend proposals for award based upon the Evaluation Board's rank order of the proposals, and may select a proposal out of rank based on one or more of the following selecting factors: a. Degree to which the project complements one or more programs of DoC's three science organizations' science and technology program priorities (see Program Priorities below), including the amount and quality of experience that the institution that will use the facility has had with novel research.

b. Ability of a project to fulfill objectives of the Recovery Act, as described in the Program Description above: preservation of jobs and the promotion of economic recovery; provision of investments needed to increase economic efficiency by spurring technological advances; and investing in infrastructure that will provide long-term economic benefits, through activities that will commence as quickly as possible while ensuring prudent management.

c. Degree to which the applicant proposes an early construction start date and/or is close to or has awarded a construction contract for the facility. For example, an early start date for construction of a ready to proceed project may be considered more favorably than a project that requires a longer time to complete design requirements.

NIST will emphasize the selection of projects that are ready to proceed and will thereby stimulate local economies through the creation or retention of jobs in U.S. jurisdictions, as well as yield significant program benefits. Projects that are ready to proceed are generally those where feasibility studies and/or other baseline information required for a design to commence are completed, where required consultations and permits, if not in-hand, are either in progress or where there is reasonable assurance provided that they can be attained quickly, and where National Environmental Policy Act (NEPA) or equivalent analysis and any environmental permits and authorizations are finished or can be expeditiously completed, so that projects can be implemented shortly after funding is made available. The adequacy of information needed to assess compliance with and to make a determination under NEPA, as described below, may be considered.

d. Assuring a balance/distribution of projects across the program priorities (see Program Priorities below).

e. Availability of Federal funds.

f. Experience or potential of promoting national impacts through research outcomes, training, cooperation with Federal programs, and/or opportunities for visiting researchers.

g. Credibility of plans to transition to operational status (*i.e.*, staffing and equipping the research science building, and operational readiness).

h. Degree to which the project considers and incorporates green/sustainable design practices.

i. Although cost sharing is not required, the degree to which the applicant is proposing cost share will be considered. (A cost share of 25% would be viewed favorably; 50% even more favorably.)

j. Whether this project duplicates other projects funded by DoC or other Federal agencies.

k. Applicant's prior Federal award performance.

Program Priorities

All applicable fields of science that complement one or more programs of DoC's three science organizations: NIST, the National Oceanic and Atmospheric Administration (NOAA), and the National Telecommunications and Information Administration (NTIA). Specifically, these include science related to measurements, oceans and atmosphere, and telecommunications. More information about those programs can be found on the agencies' Web sites (*www.nist.gov*, *www.noaa.gov*, and *www.ntia.doc.gov*).

Proposals are only required to link to the program priorities of one of the three DoC science organizations. Proposals that address program priorities of more than one organization are not considered to be more competitive.

Executive Order 12372 (Intergovernmental Review of Federal Programs). Proposals under this program are not subject to Executive Order 12372.

Administrative Procedure Act and Regulatory Flexibility Act. Prior notice and comment are not required under 5 U.S.C. 553, or any other law, for rules relating to public property, loans, grants, benefits or contracts (5 U.S.C. 553(a)). Because prior notice and an opportunity for public comment are not required pursuant to 5 U.S.C. 553 or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis is not required and has not been prepared.

E.O. 13132 (Federalism). This notice does not contain policies with Federalism implications as defined in Executive Order 13132.

E.O. 12866 (Regulatory Planning and Review). This notice is determined to be not significant under Executive Order 12866.

Paperwork Reduction Act. Notwithstanding any other provision of the law, no person is required to, nor shall any person be subject to a penalty for failure to, comply with a collection of information subject to the

requirements of the Paperwork Reduction Act (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This notice contains collection-of-information requirements subject to the PRA. The use of Form S NIST–1101, NIST Construction Grant Program Budget Narrative, NIST–1101A, NIST Construction Grant Program Budget Narrative, and NIST–1101B, NIST Construction Grant Program Details on Unallowable Project Costs, has been approved under OMB Control No. 0693–0055; and SF–424, Application for Federal Assistance, SF–424C, Budget Information—Construction Programs, SF–424D, Assurances—Construction Programs, and SF–LLL, Disclosure of Lobbying Activities, have been approved by OMB under the respective control numbers 4040–0004, 4040–0008, 4040–0009, and 0348–0046.

Security Interest. Grant recipients will be required to execute a security interest or other statement of NIST's interest in the property (building), acceptable to NIST, which must be perfected and placed on record in accordance with local law. This security interest will provide that, for the estimated useful life of the building (20 years), the recipient will not sell, transfer, convey, or mortgage any interest in the real property improved in whole or in part with Federal funds made available under the award, nor shall the recipient use the property for purposes other than the purposes for which the award was made, without the prior written approval of the Grants Officer. Such approval may be withheld until such time as the recipient first pays to NIST the Federal share of the property as provided in 15 CFR Part 14.

DoC Pre-Award Notification Requirements. The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements, which are contained in the **Federal Register** Notice of February 11, 2008 (73 FR 7696–01), are applicable to this solicitation.

Employer/Taxpayer Identification Number and Dun and Bradstreet Data Universal Numbering System

On the form SF–424 items 8.b. and 8.c., the applicant's 9-digit Employer/Taxpayer Identification Number (EIN/TIN) and 9-digit Dun and Bradstreet Data Universal Numbering System (DUNS) number must be consistent with the information on the Central Contractor Registration (CCR) (*www.ccr.gov*) and Automated Standard Application for Payment System (ASAP). For complex organizations with multiple EIN/TIN and DUNS numbers, the EIN/TIN and DUNS numbers MUST be the numbers for the applying organization. Organizations that provide incorrect/inconsistent EIN/TIN and DUNS numbers may experience significant delays in receiving funds if their proposal is selected for funding. Please confirm that the EIN/TIN and DUNS number are consistent with the information on the CCR and ASAP.

National Environmental Policy Act. The Department must analyze the potential environmental impacts, as required by the National Environmental Policy Act (NEPA), for applicant projects or proposals which are seeking Recovery Act funding. General information on compliance with NEPA can be found at the following Web sites: *http://www.nepa.noaa.gov*, and the Council on Environmental Quality's (CEQ) NEPAnet, *http://ceq.hss.doe.gov/nepa/nepanet.htm*.

Consequently, as part of an applicant's proposal, and under their description of their program activities, applicants are required to provide detailed information on the activities to be conducted, safety concerns, locations, site characteristics, surrounding environment, species and habitat that might be affected, construction activities, and any environmental concerns that may exist (*e.g.*, the use and disposal of hazardous or toxic chemicals, impacts to endangered and threatened species, or any social, economic or cultural impacts to the surrounding environment) in accordance with the required NIST–1101B, NIST Construction Grant Program Environmental Compliance Questionnaire.

It is the applicant's responsibility to obtain all necessary Federal, state, and local government permits and approvals where necessary for the proposed work to be conducted. Applicants are expected to design their projects so that they minimize the potential for adverse impacts to the environment. Applicants will also be required to cooperate with the Department in identifying feasible measures to reduce or avoid any identified adverse environmental impacts of their proposed project. The failure to do so will be grounds for not awarding a grant.

Documentation of requests/completion of required environmental authorizations and permits, including the Endangered Species Act, if applicable, should be included in the proposal. Applications will be reviewed to ensure that they contain sufficient information to allow Department staff to conduct a NEPA analysis so that appropriate NEPA documentation, required as part of the proposal, can be submitted to the NIST Grants and Agreements Management Division along with the recommendation for funding for selected applications.

Applicants proposing activities that cannot be covered by a Program Environmental Assessment (PEA) and Finding of No Significant Impact (FONSI) or whose activities are not covered under another agency's NEPA compliance procedures that can be analyzed and adopted for use by the Department, will be informed after the technical review stage to determine if NEPA compliance and other requirements can otherwise be expeditiously met so that a project can proceed within the timeframes anticipated under the American Recovery and Reinvestment Act.

If additional information is required after an application is accepted, funds can be withheld by the Grants Officer under a special award condition requiring the recipient to submit additional environmental law compliance information sufficient to enable the Department to make an assessment on any impacts that a project may have on the environment.

Notification of Recovery Act Requirements. Recovery Act limitations are applicable to the projects funded under this Notice. Recipients must comply with the following three provisions of the Recovery Act, as applicable, and any other terms required by the Act or that may be added to the recipient's award pursuant to guidance implemented by the Office of Management and Budget.

a. *Buy American Recovery Act Provision.* Unless waived by DoC, none of the funds appropriated or otherwise made available by ARRA, may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States. This provision shall be applied in a manner consistent with United States obligations under international agreements.

b. *Davis-Bacon Act.* Under Section 1606 of the ARRA, projects using ARRA funds require the payment of not less than the prevailing wages under the Davis-Bacon Act to ''all laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part by and through the Federal Government.''

c. *False Claims Act.* Each recipient or sub-recipient awarded funds under the ARRA shall promptly refer to an appropriate inspector general any

credible evidence that a principal, employee, agent, contractor, sub-grantee, subcontractor, or other person has submitted a false claim under the False Claims Act or has committed a criminal or civil violation of laws pertaining to fraud, conflict of interest, bribery, gratuity, or similar misconduct involving those funds.

Ensuring Responsible Spending of Recovery Act Funds. The agency intends to implement this program in compliance with Office of Management and Budget guidance on the President's Memorandum for the Heads of Executive Departments and Agencies of March 20, 2009. Ensuring Responsible Spending of Recovery Act Funds, 74 FR 12531 (Mar. 25, 2009), when such guidance becomes available.

Best Practices to Promote Equality of Opportunity. Pursuant to OMB Guidance (see, *e.g.*, ''Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009,'' April 3, 2009) and consistent with the Recovery Act and other applicable laws, DoC encourages recipients to implement best practices to promote equality of opportunity, to provide opportunities for small and disadvantaged businesses, including veteran-owned small businesses and service disabled veteran-owned small businesses, and to follow sound labor practices.

Reporting. Award Recipients shall provide access to information that is required to assess the project's progress throughout the project life cycle. The following reports are required:

a. *Technical Performance Reports.* Award Recipients shall submit a technical performance report in triplicate (an original and two copies) on a calendar quarter basis for the periods ending March 31, June 30, September 30, and December 31, or any portion thereof. Reports are due no later than 30 days following the end of each reporting period. A final technical performance report shall be submitted within 90 days after the expiration date of the award. Two copies of the technical performance reports shall be submitted to the Project Manager and the original report to the NIST Grants Officer. Technical performance reports shall contain information as prescribed in 15 CFR 14.51.

b. *Financial Reports.* For recipients under this program, Article A.01 of the DoC Financial Assistance Standard Terms and Conditions dated March 2008 is revised as follows:

Award Recipients shall submit a Federal Financial Report (SF–425) in triplicate (an original and two copies) on a calendar quarter basis for the periods ending March 31, June 30, September 30, and December 31, or any portion thereof. Reports are due no later than 30 days following the end of each reporting period. A final SF–425 shall be submitted within 90 days after the expiration date of the award. All SF–425s shall be submitted to the NIST Grants Officer.

c. *Recovery Act Reports—Job Creation and Retention.* As set out in Sec. 1512(c) of the Recovery Act, no later than ten (10) days after the end of each calendar quarter, any recipient that received funds under the Recovery Act from NIST must submit a report to NIST that contains the following four items:

(1) The total amount of Recovery Act funds received from NIST.

(2) The amount of Recovery Act funds received that were obligated and expended to projects or activities. This reporting will also include unobligated allotment balances to facilitate reconciliations.

(3) A detailed list of all projects or activities for which recovery funds were obligated and expended, including:

(a) The name of the project or activity;

(b) A description of the project or activity;

(c) An evaluation of the completion status of the project or activity;

(d) An estimate of the number of jobs created and the number of jobs retained by the project or activity; and

(e) For infrastructure investments made by State and local governments, the purpose, total cost, and rationale of the agency for funding the infrastructure investment with funds made available under this Act, and name of the person to contact at the agency if there are concerns with the infrastructure investment.

(4) Detailed information on any subcontracts or subgrants awarded by the recipient to include the data elements required to comply with the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109–282), allowing aggregate reporting on awards below $25,000 or to individuals, as prescribed by the Director of the Office of Management and Budget (OMB).

Recipients that must report information in accordance with paragraph (4) above must register with the Central Contractor Registration database (*http://www.ccr.gov/*) or complete other registration requirements as determined by the Director of OMB. Section 1512(d) further requires that no later than thirty (30) days after the end of each calendar quarter, NIST must make the information in reports submitted under section 1512(c) of the Recovery Act as outlined above publicly available by posting the information on a Web site. OMB Memo M–09–10, ''Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009,'' which can be accessed at *http://www.recovery.gov/*, provides information on requirements for Federal agencies under the Recovery Act. Additional guidance may be forthcoming related to responsibilities of recipients of grants and cooperative agreements under the Recovery Act.

Reporting requirements are described in the Department of Commerce Financial Assistance Standard Terms and Conditions dated March, 2008, found on the Internet at: *http://oamweb.osec.doc.gov/docs/GRANTS/DOC%20STCsMAR08Rev.pdf*.

The references to Financial Reporting Form SF–269 in the DoC Standard Terms & Conditions, A.01 and B.01, are hereby replaced with the SF–425, ''Federal Financial Report,'' as required by the Office of Management and Budget (OMB) (73 FR 61175, October 15, 2008). As authorized under 15 CFR 14.52 and 24.41, the OMB approved SF–425 shall be used in the place of the SF–269 and SF–272 under the uniform administrative requirements and elsewhere under awards in this program where such forms are referenced.

Dated: May 26, 2009.

Patrick Gallagher,

Deputy Director.

[FR Doc. E9–12664 Filed 5–29–09; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XP00

Small Takes of Marine Mammals Incidental to Specified Activities; Open-water Marine Survey Program in the Chukchi Sea, Alaska, During 2009–2010

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

ACTION: Notice; proposed incidental take authorization; request for comments.

SUMMARY: NMFS has received an application from Shell Offshore Inc. and Shell Gulf of Mexico Inc., collectively known as Shell, for an Incidental Harassment Authorization (IHA) to take marine mammals incidental to an open-water marine survey program, which includes shallow hazards and site

clearance work and strudel scour surveys, in the Chukchi Sea, Alaska. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an IHA to Shell to incidentally take, by harassment, small numbers of several species of marine mammals during the Arctic open-water seasons between August 2009, and July, 2010, during the aforementioned activity.

DATES: Comments and information must be received no later than July 1, 2009.

ADDRESSES: Comments on the application should be addressed to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225. The mailbox address for providing email comments is *PR1.0648–XP00@noaa.gov*. Comments sent via e-mail, including all attachments, must not exceed a 10–megabyte file size.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

A copy of the application containing a list of the references used in this document may be obtained by writing to the address specified above, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications*.

Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Candace Nachman, Office of Protected Resources, NMFS, (301) 713–2289 or Brad Smith, NMFS, Alaska Region, (907) 271–3023.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

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

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

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

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

Summary of Request

On December 15, 2008, NMFS received an application from Shell for the taking, by Level B harassment only, of small numbers of several species of marine mammals incidental to conducting an open-water marine survey program during the 2009/2010 Arctic open-water season in the Chukchi Sea. Shell plans to conduct site clearance and shallow hazards surveys and a strudel scour survey in the Chukchi Sea. These surveys are a continuation of those conducted by Shell in the Chukchi Sea in 2008. Shell's December 2008, application also requested MMPA coverage for site clearance and shallow hazards surveys, an ice gouge survey, and a strudel scour survey in the Beaufort Sea and an ice gouge survey in the Chukchi Sea for the 2009/2010 season. However, in an addendum to the IHA application submitted to NMFS on March 10, 2009, Shell indicated that it has cancelled all of the planned survey programs for the Beaufort Sea and the ice gouge survey for the Chukchi Sea in 2009. Therefore, this **Federal Register** Notice only describes the potential effects of conducting site clearance and shallow hazards surveys and a strudel scour survey in the Chukchi Sea for the 2009/2010 open-water season. Shell submitted a second addendum to its application on May 19, 2009, indicating that Shell now plans to use a 40 in^3 airgun array instead of the 20 in^3 array (see the ''Description of the Specified Activity'' section later in this document for more detail on the specifics of the project).

Site clearance and shallow hazards surveys will evaluate the seafloor and shallow sub-seafloor at prospective exploration drilling locations, focusing on the depth to seafloor, topography, the potential for shallow faults or gas zones, and the presence of archaeological features. The types of equipment used to conduct these surveys use low level energy sources focused on limited areas in order to characterize the footprint of the seafloor and shallow sub-seafloor at prospective drilling locations.

NMFS issued an IHA to Shell on August 20, 2008, to conduct its marine seismic survey program in the Beaufort and Chukchi Seas for the 2008/2009 Arctic open-water season. This IHA is valid through August 19, 2009, or until a new IHA is issued to Shell, whichever is earlier.

Description of the Specified Activity

Chukchi Site Clearance and Shallow Hazards Surveys

Site clearance and shallow hazards surveys of potential proposed locations for exploration drilling will be executed as required by the Minerals Management Service's (MMS) regulations. These surveys gather data on: (1) bathymetry; (2) seabed topography and other seabed characteristics (e.g., boulder patches); (3) potential geohazards (e.g., shallow faults and shallow gas zones); and (4) the presence of any archeological features (e.g., shipwrecks). Site clearance and shallow hazards surveys can be accomplished by one vessel with acoustic sources. No other vessels are necessary to accomplish the proposed work.

The Chukchi Sea site clearance and shallow hazards surveys will be

conducted on leases that were acquired in Outer Continental Shelf (OCS) Lease Sale 193. Site clearance surveys are confined to small specific areas within OCS blocks. Actual locations of site clearance and shallow hazards surveys have not been definitively set as of this date, although the surveys will occur within the Chukchi Sea marine survey area of OCS lease blocks shown in Figure 1 of Shell's application. These surveys will occur more than 113 km (70 mi) or more offshore of the Alaska coast. Before the commencement of operations, survey location information will be supplied to MMS as ancillary activities authorizations and provided to other interested agencies as it becomes available.

Shell anticipates shooting approximately 480 km (298 mi) of survey lines (plus approximately 120 km (74.6 mi) of mitigation gun activity between survey lines) from August through October, 2009, exposing approximately 900 km^2 (347.5 mi^2) of water to sounds of 160 dB (rms) or greater. The operation will be active 24 hr/day and use a single vessel to collect the geophysical data.

The vessel that will be conducting the site clearance and shallow hazards surveys may also be used in the deployment and retrieval of underwater Ocean Bottom Hydrophones (OBHs) as described in the Marine Mammal Monitoring and Mitigation Plan (4MP) in Attachment A of Shell's application and also later in this document. These OBHs are anchored underwater buoys that record marine mammal vocalizations and other underwater sounds.

These surveys are confined to small specific areas within OCS blocks. At this time, Shell has indicated that the *R/V Norseman II* will be used to conduct the activity. The *R/V Norseman II* is a diesel powered vessel, 35.05 m (115 ft) long, 8.66 m (28.4 ft) wide, with a 4.08 m (13.4 ft) draft. In the event the *R/V Norseman II* is unavailable, Shell would utilize a similar vessel to conduct the activities.

It is proposed that the following acoustic instrumentation, or something similar, will be used: (1) dual-frequency side scan sonar (2–7 kHz or 8–23 kHz), or similar; (2) single beam Echo Sounder (33–210 kHz), or similar; (3) multibeam Echo Sounder (200 kHz), or similar; (4) high resolution multi-channel two-dimensional (2D) system, 40 in^3 (4 x 10) airgun array (0–150 Hz), or similar; (5) shallow sub-bottom profiler (SBP; 1–12 kHz), or similar; and (6) medium penetration SBP (400–800 Hz), or similar.

This activity is proposed to occur during August-October 2009, and, as proposed, the total program will last a maximum of 50 days of active data acquisition, excluding downtime due to weather and other unforeseen delays. This vessel may also be used to perform other activities, such as deploying and retrieving the OBHs. The time for deploying and retrieving the OBHs is not included in the 50–day estimate.

Chukchi Strudel Scour Survey

During the early melt, the rivers begin to flow and discharge water over the coastal sea ice near the river deltas. That water rushes down holes in the ice (''strudels'') and scours the seafloor. These erosional areas are called ''strudel scours''. Information on these features is required for prospective pipeline planning. Two proposed activities are required to gather this information: aerial survey via helicopter overflights during the melt to locate the strudels and strudel scour marine surveys to gather bathymetric data. The overflights investigate possible sources of overflood water and will survey local streams that discharge in the vicinity of potential pipeline shore crossings. These helicopter overflights will occur during mid-May/early June 2010 and, weather permitting, should take no more than four days. There are no planned landings during these overflights other than at local airports. Areas that have strudel scour identified during the aerial survey will be verified and surveyed with a marine vessel after the breakup of nearshore ice. This proposed activity, i.e., marine surveys to gather bathymetric data, is not anticipated to take more than 10 days to conduct, excluding downtime due to weather and other unforeseen delays. It is anticipated to occur in July through mid-August 2010. This is a daylight only operation. The specific locations for pipeline shore crossings have not yet been identified. This vessel will use the following equipment: multi-beam bathymetric sonar, or similar; side-scan sonar system, or similar; and single beam bathymetric sonar, or similar.

The vessel has not been contracted; however, it is anticipated that it will be the diesel-powered *R/V Annika Marie* which has been utilized from 2006–2008 and measures 13.1 m (43 ft) long, or similar vessel. Only one vessel is needed to complete the survey, and the acoustic sources will be deployed from that vessel.

Marine Mammals Affected by the Activity

Marine mammals that occur in the proposed survey areas belong to three taxonomic groups: (1) odontocetes (toothed cetaceans), (2) mysticetes (baleen whales), and (3) carnivora (pinnipeds and polar bears). Cetaceans and pinnipeds (except walrus) are the subject of this IHA request to NMFS. In the U.S., the walrus and polar bear are managed by the U.S. Fish and Wildlife Service (USFWS). A separate permit application for this survey has been submitted to USFWS for incidental ''takes'' specific to walruses and polar bears, and these species are not discussed further in Shell's application or this **Federal Register** Notice.

Marine mammal species under the jurisdiction of NMFS which are known to or may occur in the open-water marine survey area of the Chukchi Sea include eight cetacean species and four species of pinnipeds (see Table 4–1 in Shell's application). Three of these species, the bowhead, humpback and fin whales, are listed as ''endangered'' under the Endangered Species Act (ESA). The bowhead whale is more common in the survey area than other endangered species. Based on a small number of sightings, the fin whale is unlikely to be encountered along the planned trackline in the Chukchi Sea. Humpback whales normally are not found in the Chukchi Sea; however, several humpback sightings were recorded during vessel-based surveys in the Chukchi Sea in 2007 (Reiser *et al.*, 2008).

The marine mammal species under NMFS jurisdiction that are most likely to occur in the survey area include four cetacean species (beluga, bowhead, and gray whales and harbor porpoise), and three pinniped species (ringed, bearded, and spotted seals). Most encounters are likely to occur in nearshore shelf habitats or along the ice edge. Animal densities are generally expected to be lower in deep water and at locations far-offshore. The marine mammal species that is likely to be encountered most widely (in space and time) throughout the survey period is the ringed seal. Encounters with bowhead and gray whales are expected to be limited to particular regions and seasons, as discussed in Shell's application.

Four additional cetacean species and one pinniped species-the killer, minke, humpback, and fin whales and ribbon seals-could occur in the project area, but each of these species is uncommon or rare in the survey area and relatively few encounters with these species are expected during the open-water marine survey program. Descriptions of the biology, distribution, and population status of the marine mammal species under NMFS' jurisdiction can be found in Shell's application and the NMFS

Stock Assessment Reports (SARS). The Alaska SAR is available at: *http://www.nmfs.noaa.gov/pr/pdfs/sars/ak2008.pdf*. Please refer to those documents for information on these species.

Potential Effects of Survey Activities on Marine Mammals

The only anticipated impacts to marine mammals associated with Shell's proposed activities (primarily resulting from noise propagation) are from vessel movements and airgun operations. Aircraft may provide a potential secondary source of sound. The physical presence of vessels and aircraft could also potentially lead to non-acoustic effects on marine mammals involving visual or other cues.

The effects of sounds from airguns might include one or more of the following: tolerance, masking of natural sounds, behavioral disturbance, and temporary or permanent hearing impairment or non-auditory effects (Richardson *et al.*, 1995). As outlined in previous NMFS documents, the effects of noise on marine mammals are highly variable, and can be categorized as follows (based on Richardson *et al.*, 1995):

(1) The noise may be too weak to be heard at the location of the animal (i.e., lower than the prevailing ambient noise level, the hearing threshold of the animal at relevant frequencies, or both);

(2) The noise may be audible but not strong enough to elicit any overt behavioral response;

(3) The noise may elicit reactions of variable conspicuousness and variable relevance to the well being of the marine mammal; these can range from temporary alert responses to active avoidance reactions such as vacating an area at least until the noise event ceases;

(4) Upon repeated exposure, a marine mammal may exhibit diminishing responsiveness (habituation), or disturbance effects may persist; the latter is most likely with sounds that are highly variable in characteristics, infrequent, and unpredictable in occurrence, and associated with situations that a marine mammal perceives as a threat;

(5) Any anthropogenic noise that is strong enough to be heard has the potential to reduce (mask) the ability of a marine mammal to hear natural sounds at similar frequencies, including calls from conspecifics, and underwater environmental sounds such as surf noise;

(6) If mammals remain in an area because it is important for feeding, breeding, or some other biologically important purpose even though there is chronic exposure to noise, it is possible that there could be noise-induced physiological stress; this might in turn have negative effects on the well-being or reproduction of the animals involved; and

(7) Very strong sounds have the potential to cause temporary or permanent reduction in hearing sensitivity. In terrestrial mammals, and presumably marine mammals, received sound levels must far exceed the animal's hearing threshold for there to be any temporary threshold shift (TTS) in its hearing ability. For transient sounds, the sound level necessary to cause TTS is inversely related to the duration of the sound. Received sound levels must be even higher for there to be risk of permanent hearing impairment. In addition, intense acoustic or explosive events may cause trauma to tissues associated with organs vital for hearing, sound production, respiration and other functions. This trauma may include minor to severe hemorrhage.

Tolerance

Numerous studies have shown that pulsed sounds from airguns are often readily detectable in the water at distances of many kilometers. Numerous studies have shown that marine mammals at distances more than a few kilometers from operating seismic vessels often show no apparent response. That is often true even in cases when the pulsed sounds must be readily audible to the animals based on measured received levels and the hearing sensitivity of that mammal group. Although various baleen whales, toothed whales, and (less frequently) pinnipeds have been shown to react behaviorally to airgun pulses under some conditions, at other times, mammals of all three types have shown no overt reactions. In general, pinnipeds and small odontocetes seem to be more tolerant of exposure to airgun pulses than baleen whales.

Masking

Masking effects of pulsed sounds will be limited relative to continuous sound sources. Bowhead whales are known to continue calling in the presence of marine survey sounds, and their calls can be heard between sound pulses, although at reduced rates (Greene *et al.*, 1999; Richardson *et al.*, 1986). Masking effects are expected to be minimal to nonexistent in the case of belugas given that sounds important to that species are predominantly at much higher frequencies than are airgun sounds.

Behavioral Effects

Any impacts to marine mammals associated with sound propagation from vessel movements and survey operations would be non-lethal, temporary, and, at most, may result in short-term displacement of whales and seals from within the ensonified zones produced by such sound sources. The following discussion of potential behavioral deflection of whales or seals pertains to observations of behavior during relatively large scale seismic programs, such as deep 3D seismic sound sources. As Shell's planned 2009/2010 open-water marine survey program in the Chukchi Sea only includes small-scale sound sources used to perform site clearance and shallow hazards and strudel scour surveys, NMFS anticipates any effects to marine mammals to be similar to or less than those described next.

Any impacts on the whale and seal populations in the vicinity of Shell's Chukchi Sea operations are expected to be non-lethal, short-term, and transitory in nature arising from the temporary displacement of individuals or small groups from locations they may occupy at the time they are exposed to sounds between 160 dB to 190 dB (rms) received levels. In the case of migrating bowhead whales, displacement may take the form of deflection from their swim path away from (seaward of) received sound levels lower than 160 dB (rms; Richardson *et al.*, 1999). While it is not presently known at what distance after passing the sound source bowhead whales return to their previous migration route, any deflection is expected to be only temporary and does not appear to adversely impact the whales or materially affect their successful completion of the migration to the winter calving grounds.

Results from the 1996–1998 BP and Western Geophysical seismic monitoring programs in the Beaufort Sea indicate that most fall migrating bowhead whales deflected seaward to avoid an area within about 20 km (12.4 mi) of an active nearshore seismic operation, with the exception of a few close sightings when there was an island or very shallow water between the seismic operations and the whales (Miller *et al.*, 1998, 1999). The available data do not provide an unequivocal estimate of the distance (and received sound levels) at which approaching bowheads begin to deflect, but this may be on the order of 35 km (21.7 mi). Any deflection as a result of being exposed to seismic operations would be temporary and would not adversely impact the whales or materially affect

the whales' successful completion of the migration to winter calving grounds.

When the received levels of sound exceed some threshold, cetaceans are expected to exhibit behavioral disturbance reactions. The levels, frequencies, and types of sound that will elicit a response vary between and within species, individuals, locations, and seasons. Behavioral changes may be subtle alterations in surface, respiration, and dive cycles. More conspicuous responses include changes in activity or aerial displays, movement away from the sound source, or complete avoidance of the area. The reaction threshold and degree of response also are related to the activity of the animal at the time of the disturbance. Whales engaged in active behaviors, such as feeding, socializing, or mating, appear less likely than resting animals to exhibit overt behavioral reactions, unless the disturbance is perceived as directly threatening.

Hearing Impairment and Other Physical Effects

Temporary or permanent hearing impairment is a possibility when marine mammals are exposed to very strong sounds, but there has been no specific documentation of this for marine mammals exposed to sequences of airgun pulses. Currently, NMFS' practice regarding exposure of marine mammals to high-level sounds is that cetaceans and pinnipeds should not be exposed to impulsive sound pressure levels (SPLs) greater than 180 and 190 dB re 1 μPa (rms), respectively (NMFS, 2000). Those criteria have been used in defining the safety (shutdown) radii planned for the proposed survey activities. However, those criteria were established before there were any data on the minimum received levels of sounds necessary to cause temporary auditory impairment in marine mammals. The precautionary nature of these criteria are summarized here:

- The 180 dB criterion for cetaceans is precautionary (i.e., lower than necessary to avoid TTS, let alone permanent auditory injury, at least for belugas and delphinids) as it was established prior to empirical research on marine mammals that now indicate that permanent auditory injury would not occur until significantly higher SPLs were encountered.
- The minimum sound level necessary to cause permanent hearing impairment is higher, by a variable and generally unknown amount, than the level that induces TTS.
- The level associated with the onset of TTS is often considered to be a level below which there is no danger of permanent damage.

Several aspects of the planned monitoring and mitigation measures for this project are designed to detect marine mammals occurring near the airguns to avoid exposing them to sound pulses that might cause hearing impairment. In addition, many cetaceans are likely to show some avoidance of the area with high received levels of airgun sound (see above). In those cases, the avoidance responses of the animals themselves will reduce or (most likely) prevent any possibility of hearing impairment.

Non-auditory physical effects might also occur in marine mammals exposed to strong underwater pulsed sound. Possible types of non-auditory physiological effects or injuries that theoretically might occur in mammals close to a strong sound source include stress, neurological effects, bubble formation, and other types of organ or tissue damage. Some marine mammal species (i.e., beaked whales) may be especially susceptible to injury and/or stranding when exposed to strong pulsed sounds. However, as discussed below, there is no definitive evidence that any of these effects occur even for marine mammals in close proximity to large arrays of airguns, and beaked whales do not occur in the proposed project area. It is unlikely that such effects would occur during Shell's proposed surveys given the brief duration of exposure and the planned monitoring and mitigation measures described later in this document. The following sections discuss the possibilities of TTS, permanent threshold shift (PTS), and non-auditory physical effects in more detail.

(TTS) – TTS is the mildest form of hearing impairment that can occur during exposure to a strong sound (Kryter, 1985). While experiencing TTS, the hearing threshold rises and a sound must be stronger in order to be heard. At least in terrestrial mammals, TTS can last from minutes or hours to (in cases of strong TTS) days. For sound exposures at or somewhat above the TTS threshold, hearing sensitivity in both terrestrial and marine mammals recovers rapidly after exposure to the noise ends. Few data on sound levels and durations necessary to elicit mild TTS have been obtained for marine mammals, and none of the published data concern TTS elicited by exposure to multiple pulses of sound.

For toothed whales exposed to single short pulses, the TTS threshold appears to be, to a first approximation, a function of the energy content of the pulse (Finneran *et al.*, 2002, 2005). Given the available data, the received level of a single seismic pulse (with no frequency weighting) might need to be approximately 186 dB re 1 $\mu Pa^2 \cdot s$ (i.e., 186 dB sound exposure level [SEL]) in order to produce brief, mild TTS. Exposure to several strong seismic pulses that each have received levels near 175–180 dB SEL might result in slight TTS in a small odontocete, assuming the TTS threshold is (to a first approximation) a function of the total received pulse energy. For Shell's proposed survey activities, the distance at which the received energy level (per pulse) would be expected to be ≥175–180 dB SEL is the distance to the 190 dB re 1 μPa (rms) isopleth (given that the rms level is approximately 10–15 dB higher than the SEL value for the same pulse). Seismic pulses with received energy levels ≥175–180 dB SEL (190 dB re 1 μPa (rms)) are expected to be restricted to radius of approximately 50 m (164 ft) around the airgun array. For an odontocete closer to the surface, the maximum radius with ≥175–180 dB SEL or ≥190 dB re 1 μPa (rms) would be smaller.

For baleen whales, there are no data, direct or indirect, on levels or properties of sound that are required to induce TTS. The frequencies to which baleen whales are most sensitive are lower than those to which odontocetes are most sensitive, and natural background noise levels at those low frequencies tend to be higher. As a result, auditory thresholds of baleen whales within their frequency band of best hearing are believed to be higher (less sensitive) than are those of odontocetes at their best frequencies (Clark and Ellison, 2004). From this, it is suspected that received levels causing TTS onset may also be higher in baleen whales. However, no cases of TTS are expected given the small size of the airguns proposed to be used and the strong likelihood that baleen whales (especially migrating bowheads) would avoid the approaching airguns (or vessel) before being exposed to levels high enough for there to be any possibility of TTS.

In pinnipeds, TTS thresholds associated with exposure to brief pulses (single or multiple) of underwater sound have not been measured. Initial evidence from prolonged exposures suggested that some pinnipeds may incur TTS at somewhat lower received levels than do small odontocetes exposed for similar durations (Kastak *et al.*, 1999, 2005; Ketten *et al.*, 2001; cf. Au *et al.*, 2000). However, more recent indications are that TTS onset in the most sensitive pinniped species studied (harbor seal, which is closely related to

the ringed seal) may occur at a similar SEL as in odontocetes (Kastak *et al.*, 2004).

NMFS (1995, 2000) concluded that cetaceans and pinnipeds should not be exposed to pulsed underwater noise at received levels exceeding, respectively, 180 and 190 dB re 1 μPa (rms). The established 180- and 190–dB re 1 μPa (rms) criteria are not considered to be the levels above which TTS might occur. Rather, they are the received levels above which, in the view of a panel of bioacoustics specialists convened by NMFS before TTS measurements for marine mammals started to become available, one could not be certain that there would be no injurious effects, auditory or otherwise, to marine mammals. As summarized above, data that are now available imply that TTS is unlikely to occur unless bow-riding odontocetes are exposed to airgun pulses much stronger than 180 dB re 1 μPa rms (Southall *et al.*, 2007).

No cases of TTS are expected as a result of Shell's proposed activities given the small size of the source, the strong likelihood that baleen whales (especially migrating bowheads) would avoid the approaching airguns (or vessel) before being exposed to levels high enough for there to be any possibility of TTS, and the mitigation measures proposed to be implemented during the survey described later in this document.

(PTS) – When PTS occurs, there is physical damage to the sound receptors in the ear. In some cases, there can be total or partial deafness, whereas in other cases, the animal has an impaired ability to hear sounds in specific frequency ranges.

There is no empirical evidence that exposure to pulses of airgun sound can cause PTS in any marine mammal, even with large arrays of airguns (see Southall *et al.*, 2007). However, given the possibility that mammals close to an airgun array might incur TTS, there has been further speculation about the possibility that some individuals occurring very close to airguns might incur PTS. Single or occasional occurrences of mild TTS are not indicative of permanent auditory damage in terrestrial mammals. Relationships between TTS and PTS thresholds have not been studied in marine mammals, but are assumed to be similar to those in humans and other terrestrial mammals. PTS might occur at a received sound level at least several decibels above that inducing mild TTS if the animal is exposed to the strong sound pulses with very rapid rise time.

It is highly unlikely that marine mammals could receive sounds strong enough (and over a sufficient duration) to cause permanent hearing impairment during a project employing the airgun sources planned here (i.e., an airgun array with a total discharge volume of 40 in^3). In the proposed project, marine mammals are unlikely to be exposed to received levels of seismic pulses strong enough to cause more than slight TTS. Given the higher level of sound necessary to cause PTS, it is even less likely that PTS could occur. In fact, even the levels immediately adjacent to the airgun may not be sufficient to induce PTS, especially because a mammal would not be exposed to more than one strong pulse unless it swam immediately alongside the airgun for a period longer than the inter-pulse interval. Baleen whales, and belugas as well, generally avoid the immediate area around operating seismic vessels. The planned monitoring and mitigation measures, including visual monitoring, power-downs, and shutdowns of the airguns when mammals are seen within the safety radii, will minimize the already-minimal probability of exposure of marine mammals to sounds strong enough to induce PTS.

Non-auditory Physiological Effects – Non-auditory physiological effects or injuries that theoretically might occur in marine mammals exposed to strong underwater sound include stress, neurological effects, bubble formation, and other types of organ or tissue damage. However, studies examining such effects are very limited. If any such effects do occur, they probably would be limited to unusual situations when animals might be exposed at close range for unusually long periods. It is doubtful that any single marine mammal would be exposed to strong seismic sounds for an extended period such that significant physiological stress would develop. Only individuals swimming close to, parallel to, and at the same speed as the vessel would incur a number of high intensity sounds. The small airgun array proposed to be used by Shell would only have 190 and 180 dB distances of 50 and 160 m (164 and 525 ft), respectively.

In general, little is known about the potential for seismic survey sounds to cause auditory impairment or other physical effects in marine mammals. Available data suggest that such effects, if they occur at all, would be limited to short distances or more likely to projects involving large airgun arrays. However, the available data do not allow for meaningful quantitative predictions of the numbers (if any) of marine mammals that might be affected in those ways. Marine mammals that show behavioral avoidance of seismic vessels, including most baleen whales, some odontocetes (including belugas), and some pinnipeds, are especially unlikely to incur auditory impairment or other physical effects. Also, the planned monitoring and mitigation measures (described later in this document) include shutdowns of the airguns, which will reduce any such effects that might otherwise occur.

Stranding and Mortality

In numerous past IHA notices for seismic surveys, commenters have referenced two stranding events allegedly associated with seismic activities, one off Baja California and a second off Brazil. NMFS has addressed this concern several times, and, without new information, does not believe that this issue warrants further discussion. For information relevant to strandings of marine mammals, readers are encouraged to review NMFS' response to comments on this matter found in 69 FR 74905 (December 14, 2004), 71 FR 43112 (July 31, 2006), 71 FR 50027 (August 24, 2006), and 71 FR 49418 (August 23, 2006). In addition, a June, 2008, stranding of 30–40 melon-headed whales off Madagascar that appears to be associated with seismic surveys is currently under investigation. One report indicates that the stranding began prior to seismic surveys starting.

It should be noted that strandings have not been recorded for marine mammal species in the Beaufort and Chukchi seas. NMFS notes that in the Beaufort Sea, aerial surveys have been conducted by MMS and industry during periods of industrial activity (and by MMS during times with no activity). No strandings or marine mammals in distress have been observed during these surveys and none have been reported by North Slope Borough inhabitants. Additionally, if bowhead and gray whales react to sounds at very low levels and therefore move away from the source and outside of the safety radii, then strandings would be unlikely to occur in the Arctic Ocean since a reaction or physical impact that could potentially lead to serious injury or mortality would not likely occur. As a result, NMFS does not expect any marine mammals will incur serious injury or mortality in the Arctic Ocean or strand as a result of the proposed survey.

Possible Effects from Sonar Equipment

While the sonar equipment proposed to be used for this project generates high sound energy, the equipment operates at frequencies (≤100 kHz) beyond the effective hearing range of most marine mammals likely to be encountered

during the proposed activities (Richardson *et al.*, 1995). The equipment proposed for the seismic profiling operate at a frequency range and sound level that could affect marine mammal behavior if they occur within a relatively close distance to the sound source (Richardson *et al.*, 1995). However, given the direct downward beam pattern of these sonar systems coupled with the high-frequency characteristics of the signals, the horizontal received levels of 180 and 190 dB re 1 μPa (rms) would be much smaller when compared to those from the low-frequency airguns with similar source levels. Therefore, NMFS believes that effects of signals from sonar equipment to marine mammals will be negligible.

Estimated Take of Marine Mammals

The anticipated harassments from the activities described above may involve temporary changes in behavior. There is no evidence that the planned activities could result in serious injury or mortality, for example due to collisions with vessels or strandings. Disturbance reactions, such as avoidance, are very likely to occur amongst marine mammals in the vicinity of the source vessel. The mitigation and monitoring measures proposed to be implemented (described later in this document) during this survey are based on Level B harassment criteria and will minimize any potential risk of injury.

The sections below describe methods to estimate ''take by harassment'' and present estimates of the numbers of marine mammals that might be affected during the proposed site clearance and shallow hazards program in the Chukchi Sea. The estimates are based on data obtained during marine mammal surveys in and near the proposed survey area and on estimates of the sizes of the areas where effects could potentially occur. In some cases, these estimates were made from data collected in regions, habitats, or seasons that differ from those in the proposed survey areas. Adjustments to reported population or density estimates were made to account for these differences insofar as possible.

Although several systematic surveys of marine mammals have been conducted in the southern Beaufort Sea, few data (systematic or otherwise) are available on the distribution and numbers of marine mammals in the Chukchi Sea beyond the 200 m (656 ft) bathymetry contour. The main sources of distributional and numerical data used in deriving the estimates are described below and in Shell's application. While there is some uncertainty related to the use of regional population densities for applications that are local in focus, these estimates are based on the best available scientific data and represents standard practice.

Marine Mammal Density Estimates

This section provides estimates of the number of individuals potentially exposed to sound levels at or above 160 dB re 1 μPa (rms). The estimates are based on a consideration of the number of marine mammals that might be disturbed appreciably by operations in the Chukchi Sea.

For the Chukchi Sea, cetacean densities during the summer (July-August) were estimated from effort and sightings data in Moore *et al.* (2000b) while pinniped densities were estimated from Bengtson *et al.* (2005). Because few data are available on the densities of marine mammals other than large cetaceans in the Chukchi Sea in the fall (September-October), density estimates from the summer period have been adjusted to reflect the expected ratio of summer-to-fall densities based on the natural history characteristic of each species. Alternatively, some densities from data collected aboard industry vessels in 2006 and 2007 in the Chukchi Sea have been used.

As noted above, there is some uncertainty about the representativeness of the data and assumptions used in the calculations. To provide some allowance for the uncertainties, ''maximum estimates'' as well as ''average estimates'' of the numbers of marine mammals potentially affected have been derived and provided by Shell in their application. For a few marine mammal species, several density estimates were available, and in those cases, the average and maximum estimates were calculated from the survey data. In other cases, only one, or no applicable estimate was available so correction factors were used to arrive at ''average'' and ''maximum'' estimates. These are described in detail in Shell's application and the following subsections. Except where noted, the ''maximum'' estimates have been calculated as twice the ''average'' estimates. The densities presented are believed to be similar to, or in most cases higher than, the densities that will actually be encountered during the survey.

Detectability bias, quantified in part by [$f(0)$], is associated with diminishing sightability with increasing lateral distance from the survey trackline. Availability bias [$g(0)$] refers to the fact that there is less than 100 percent probability of sighting an animal that is present along the survey trackline. These correction factors were applied to the data from Moore *et al.* (2000b) and were already included in data provided by Richardson and Thompson (2002) on beluga and bowhead whales, and where possible were applied to the available data for other species.

Estimated densities of marine mammals in the Chukchi Sea during the ''summer'' (July and August) site clearance and shallow hazards survey are presented in Table 6–1 of Shell's application. Densities of marine mammals estimated for the ''fall'' period of Shell's proposed activities in the Chukchi Sea (September and possibly October) are presented in Table 6–2 of the application. Both ''average'' and ''maximum'' densities are provided in the tables. Unless otherwise noted by Shell in the application, maximum densities are twice the average densities. However, since Shell did not provide a rationale regarding the maximum estimate, NMFS has decided that the average density data of marine mammal populations will be used to calculate estimated take numbers because these numbers are based on surveys and monitoring of marine mammals in the vicinity of the proposed project area. NMFS only used the ''maximum'' estimates for marine mammal species that are considered rare in the project area and for which little to no density information exists (i.e., killer, fin, humpback, and minke whales and ringed seals).

(1) Cetaceans

Nine species of cetaceans are known to occur in the Chukchi Sea project area. Only four of these (bowhead, beluga, and gray whales and harbor porpoise) are expected to be encountered in meaningful numbers during the proposed survey. Three of the nine species (bowhead, fin, and humpback whales) are listed as endangered under the ESA.

Beluga Whales – Summer densities of beluga whales in offshore waters are expected to be very low. Aerial surveys have recorded very few belugas in the offshore Chukchi Sea during the summer months (Moore *et al.*, 2000b). Additionally, no belugas were observed during more than 42,000 km (26,100 mi) of useable visual effort from industry vessels operating in the Chukchi Sea in 2006 and 2007 (Ireland *et al.*, 2007a,b; Patterson *et al.*, 2007; Reiser *et al.*, 2008). Shallow hazards and site clearance survey activities in 2009 will largely be restricted to open-water areas as were the 2006 and 2007 surveys. Expected densities have been calculated from data in Moore *et al.* (2000b; see Table 6–1 in Shell's application).

In the fall, beluga whale densities in the Chukchi Sea are expected to be higher than in the summer because individuals of the Beaufort Sea stock will be migrating south to their wintering grounds in the Bering Sea (Angliss and Outlaw, 2008). Densities are assumed to be similar in open-water and ice-margin areas although they are probably somewhat higher along the edge of the pack ice than in open-water areas where shallow hazards and site clearance surveys will be conducted. Densities derived from survey results in the northern Chukchi Sea in Moore *et al.* (2000b) were used as the average density for open-water and ice-margin fall estimates (see Table 6–2 in Shell's application).

Bowhead Whales – By July, most bowhead whales are northeast of the Chukchi Sea, within or migrating toward their summer feeding grounds in the eastern Beaufort Sea resulting in low density estimates for the Chukchi Sea (Moore *et al.*, 2000b). The summer estimate in the Chukchi Sea was calculated by assuming there was one bowhead sighting during the 10,684 km (6,639 mi) of survey effort in the Chukchi Sea during the summer months reported in Moore *et al.* (2000b), although, no bowheads were actually observed during those surveys. During the autumn, bowhead whales that summered in the Beaufort Sea and Amundsen Gulf are migrating west and south to their wintering grounds in the Bering Sea making it more likely that bowheads will be encountered in the Chukchi Sea. However, a tagging study of two bowhead whales from 2006 showed that both whales occurred together along the northern Chukotka coast in November of that year, indicating that perhaps they traveled through the northern Chukchi Sea to reach Russian waters (Quakenbush, 2007). A correction factor of ×0.05 has been used to adjust the observed autumn densities from the Beaufort Sea (Richardson and Thomson, 2002) to estimated densities in the Chukchi Sea, for the following reasons: (1) the migration corridor is narrower in the Beaufort Sea where available data have been obtained; (2) bowheads sometimes linger to feed for extended periods in the Beaufort Sea but extended feeding has not been documented in the central and eastern Chukchi Sea in autumn; and (3) most bowheads will travel through the Chukchi Sea north of the shallow hazards and site clearance survey area after activities are expected to be completed in 2009.

Gray Whales – Gray whale densities were estimated from summer aerial surveys by Moore *et al.* (2000b). Moore *et al.* (2000b) found large summer concentrations of gray whales off the Seward Peninsula, far to the south of Shell's planned open-water marine surveys. The distribution of gray whales in the proposed survey area was scattered and limited to nearshore areas where most whales were observed in water less than 35 m (115 ft) deep (Moore *et al.*, 2000b). A density calculated from effort and sightings in Moore *et al.* (2000b) in water greater than 35 m (115 ft) in depth was used as the average estimate for the Chukchi Sea during the summer period. In the autumn, gray whales may be dispersed more widely through the northern Chukchi Sea (in the area of the survey), and densities are expected to be slightly higher. A density calculated from effort and sightings in water greater than 35 m (115 ft) deep during autumn in Moore *et al.* (2000b) was used as the average estimate for the Chukchi Sea during the fall period.

Harbor Porpoise – Harbor porpoise densities were estimated from industry data collected during 2006 activities in the Chukchi Sea. Prior to 2006, no reliable estimates were available for the Chukchi Sea, and harbor porpoise presence was expected to be very low and limited to nearshore regions. Observers on industry vessels in 2006, however, commonly recorded sightings throughout the Chukchi Sea during the summer and early autumn months. A density estimate from these data has been used for the summer period. No sightings were recorded during the majority of the fall period, so minimal values have been used for that time period.

The remaining four cetacean species that could be encountered in the Chukchi Sea during Shell's proposed open-water marine survey include the humpback, killer, minke, and fin whales. Although there is evidence of the occasional occurrence of these species in the Chukchi Sea, it is unlikely that individuals will be encountered during the proposed survey. George and Suydam (1998) reported killer whales, Brueggeman *et al.* (1990) reported one minke whale, Suydam and George (1992) and Ireland *et al.* (2008) reported harbor porpoise, and Gambell (1985) recorded the northern extent of fin whales to be in the Chukchi Sea. Small numbers of minke and humpback whales were observed during industry activities in 2006 and 2007 (Ireland *et al.*, 2008).

(2) Pinnipeds

Four species of pinnipeds may be encountered in the Chukchi Sea area of Shell's proposed shallow hazards and site clearance program: ringed, bearded, spotted, and ribbon seals. Each of these species, except the spotted seal, is associated with both the ice margin and the nearshore area. The ice margin is considered preferred habitat (as compared to the nearshore areas) during most seasons. Spotted seals are often considered to be predominantly a coastal species except in the spring when they may be found in the southern margin of the retreating sea ice, before they move to shore. However, satellite tagging has shown that they sometimes undertake long excursions into offshore waters, as far as 120 km (74.6 mi) off the Alaskan coast in the eastern Chukchi Sea, during summer (Lowry *et al.*, 1994, 1998). Ribbon seals have been reported in very small numbers within the Chukchi Sea by observers on industry vessels (Ireland *et al.*, 2007a; Patterson *et al.*, 2007) so minimal values have been used for expected densities.

Ringed and Bearded Seals – For ringed and bearded seals both ''average'' and ''maximum'' summer densities are available in Bengtson *et al.* (2005) from spring surveys in the offshore pack ice zone of the northern Chukchi Sea (see Tables 6–1 and 6–2 in Shell's application). The ringed seal density estimates calculated from data collected during 2006 and 2007 industry operations were 0.262 and 0.041seals/km^2, respectively (Jankowski *et al.*, 2007; Reiser *et al.*, 2008), and are lower than those estimated by Bengtson *et al.* (2005). The fall density of ringed seals in the Chukchi Sea has been estimated as two-thirds the summer densities because at that time of year, ringed seals reoccupy nearshore fast ice areas as the fast ice forms.

Spotted Seals – Very little information on spotted seal densities in offshore areas of the Chukchi Sea is available because of the difficulty in estimating their density when at sea. Spotted seal densities were estimated by multiplying the bearded seal density from Bengtson *et al.* (2005) by 0.2 based on the ratio of abundance estimates of spotted seal to bearded seal.

Exposure Calculations of Marine Mammals

Numbers of marine mammals that might be present and potentially disturbed as a result of the site clearance and shallow hazards survey are estimated below based on available data about mammal distribution and densities at different locations and times of the year, as described in the previous subsections. The proposed survey would take place in the Chukchi Sea over two different seasons (i.e., half in the summer, August, and half in the fall,

September). The estimates of marine mammal densities have therefore been separated both spatially and temporally in an attempt to represent the distribution of animals expected to be encountered over the duration of the survey.

The number of individuals of each species potentially exposed to received sound levels at or above 160 dB re 1 μPa (rms) within the survey region, time period, and habitat zone was estimated by multiplying:

- The expected species density (as provided in Tables 6–1 and 6–2 of Shell's application); by
- The anticipated area to be ensonified to the specified level in the survey region (900 km^2), time period, and habitat zone to which that density applies.

The numbers of potential individuals exposed were then summed for each species across the survey regions, seasons, and habitat zones. Some of the animals estimated to be exposed, particularly migrating bowhead whales, might show avoidance reactions before being exposed to 160 dB re 1 μPa (rms). Thus, these calculations actually estimate the number of individuals potentially exposed to sound at or above 160 dB (rms) that would occur if there were no avoidance of the area ensonified to that level.

The area of water potentially exposed to received levels at or above 160 dB (rms) by the proposed operations was calculated by multiplying the planned trackline distance by the cross-track distance of the sound propagation measured during previous field seasons. For site clearance and shallow hazards surveys in 2008 in the Chukchi Sea, the 160 dB radius from the *Cape Flattery*'s four 10 in^3 airguns measured in 2008 was 1,400 m (0.87 mi), and the single 10 in^3 airgun was 440 m (0.27 mi).

Closely spaced survey lines and large cross-track distances of the 160 dB radii can result in repeated exposure of the same area of water. Excessive amounts of repeated exposure can lead to overestimation of the number of animals potentially exposed through double counting. However, the relatively short cross-track distances of the 160 dB radii associated with the site clearance and shallow hazards surveys result in little overlap of exposed waters during the survey, so multiple exposures due to overlap of ensonified areas have not been removed from the area calculations.

Shallow hazards and site clearance surveys in the Chukchi Sea are planned to occur along approximately 480 km (298 mi) of survey lines (plus approximately 120 km (74.6 mi) of mitigation gun activity between survey lines) from August-September exposing approximately 900 km^2 (347.5 mi^2) of water to sounds at or above 160 dB (rms).

Density estimates in the Chukchi Sea have been derived for two time periods, the summer period (August) and the fall period (September). Animal densities encountered in the Chukchi Sea during both of these time periods will further depend on the habitat zone within which the source vessel is operating: (1) open-water; or (2) ice margin. The survey vessel is not an icebreaker and cannot tow survey equipment through pack ice. Under this assumption, densities of marine mammals expected to be observed in or near ice margin areas have been applied to 10 percent of the proposed survey trackline. Densities of marine mammals expected to occur in open-water areas have been applied to the remaining 90 percent of the survey trackline.

Approximately half of the proposed Chukchi Sea site clearance and shallow hazards survey is planned to be completed in August, so the summer density estimates have been applied to 50 percent of the trackline falling within each habitat zone. The other half of the trackline is planned to be surveyed in September, so the fall marine mammal densities have also been applied to 50 percent of the trackline in each habitat zone.

Based on the operational plans and marine mammal densities described above, the estimates of marine mammals potentially exposed to sounds at or above 160 dB (rms) in the Chukchi Sea are presented in Table 6–7 of Addendum 2 to Shell's application. A discussion of the number of potential exposures is summarized by species in the following subsections.

(1) Cetaceans

Based on density estimates, one ESA-listed cetacean species (the bowhead whale) is expected to be exposed to received sound levels at or above 160 dB (rms) unless bowheads avoid the survey vessel before the received levels reach 160 dB. Migrating bowheads are likely to avoid the survey vessel, though many of the bowheads engaged in other activities, particularly feeding and socializing may not. Using average density estimates, Shell estimates that one bowhead whale may potentially be exposed to sounds at or above 160 dB (rms) in the Chukchi Sea project area during the site clearance and shallow hazards survey (see Table 6–7 of Addendum 2 to Shell's application). Two other cetacean species listed as endangered under the ESA that may be encountered in the project area (fin and humpback whales) are unlikely to be exposed given their low ''average'' density estimates in the area. However, Shell has estimated that a ''maximum'' of five humpback whales and five fin whales may be exposed to sound levels at or above 160 dB (rms) during the proposed survey (see Table 6–7 in Addendum 2). NMFS' reasoning for using the ''maximum'' estimate for these species was explained earlier in this document.

Most of the cetaceans exposed to survey sounds with received levels greater than or equal to 160 dB (rms) would involve mysticetes (bowhead and gray whales), monodontids (beluga whales), and porpoise (harbor porpoise). Average and maximum estimates of the number of exposures of cetaceans other than bowheads are beluga whale (10 and 19, respectively), gray whale (19 and 37, respectively), and harbor porpoise (6 and 11, respectively). Average estimates for the other cetacean species are zero (see Table 6–7 in Addendum 2 to Shell's application) since accurate density estimates are not possible given the paucity of sightings. However, maximum estimates are provided for these species (see Table 6–7).

For the common species, the requested numbers are calculated as described previously in this document and based on the average densities from the data reported in the different studies mentioned previously.

(2) Pinnipeds

The ringed seal is the most widespread and abundant pinniped in ice-covered Arctic waters, and there is a great deal of annual variation in population size and distribution of these marine mammals. Ringed seals account for the vast majority of marine mammals expected to be encountered and hence exposed to airgun sounds with received levels greater than or equal to 160 dB re 1 μPa (rms) during the proposed site clearance and shallow hazards survey. The average (and maximum) exposure estimate is that 692 (1,078) ringed seals might be exposed to marine survey sounds with received levels at or above 160 dB (rms).

Two additional pinniped species (other than Pacific walrus) are expected to be encountered. They are the bearded seal (31 and 43, average and maximum estimates, respectively) and the spotted seal (6 and 11, average and maximum estimates, respectively; Table 6–7 in Addendum 2 to Shell's application). Survey activities near spotted seal haulouts at Icy Cape in the Chukchi Sea will remain more than 8 km (5 mi) from shore and be timed to minimize the

chance of disturbance to hauled out seals. The ribbon seal is unlikely to be encountered. Therefore, only a maximum estimate (5) has been provided for this species based on the minimal density data and extremely low density estimates for this species in the Chukchi Sea. NMFS' reasoning for using the ''maximum'' estimate for this species was explained earlier in this document.

Conclusions

(1) Cetaceans

Most of the bowhead whales encountered during the summer will likely show overt disturbance (avoidance) if they receive airgun sounds with levels at or above 160 dB re 1 μPa (rms). The small airgun array proposed for use in this survey greatly limits the size of the 160 dB zone around the ship (1,400 m (0.87 mi)). The use of this smaller airgun array will result in fewer bowhead whales being disturbed by the survey when compared to the use of larger airgun arrays.

Seismic operators sometimes see dolphins and other small toothed whales near operating airgun arrays, but in general, there seems to be a tendency for most delphinds to show some limited avoidance of operating seismic vessels (Stone, 2003; Moulton and Miller, 2005; Holst *et al.*, 2006; Stone and Tasker, 2006). Studies that have reported cases of small toothed whales close to the operating airguns include Duncan (1985), Arnold (1996), Stone (2003), and Holst *et al.* (2006). However, at least when in the Canadian Beaufort Sea in summer, belugas appear to be fairly responsive to seismic energy, with few being sighted within 10–20 km (6.2–12.4 mi) of seismic vessels during aerial surveys. These results were consistent with the low number of beluga sightings reported by observers aboard the seismic vessel, suggesting that some belugas might be avoiding the seismic operations at distances of 10–20 km (6.2–12.4 mi; Miller *et al.*, 2005). The study conducted by Miller *et al.* (2005) was aboard a vessel conducting a 3D seismic survey, utilizing two identical 2,250 in^3 airgun arrays with each array containing 24 guns. Since the acoustic sources proposed to be used during Shell's survey are significantly smaller (40 in^3 array) than the ones described in the Miller *et al.* (2005) study, deflections of that magnitude are not expected. Belugas will likely occur in small numbers in the Chukchi Sea during the survey period and few will likely be affected by the survey activity.

Taking into account the mitigation measures that are planned, effects on cetaceans are generally expected to be restricted to avoidance of a limited area around the survey operation and short-term changes in behavior, falling within the MMPA definition of ''Level B harassment''. Furthermore, the estimated numbers of animals potentially exposed to sound levels sufficient to cause appreciable disturbance are relatively low percentages of the population sizes in the Bearing-Chukchi-Beaufort seas, as described next.

Based on the 160 dB (rms) disturbance criterion, the best (average) estimates of the numbers of cetacean exposures to sounds at or above 160 dB re 1 μPa (rms) represent varying proportions of the populations of each species in the Chukchi Sea and adjacent waters (cf. Table 6–1 in Shell's application). For species listed as endangered under the ESA, Shell's estimates suggest it is unlikely that fin whales or humpback whales will be exposed to received levels greater than or equal to 160 dB rms, but that approximately one bowhead may be exposed at this level. The latter is less than 0.01 percent of the Bering-Chukchi-Beaufort population of greater than 13,779 individuals assuming 3.4 percent annual population growth from the 2001 estimate of 10,545 animals (Zeh and Punt, 2005).

Beluga whales may be exposed to sounds produced by the airgun arrays during the proposed survey, and the numbers potentially affected are small relative to the population size (Table 6–7 in Addendum 2 to Shell's application). The best estimate of the number of belugas that might be exposed to sounds at or above 160 dB (10) represents 0.27 percent of the eastern Chukchi Sea population of approximately 3,710 individuals (Angliss and Allen, 2009).

Gray whales and harbor porpoise may also be exposed to sounds produced by the airguns. The best (average) estimate of the number of gray whales and harbor porpoise that might be exposed to sounds at or above 160 dB (rms) represents 0.11 percent of the Eastern North Pacific stock of gray whales and less than 0.01 percent of the Bering Sea stock of harbor porpoise.

In addition, killer, fin, humpback, and minke whales could also be taken by Level B harassment as a result of the proposed survey. However, the possibility is low. The numbers of ''average'' estimated take of these species are not available because they are rare in the project area and little density data exist for these species in the proposed project area. Since the Chukchi Sea represents only a small fraction of the North Pacific and Arctic basins where these animals occur, and these animals do not regularly congregate in the vicinity of the project area, NMFS believes that only relatively small numbers, if any, of these marine mammal species would be potentially affected by the proposed open-water marine survey program.

Varying estimates of the numbers of marine mammals that might be exposed to sounds from the airgun array during the 2009 Shell shallow hazards and site clearance surveys have been presented (average vs. maximum). The relatively short-term exposures that will occur are not expected to result in any long-term negative consequences for the individuals or their populations.

The many reported cases of apparent tolerance by cetaceans of seismic exploration, vessel traffic, and some other human activities show that co-existence is possible. Mitigation measures such as controlled vessel speed, dedicated marine mammal observers (MMOs), non-pursuit, shutdowns or power-downs when marine mammals are seen within defined ranges, and avoiding migration pathways when animals are likely most sensitive to noise will further reduce short-term reactions and minimize any effects on hearing sensitivity. In all cases, the effects are expected to be short-term, with no lasting biological consequence. Subsistence issues are addressed later in this document.

Potential Bowhead Disturbance at Lower Received Levels – Aerial surveys during fall seismic surveys in the Beaufort Sea showed that migrating bowhead whales appeared to avoid seismic activities at distances of 20–30 km (12.4–18.6 mi) and received sound levels of 120–130 dB rms (Miller *et al.*, 1999; Richardson *et al.*, 1999). Therefore, it is possible that a larger number of bowhead whales than estimated above may be disturbed to some extent if reactions occur at or near approximately 130 dB (rms). Using the same method of calculation as described earlier in this document for estimating take, the number of migrating bowhead whales exposed to sounds greater than or equal to 120 dB by the proposed survey would be approximately 8.5 the number estimated at 160 dB. (It should be noted though that this calculation is more accurate for the Beaufort Sea where the bowhead whale migration pathway is narrower and more clearly defined than in the Chukchi Sea.) However, acoustic data collected in the vicinity of seismic surveys in the Beaufort Sea in 2007 indicated that bowhead whales did not avoid the sound source at distances equivalent to

120 dB (rms) and instead tolerated sounds at higher levels while likely changing their calling behavior (Blackwell *et al.*, 2008).

Reducing operations during the bowhead whale subsistence harvest is meant to accomplish two mitigation objectives. It greatly reduces the potential for conflicts with subsistence hunting activities, and it allows a large proportion of the bowhead population to migrate past the survey area without being exposed to survey sounds at or above 160 dB (rms) or 120 dB (rms).

The western Arctic stock of bowhead whales usually begins its westward migration through the Beaufort Sea in late August. Westbound bowheads typically reach the Barrow area in mid-September and remain in that area until late October (Brower, 1996). Therefore, migrating bowhead whales are not expected in the proposed Chukchi Sea survey area until the second half of the survey, as the project is expected to occur for approximately 50 days between August and September.

(2) Pinnipeds

A few pinniped species are likely to be encountered in the study area, but the ringed seal is by far the most abundant marine mammal species in the survey area. The best (average) estimates of the numbers of individual seals likely to be exposed to airgun sounds at received levels at or above 160 dB re 1 μPa (rms) during the open-water marine survey in the Chukchi Sea are as follows: ringed seals (692), bearded seals (31), and spotted seals (6), (representing 0.3 percent, 0.6 percent, and 0.01 percent, respectively, of the Bering-Chukchi-Beaufort populations for each species). It is probable that only a small percentage of the animals exposed to sound levels at 160 dB would actually be disturbed. For example, Moulton and Lawson (2002) indicate that most pinnipeds exposed to seismic sounds lower than 170 dB do not visibly react to that sound, and, therefore, pinnipeds are not likely to react to seismic sounds unless they are greater than 170 dB re 1 μPa (rms). Consequently, the take estimates presented in this document may be an overestimation. The short-term exposures of pinnipeds to airgun sounds are not expected to result in any long-term negative consequences for the individuals or their populations, as observations have shown pinnipeds to be rather tolerant of (or habituated to) underwater seismic sounds.

Potential Impacts on Habitat

The proposed activities will not result in any permanent impact on habitats used by marine mammals or to their prey sources. Site clearance and shallow hazards activities will occur during the time of year when bowhead whales are present (i.e., August and September). Any effects would be temporary and of short duration at any one place. The primary potential impacts to marine mammals are associated with acoustic sound levels from the proposed site clearance and shallow hazards survey work discussed earlier in this document.

Mortality to fish, fish eggs, and larvae from energy sources would be expected within a few meters (0.5 to 3 m (1.6 to 10 ft)) from the sound source. Direct mortality has been observed in cod and plaice within 48 hours that were subjected to pulses 2 m (6.6 ft) from the source (Matishov, 1992); however, other studies did not report any fish kills from sound source exposure (La Bella *et al.*, 1996; IMG, 2002; Hassel *et al.*, 2003). To date, fish mortalities associated with normal operations are thought to be slight. Saetre and Ona (1996) modeled a worst-case mathematical approach on the effects of energy on fish eggs and larvae, and concluded that mortality rates caused by exposure to sounds are so low compared to natural mortality that issues relating to stock recruitment should be regarded as insignificant.

Limited studies on physiological effects on marine fish and invertebrates to acoustic stress have been conducted. No significant increases in physiological stress from sound energy were detected for various fish, squid, and cuttlefish (McCauley *et al.*, 2000) or in male snow crabs (Christian *et al.*, 2003). Behavioral changes in fish associated with sound exposures are expected to be minor at best. Because only a small portion of the available foraging habitat would be subjected to sound pulses at a given time, fish would be expected to return to the area of disturbance within anywhere from 15 to 30 min (McCauley *et al.*, 2000) to several days (Engas *et al.*, 1996).

Available data indicate that mortality and behavioral changes of various fish or invertebrates do occur within very close range (less than 2 m (6.6 ft)) to the energy source. The proposed acquisition activities in distinct areas in the Chukchi Sea would impact less than 0.1 percent of available food resources, which would have little, if any, effect on a marine mammal's ability to forage successfully.

The proposed activities are not expected to have any habitat-related effects that would produce long-term impacts to marine mammals or their habitat due to the limited extent of the acquisition areas and timing of the activities.

Effects of Seismic Noise and Other Related Activities on Subsistence

The disturbance and potential displacement of marine mammals by sounds from seismic activities are the principal concerns related to subsistence use of the area. Subsistence remains the basis for Alaska Native culture and community. Marine mammals are legally hunted in Alaskan waters by coastal Alaska Natives. In rural Alaska, subsistence activities are often central to many aspects of human existence, including patterns of family life, artistic expression, and community religious and celebratory activities. The main species that are hunted include bowhead and beluga whales, ringed, spotted, and bearded seals, walruses, and polar bears . The importance of each of these species varies among the communities and is largely based on availability.

Communities that participate in subsistence hunts that have the potential to be affected by Shell's open-water marine survey program in the Chukchi Sea proposed survey areas are Point Hope, Point Lay, Wainwright, Barrow and possibly Kotzebue (however, this community is much farther to the south of the proposed project area).

Point Hope residents subsistence hunt for bowhead and beluga whales, polar bears, and walrus. Bowhead and beluga whales are hunted in the spring and early summer along the ice edge. Beluga whales may also be hunted later in the summer along the shore. Walrus are harvested in late spring and early summer, and polar bears are hunted from October to April (MMS, 2007). Seals are available from October through June, but are harvested primarily during the winter months, from November through March, due to the availability of other resources during the other periods of the year (MMS, 2007).

With Point Lay situated near Kasegaluk Lagoon, the community's main subsistence focus is on beluga whales. Each year, hunters from Point Lay drive belugas into the lagoon to a traditional hunting location. The belugas have been predictably sighted near the lagoon from late June through mid- to late July (Suydam *et al.*, 2001). Seals are available year-round, and polar bears and walruses are normally hunted in the winter. Hunters typically travel to Barrow, Wainwright, or Point Hope to participate in bowhead whale harvest, but there is interest in reestablishing a local Point Lay harvest. Shell's activities are scheduled to avoid

the traditional subsistence beluga hunt, which annually occurs in July.

Wainwright residents subsist on both beluga and bowhead whales in the spring and early summer. During these two seasons the chances of landing a whale are higher than during other seasons. Seals are hunted by this community year-round, and polar bears are hunted in the winter.

Barrow residents' main subsistence focus is concentrated on biannual bowhead whale hunts. They hunt these whales during the spring and fall. Westbound bowheads typically reach the Barrow area in mid-September and are in that area until late October (e.g., Brower, 1996). Autumn bowhead whaling near Barrow normally begins in mid-September to early October but may begin as early as late-August if whales are observed and ice conditions are favorable (USDI/BLM, 2005). Whaling near Barrow can continue into October, depending on the quota and conditions. Other animals, such as seals, walruses, and polar bears are hunted outside of the whaling season, but they are not the primary source of the subsistence harvest (URS Corporation, 2005).

There could be an adverse impact on the Inupiat bowhead subsistence hunt if the whales were deflected seaward (further from shore) in traditional hunting areas. The impact would be that whaling crews would have to travel greater distances to intercept westward migrating whales thereby creating a safety hazard for whaling crews and/or limiting chances of successfully striking and landing bowheads. This potential impact is mitigated by application of the procedures established in the 4MP. Adaptive mitigation measures may be employed during times of active scouting and whaling within the traditional subsistence hunting areas of the potentially affected communities. Shell does not plan to begin activities until after completion of the spring bowhead hunts. However, there is a possibility that their data acquisition will not be completed prior to the start of the fall bowhead hunt in Barrow. However, it is not expected that the whales will be deflected further offshore before reaching Barrow since Shell's survey will occur approximately 225 km (140 mi) west of Barrow. The whales will be traveling westward through the Beaufort Sea from Canada and will reach Barrow before entering the survey area in the Chukchi Sea. Based on these factors, Shell's Chukchi Sea survey is not expected to interfere with the fall bowhead harvest in Barrow. In recent years, bowhead whales have occasionally been taken in the fall by coastal villages along the Chukchi coast, but the total number of these animals has been small.

Shell has adopted a spatial and temporal operational strategy for its Chukchi Sea operations that should minimize impacts to subsistence hunters. Operations will not begin prior to the close of the spring bowhead hunt in the Chukchi coastal villages and will closely coordinate with and avoid imµPacts to beluga whale hunts and walrus hunts through subsistence advisors.

The timing (late summer and fall after many of the Chukchi Sea communities have harvested sizeable portions of their marine mammal quota) and distance (approximately 113 km (70 mi) or more) from shore, as well as the low volume airguns that are proposed to be used and the proposed mitigation measures described later in this document, are expected to mitigate any adverse effects of the surveys on the availability of marine mammals for subsistence uses. NMFS does not expect subsistence users to be directly displaced by the proposed survey because subsistence hunters usually do not travel this far (113 km [70 mi]) offshore to harvest marine mammals. Additionally, because of the significant distance offshore and the lack of hunting in these areas, there is no expectation that any physical barriers would exist between marine mammals and subsistence users. Based on this information, NMFS has preliminarily determined that Shell's proposed open-water marine survey program in the Chukchi Sea in 2009/2010 will not have an unmitigable adverse impact on subsistence uses.

Plan of Cooperation (POC)

Regulations at 50 CFR 216.104(a)(12) require IHA applicants for activities that take place in Arctic waters to provide a POC or information that identifies what measures have been taken and/or will be taken to minimize adverse effects on the availability of marine mammals for subsistence purposes. Shell has prepared and will implement a draft POC for its 2009 activities. The POC also describes concerns received during 2008. Shell developed the POC to mitigate and avoid any unreasonable interference from their planned activities with North Slope subsistence uses and resources. The POC is, and has been in the past, the result of numerous meetings and consultations between Shell, affected subsistence communities and stakeholders, and Federal agencies. The POC identifies and documents potential conflicts and associated measures that will be taken to minimize any adverse effects on the availability of marine mammals for subsistence use. The Draft POC document was distributed to the communities, subsistence users groups, NMFS, and USFWS on May 15, 2009. To be effective, the POC must be a dynamic document which will expand to incorporate the communications and consultation that will continue to occur throughout 2009 and 2010. Outcomes of POC meetings are typically included in updates attached to the POC as addenda and distributed to federal, state, and local agencies as well as local stakeholder groups that either adjudicate or influence mitigation approaches for Shell's open-water programs.

Shell has held and plans to hold additional community meetings in Barrow, Wainwright, Point Hope, Point Lay, and Kotzebue regarding its 2009 Chukchi open-water marine survey program. Some of the community POC meetings that have already occurred include: February 2, 2009, in Barrow; March 24, 2009, in Point Hope; March 25, 2009, in Kotzebue; March 26, 2009, in Wainwright; and April 22, 2009, in Point Lay. Shell plans to focus on lessons learned from the 2008 open-water program and begin preparing mitigation measures (beyond those already identified elsewhere in this document) to avoid potential conflicts. During 2009, Shell will continue to meet with the marine mammal commissions and committees including the Alaska Eskimo Whaling Commission (AEWC), Eskimo Walrus Commission (EWC), Alaska Beluga Whale Committee (ABWC), Alaska Ice Seal Committee (AISC), and the Alaska Nanuuq Commission (ANC). Throughout 2009, Shell anticipates meeting with the marine mammal commissions and committees active in the subsistence harvests and marine mammal research.

Also during 2009, Shell will meet at least twice with the commissioners and committee heads of ABWC, ANC, EWC, and AISC jointly in co-management meetings. During a pre-season co-management meeting Shell will present pre-season planning to the commissioners and committee leads in order to gather their input on subsistence use concerns, consider their traditional knowledge in the design of project mitigations, and to hear about their involvement in research on marine mammals and/or traditional use. Following the season, Shell will have a post-season co-management meeting with the commissioners and committee heads to discuss results of mitigation measures and outcomes of the preceding season. The goal of the post-season meeting is to build upon the knowledge base, discuss successful or unsuccessful

outcomes of mitigation measures, and possibly refine plans or mitigation measures if necessary.

In addition, Shell will meet with North Slope officials and community leaders on an as-requested basis before the 2009 open-water season in order to discuss the proposed activities. Lastly, Shell intends to discuss adaptive conflict avoidance mechanisms to address concerns expressed by subsistence users in the North Slope communities.

The POC also specifies times and areas to avoid in order to minimize possible conflicts with traditional subsistence hunts by North Slope villages for transit and open-water activities. As mentioned elsewhere in this document, Shell does not plan to conduct survey activities until the close of Point Lay's spring beluga hunt, which usually occurs each year in July. Additionally, Shell has stated that vessel transits in the Chukchi Sea spring lead system will not occur prior to July 1, 2009, and July 1, 2010.

Proposed Mitigation and Monitoring

As part of its application, Shell has proposed implementing a 4MP that will consist of monitoring and mitigation during their open-water shallow hazards data acquisition activities in the Chukchi Sea during the 2009/2010 open-water season. The program consists of monitoring and mitigation during Shell's various activities related to survey data acquisition, including transit and data acquisition. This program will provide information on the numbers of marine mammals potentially affected by the survey program and real-time mitigation to prevent possible injury or mortality of marine mammals by sources of sound and other vessel related activities. Monitoring efforts will be initiated to collect data to address the following specific objectives: (1) improve the understanding of the distribution and abundance of marine mammals in the Chukchi Sea project areas; and (2) assess the effects of sound and vessel activities on marine mammals inhabiting the project areas and their distribution relative to the local people that depend on them for subsistence hunting. These objectives and the monitoring and mitigation goals will be addressed through the utilization of vessel-based MMOs on the survey source vessels. Additional information can be found in Shell's application.

Proposed Mitigation Measures

The proposed survey program incorporates both design features and operational procedures for minimizing potential impacts on cetaceans and pinnipeds and on subsistence hunts. The design features and operational procedures have been described in the IHA application submitted to NMFS and requests for LOAs submitted to USFWS and are summarized here. Survey design features include:

- Timing and locating survey activities to avoid interference with the annual fall bowhead whale and other marine mammal hunts;
- Selecting and configuring the energy source array in such a way that it minimize the amount of energy introduced into the marine environment and, specifically, so that it minimizes horizontal propagation;
- Limiting the size of the acoustic energy source to only that required to meet the technical objectives of the survey; and
- Early season field assessment to establish and refine (as necessary) the appropriate 180 dB and 190 dB safety zones, and other radii relevant to behavioral disturbance.

The potential disturbance of cetaceans and pinnipeds during survey operations will be minimized further through the implementation of several ship-based mitigation measures, which include establishing and monitoring safety and disturbance zones, speed and course alterations, ramp-up (or soft start), power-down, and shutdown procedures, and provisions for poor visibility conditions.

(1) Safety and Disturbance Zones

Safety radii for marine mammals around airgun arrays are customarily defined as the distances within which received pulse levels are greater than or equal to 180 dB re 1 μPa (rms) for cetaceans and greater than or equal to 190 dB re 1 μPa (rms) for pinnipeds. These safety criteria are based on an assumption that seismic pulses at lower received levels will not injure these animals or impair their hearing abilities, but that higher received levels might have such effects. It should be understood that marine mammals inside these safety zones will not necessarily be seriously injured or killed as these zones were established prior to the current understanding that significantly higher levels of impulse sounds would be required before injury or mortality could occur (see Southall *et al.*, 2007).

Shell anticipates that monitoring similar to that conducted in the Chukchi Sea in 2007–8 will also be required in 2009. Shell plans to use MMOs onboard the survey vessel to monitor the 190 and 180 dB (rms) safety radii for pinnipeds and cetaceans, respectively, and to implement appropriate mitigation as discussed in this document.

In addition, a 160–dB (rms) vessel monitoring zone for bowhead and gray whales will be established and monitored during all survey activities. Whenever an aggregation of 12 or more bowhead or gray whales are observed during a vessel-monitoring program within the 160–dB zone around the source vessel, the survey will not commence or will shutdown until MMOs confirm they are no longer present within the 160–dB safety radius of surveying operations (see the ''Power-downs and Shutdowns'' subsection later in this document). The radius of the 160–dB isopleth based on modeling is 1,400 m (0.87 mi).

During previous survey operations in the Chukchi Sea, Shell utilized early season sound source verification (SSV) to establish safety zones for the previously mentioned sound level criteria. As the equipment being utilized in 2009 is similar to that used in 2008, Shell will initially utilize the derived (i.e., measured) sound criterion distances from 2008. An acoustics contractor will perform the direct measurements of the received levels of underwater sound versus distance and direction from the energy source arrays using calibrated hydrophones. The acoustic data will be analyzed as quickly as reasonably practicable in the field and used to verify (and if necessary adjust) the safety distances.

(2) Ramp-up

A ramp-up of an energy source array provides a gradual increase in energy levels, and involves a step-wise increase in the number and total volume of energy released until the full complement is achieved. The purpose of a ramp-up (or ''soft start'') is to ''warn'' cetaceans and pinnipeds in the vicinity of the energy source and to provide the time for them to leave the area and thus avoid any potential injury or impairment of their hearing abilities.

During the proposed survey program, the operator will ramp up energy sources slowly, if the energy source being utilized generates sound energy within the frequency spectrum of cetacean or pinniped hearing. Full ramp-ups (i.e., from a cold start after a shut down, when no airguns have been firing) will begin by firing one small airgun. The minimum duration of a shut-down period, i.e., without air guns firing, which must be followed by a ramp-up typically is the amount of time it would take the source vessel to cover the 180–dB safety radius. The actual time period depends on ship speed and the size of the 180–dB safety radius,

which are not known at this time. However, previous SSV measurements indicate that the 180–dB safety radius for the 4 x 10 in^3 airgun array is approximately 160 m (525 ft).

Ramp-up, after a shutdown, will not begin until there has been a minimum of a 30 min period of observation by MMOs of the safety zone to assure that no marine mammals are present. The entire safety zone must be visible during the 30 min lead-in to a full ramp-up. If the entire safety zone is not visible, then ramp-up from a cold start cannot begin. If a marine mammal(s) is sighted within the safety zone during the 30–min watch prior to ramp-up, ramp-up will be delayed until the marine mammal(s) is sighted outside of the safety zone or the animal(s) is not sighted for at least 15–30 minutes: 15 min for small odontocetes and pinnipeds, or 30 min for baleen whales (large odontocetes do not occur within the project area).

During periods of turn around and transit between survey transects, at least one airgun (or energy source) will remain operational. The ramp-up procedure still will be followed when increasing the source levels from one air gun to the full array. Keeping one air gun firing, however, will avoid the prohibition of a cold start during darkness or other periods of poor visibility. Through use of this approach, survey operations can resume upon entry to a new transect without a full ramp-up and the associated 30–min lead-in observations. MMOs will be on duty whenever the airguns are firing during daylight and during the 30–min periods prior to ramp-ups as well as during ramp-ups. Daylight will occur for 24 hr/day until mid-August, so until that date, MMOs will automatically be observing during the 30–min period preceding a ramp-up. Later in the season, MMOs will be called out at night to observe prior to and during any ramp-up. The vessel operator and MMOs will maintain records of the times when ramp-ups start and when the airgun arrays reach full power.

(3) Power-downs and Shutdowns

A power-down is the immediate reduction in the number of operating energy sources from all firing to some smaller number. A shutdown is the immediate cessation of firing of all energy sources. The arrays will be immediately powered down whenever a marine mammal is sighted approaching near or close to the applicable safety zone of the full arrays but is outside the applicable safety zone of the single source. If a marine mammal is sighted within the applicable safety zone of the single energy source, the entire array will be shut down (i.e., no sources firing). Although MMOs will be located on the bridge ahead of the center of the airgun array, the shutdown criterion for animals ahead of the vessel will be based on the distance from the bridge (vantage point for MMOs) rather than from the airgun array a precautionary approach. For marine mammals sighted alongside or behind the airgun array, the distance is measured from the array.

Following a power-down or shutdown, operation of the airgun array will not resume until the marine mammal has cleared the applicable safety zone. The animal will be considered to have cleared the safety zone if it:

(1) Is visually observed to have left the safety zone;

(2) Has not been seen within the zone for 15 min in the case of small odontocetes and pinnipeds; or

(3) Has not been seen within the zone for 30 min in the case of mysticetes.

For the aggregation of 12 or more bowhead or gray whales, the acoustic equipment will not be turned back on or return to full power until the aggregation has left the 160–dB isopleth or the animals forming the aggregation are reduced to fewer than 12 bowhead or gray whales.

(4) Operations at Night and in Poor Visibility

Shell plans to conduct the site clearance and shallow hazards survey 24 hr/day. Regarding nighttime operations, note that there will be no periods of total darkness until mid-August. When operating under conditions of reduced visibility attributable to darkness or to adverse weather conditions, infra-red or night-vision binoculars will be available for use. It is recognized, however, that their effectiveness is limited. For that reason, MMOs will not routinely be on watch at night, except in periods before and during ramp-ups. As stated earlier, if the entire safety zone is not visible for at least 30 min prior to ramp-up, then ramp-up may not proceed. It should be noted that if one small energy source has remained firing, the rest of the array can be ramped up during darkness or in periods of low visibility. Survey operations may continue under conditions of darkness or reduced visibility.

(5) Speed and Course Alterations

If a marine mammal (in water) is detected outside the safety radius and, based on its position and the relative motion, is likely to enter the safety radius, the vessel's speed and/or direct course would be changed in a manner that does not compromise safety requirements. The animal's activities and movements relative to the source vessel will be closely monitored to ensure that the individual does not approach within the safety radius. If the mammal is sighted approaching near or close to the applicable safety radius, further mitigative actions will be taken, i.e., either further course alterations or power-down or shutdown of the airgun(s).

Proposed Marine Mammal Monitoring

Vessel-based monitoring for marine mammals will be conducted throughout the period of survey operations. The 4MP will be implemented by a team of experienced MMOs, including both biologists and Inupiat personnel. All MMOs will be approved by NMFS prior to the start of operations. At least one observer on the survey vessel will be an Inupiat who will have the responsibility of communicating with the Inupiat community and (during the whaling season) directly with the Subsistence Advisors in coastal villages.

The MMOs will be stationed aboard the survey source vessel throughout the active field season. The duties of the MMOs will include watching for and identifying cetaceans and pinnipeds; recording their numbers, distances, and reactions to the survey operations; initiating mitigation measures when appropriate; and reporting the results. MMOs aboard the survey source vessel will be on watch during all daylight periods when the energy sources are in operation and when energy source operations are to start up at night. Each MMO shift will not exceed more than 4 consecutive hours, and no MMO will work more than 3 shifts in a 24 hr period (i.e., 12 hours total per day) in order to avoid fatigue.

Crew leaders and most other biologists serving as observers in 2009 will be individuals with experience as observers during one or more of the 1996–2008 monitoring projects for Shell, WesternGeco, or BP and/or subsequent offshore monitoring projects for other clients in Alaska, the Canadian Beaufort, or other offshore areas. Biologist-observers to be assigned will have previous marine mammal observation experience and field crew leaders will be highly experienced with previous vessel-based monitoring projects. Qualifications for those individuals will be provided to NMFS for review and acceptance. Inupiat observers will be experienced in the region and familiar with the marine mammals of the area. An MMO handbook, adapted for the specifics of the proposed survey programs from the

handbooks created for previous monitoring projects will be prepared and distributed beforehand to all MMOs (see Shell's 4MP for additional details on the handbook). Observers, including Inupiat observers, will also complete a 2–day training and refresher session on marine mammal monitoring to be conducted shortly before the anticipated start of the 2009 open-water season. The training session(s) will be conducted by marine mammalogists with extensive crew-leader experience during previous vessel-based monitoring programs.

(1) Monitoring Methodology

The observer(s) will watch for marine mammals from the best available vantage point on the operating source vessel, which is usually the bridge or flying bridge. The observer(s) will scan systematically with the naked eye and 7 x 50 reticle binoculars, supplemented with 20 x 50 image stabilized binoculars, and night-vision equipment when needed. Personnel on the bridge will assist the MMOs in watching for pinnipeds and cetaceans.

The observer(s) will give particular attention to the areas within the ''safety zone'' around the source vessel. These zones are the maximum distances within which received levels may exceed 180 dB re 1 μPa (rms) for cetaceans or 190 dB re 1 μPa (rms) for pinnipeds. MMOs will also be able to monitor the 160 dB re 1 μPa (rms) radius for Level B harassment takes, as this radius is expected to be a maximum of 1,400 m (0.87 mi). The 160–dB isopleth (1,400 m [0.87 mi]) will also be monitored for the presence of aggregations of 12 or more bowhead or gray whales.

Information to be recorded by MMOs will include the same types of information that were recorded during previous monitoring programs (1998–2008) in the Chukchi and Beaufort seas (Moulton and Lawson, 2002; Patterson *et al.*, 2007). When a mammal sighting is made, the following information about the sighting will be recorded:

(1) Species, group size, age/size/sex categories (if determinable), behavior when first sighted and after initial sighting, heading (if consistent), bearing and distance from the source vessel, apparent reaction to the source vessel (e.g., none, avoidance, approach, paralleling, etc.), closest point of approach, and behavioral pace;

(2) Time, location, heading, speed, activity of the vessel, and operational state (e.g., operating airguns, ramp-up, etc.), sea state, ice cover, visibility, and sun glare; and

(3) The positions of other vessel(s) in the vicinity of the source vessel. This information will be recorded by the MMOs at times of whale (but not seal) sightings.

The ship's position, heading, and speed, the operational state (e.g., number and size of operating energy sources), and water temperature (if available), water depth, sea state, ice cover, visibility, and sun glare will also be recorded at the start and end of each observation watch and, during a watch, every 30 min and whenever there is a change in one or more of those variables.

Distances to nearby marine mammals, e.g., those within or near the 190 dB (or other) safety zone applicable to pinnipeds, will be estimated with binoculars (7 x 50) containing a reticle to measure the vertical angle of the line of sight to the animal relative to the horizon.

Observers will use a laser rangefinder to test and improve their abilities for visually estimating distances to objects in the water. Previous experience showed that this Class 1 eye-safe device was not able to measure distances to seals more than about 70 m (230 ft) away. (Previous SSV measurements indicate that the 190–dB safety radius for the 4 x 10 in^3 airgun array proposed for use during Shell's site clearance and shallow hazards survey is approximately 50 m (164 ft), well within the range of 70 m (230 ft)). However, it was very useful in improving the distance estimation abilities of the observers at distances up to about 600 m (1968 ft)-the maximum range at which the device could measure distances to highly reflective objects such as other vessels.

When a marine mammal is seen within the safety radius applicable to that species, the geophysical crew will be notified immediately so that mitigation measures described previously in this document can be implemented. As in 1996–2001 and in 2006–2008, it is expected that the airgun arrays will be shut down within several seconds-often before the next shot would be fired, and almost always before more than one additional shot is fired. The MMO will then maintain a watch to determine when the mammal(s) is outside the safety zone such that airgun operations can resume.

Night vision equipment (''Generation 3'' binocular image intensifiers or equivalent units) will be available for use when needed. Prior to mid-August, there will be no hours of total darkness in the proposed project area. The operators will provide or arrange for the following specialized field equipment for use by the onboard MMOs: reticule binoculars, 20 x 50 image stabilized binoculars, ''Big-eye'' binoculars, laser rangefinders, inclinometer, laptop computers, night vision binoculars, and possibly digital still and digital video cameras.

(2) Field Data-recording and Verification

The observers will record their observations onto datasheets or directly into handheld computers. During periods between watches and periods when operations are suspended, those data will be entered into a laptop computer running a custom computer database. The accuracy of the data entry will be verified in the field by computerized validity checks as the data are entered and by subsequent manual checking of the database printouts. These procedures will allow initial summaries of data to be prepared during and shortly after the field season and will facilitate transfer of the data to statistical, graphical, or other programs for further processing. Quality control of the data will be facilitated by the start-of-season training session, subsequent supervision by the onboard field crew leader, and ongoing data checks during the field season.

(3) Acoustic Sound Source Verification Measurements

As part of the IHA application process for similar shallow hazards and marine survey acquisition in 2006–2008, Shell contracted JASCO Research Ltd. to conduct acoustic measurements of vessel and energy source arrays on source and support to broadband received levels of 190, 180, 170, 160, and 120 dB re 1 μPa (rms; see Table 1 of Attachment A in Shell's application).

The radii measured by these previous SSV tests will be utilized as temporary safety radii until current SSV measurements of the actual airgun array sound are available as mentioned earlier in this document. The measurements will be made at the beginning of the field season and the measured radii used for the remainder of the survey period.

In 2009, Shell plans to utilize similar equipment aboard its survey source vessel. Shell intends to make new SSV measurements at the start of its proposed 2009 Chukchi Sea surveys even though the equipment planned for 2009 surveying operations are similar to the one used in 2006–2008. Verification measurements will be performed on or as close as possible to the actual survey locations, with ice conditions being the limiting factor.

The objective of the SSV tests planned for 2009 in the Chukchi Sea will be to measure the distances in the broadside and endfire directions at which

broadband received levels reach 190, 180, 170, 160, and 120 dB re 1 μPa (rms) for the energy source array combinations that may be used during the survey processes. The configurations will include at least the full array operating and the operation of a single source that will be used during power downs. The measurements of energy source array sounds will be made at the beginning of the survey, and the distances to the various radii will be reported as soon as possible after recovery of the equipment. The primary radii of concern will be the 190 and 180 dB safety radii for pinnipeds and cetaceans, respectively, and the 160 dB disturbance radii. In addition to reporting the radii of specific regulatory concern, nominal distances to other sound isopleths down to 120 dB (rms) will be reported in increments of 10 dB.

Data will be previewed in the field immediately after download from the OBHs. An initial sound source analysis will be supplied to NMFS and the operators within 120 hr of completion of the measurements and analysis, if possible. The report will indicate the distances to sound levels between 190 dB re 1 μPa (rms) and 120 dB re 1 μPa (rms) based on a fits of empirical transmission loss formulae to data in the endfire and broadside directions. The 120 hr report findings will be based on analysis of measurements from at least three of the OBH systems. A more detailed report including analysis of data from all OBH systems will be issued to NMFS as part of the 90–day report following completion of the acoustic program (see the ''Reporting'' section later in this document).

Airgun pressure waveform data from the OBH systems will be analyzed using JASCO's suite of custom signal processing software that implements the following data processing steps:

- Energy source pulses in the OBH recordings are identified using an automated detection algorithm. The algorithm also chooses the 90 percent energy time window for rms sound level computations.
- Waveform data is converted to units of μPa using the calibrated acoustic response of the OBH system. Gains for frequency-dependent hydrophone sensitivity, amplifier and digitizer are applied in this step.
- For each pulse, the distance to the airgun array is computed from GPS deployment positions of the OBH systems and the time referenced DGPS navigation logs of the survey vessel.
- The waveform data are processed to determine flat-weighted peak SPL, rms SPL, and SEL.
- Each energy pulse is Fast Fourier Transformed to obtain 1–Hz spectral power levels in 1 s steps.
- The spectral power levels are integrated in standard 1/3–octave bands to obtain band sound pressure levels for bands from 10 Hz to 20 kHz. M-weighted SPL's for each airgun pulse may be computed in this step for species of interest.

The output of the above data processing steps includes listings and graphs of airgun array narrow band and broadband sound levels versus range and spectrograms of shot waveforms at specified ranges. Of particular importance are the graphs of level versus range that are used to compute representative radii to specific sound level thresholds.

(4) Chukchi Sea Acoustic Arrays

Shell and ConocoPhillips are jointly funding an extensive acoustic monitoring program in the Chukchi Sea in 2009. This program incorporates the acoustic programs of 2006–2008 with a total of 44 recorders distributed both broadly across the Chukchi lease area and the nearshore environment and intensively on the Burger and Klondike lease areas. The broad area arrays are designed to capture both general background soundscape data and marine mammal call data across the lease area. From these recordings, it is anticipated that Shell (and others) may be able to gain insights into large-scale distribution of marine mammals, identification of marine mammal species present, movement and migration patterns, and general abundance data.

The intense area arrays are designed to support localization of marine mammal calls on and around the leasehold areas. In the case of the Burger prospect, where Shell intends to conduct shallow hazards data acquisition, localized calls will enable investigators to understand response of marine mammals to survey operations both in terms of distribution around the operation and behavior (i.e., calling behavior).

(5) Aerial Surveys

No manned aerial overflights are anticipated during the 2009 shallow hazards and marine survey activities. In the Chukchi Sea, all shallow hazards activities will be conducted beyond 113 km (70 mi) from shore and well away from coastal communities or nearshore concentrations of subsistence resources. The strudel scour survey will be conducted beyond 8 km (5 mi) from shore and will utilize sources of low energy and frequencies outside the hearing ranges of cetacean and pinniped species in the area. Additionally, the energy source to be utilized by Shell for the proposed survey operations are minimal by comμParison to larger scale seismic operations. It is not anticiμPated that manned overflights would accomplish any direct mitigative effects or monitoring purpose. Although no manned aerial surveys are planned as part of the 4MP, NMFS believes that the monitoring and mitigation measures proposed by Shell in its 4MP will be sufficient to reduce impacts on marine mammals to the lowest level practicable.

(6) Monitoring Plan Independent Peer Review

The MMPA requires that monitoring plans be independently peer reviewed ''where the proposed activity may affect the availability of a species or stock for taking for subsistence uses'' (16 U.S.C. 1371(a)(5)(D)(ii)(III)). Regarding this requirement, NMFS' implementing regulations state, ''Upon receipt of a complete monitoring plan, and at its discretion, [NMFS] will either submit the plan to members of a peer review panel for review or within 60 days of receipt of the proposed monitoring plan, schedule a workshop to review the plan'' (50 CFR 216.108(d)). Shell's 4MP was discussed by meeting participants at the Arctic Stakeholder Open-water Workshop in Anchorage, Alaska, on April 6–8, 2009. On April 24, 2009, NMFS received a letter from the AEWC, which noted that while there was discussion of the 4MP at the workshop, they do not believe that there was ample review of the plan and wanted to know NMFS' plans to hold an independent peer review in order to meet its statutory requirement.

NMFS has considered the AEWC's request and has decided to establish an independent peer review μPanel to review the 4MP for Shell's activities during the 2009/2010 open-water season. μPanelists are selected by NMFS, in consultation with the Marine Mammal Commission, AEWC and/or other Alaskan native organizations as appropriate, and the applicant. Selected panelists are experts who are not currently employed or contracted by either the affected Alaskan native organization or the applicant. NMFS plans for this independent peer review of the 4MP to occur during the comment period for this proposed IHA. After completion of the peer review, NMFS will consider all recommendations made by the panel, incorporate appropriate changes into the monitoring requirements of the IHA (if issued), and publish the panel's findings and

recommendations in the final IHA notice of issuance or denial document.

Reporting

SSV Report

A report on the preliminary results of the acoustic verification measurements, including as a minimum the measured 190-, 180-, and 160–dB (rms) radii of the airgun sources, will be submitted within 120 hr after collection and analysis of those measurements at the start of the field season. This report will specify the distances of the safety zones that were adopted for the survey.

Technical Reports

The results of the 2009 Shell vessel-based monitoring, including estimates of ''take'' by harassment, will be presented in the ''90–day'' and Final Technical reports, as required by NMFS under IHAs. Shell proposes that the Technical Reports will include: (1) summaries of monitoring effort (e.g., total hours, total distances, and marine mammal distribution through study period versus operational state, sea state, and other factors affecting visibility and detectability of marine mammals); (2) summaries of the occurrence of power-downs, shutdowns, ramp-ups, and ramp-up delays; (3) analyses of the effects of various factors, influencing detectability of marine mammals (e.g., sea state, number of observers, and fog/glare); (4) species composition, occurrence, and distribution of marine mammal sightings, including date, water depth, numbers, age/size/gender categories (if determinable), group sizes, and ice cover; (5) sighting rates of marine mammals versus operational state (and other variables that could affect detectability); (6) initial sighting distances versus operational state; (7) closest point of approach versus operational state; (8) observed behaviors and types of movements versus operational state; (9) numbers of sightings/individuals seen versus operational state; (10) distribution around the acoustic source vessel versus operational state; and (11) estimates of take by harassment. The take estimates will be calculated using two different methods to provide both minimum and maximum estimates. The minimum estimate will be based on the numbers of marine mammals directly seen within the relevant radii (160, 180, and 190 dB (rms)) by observers on the source vessel during survey activities. The maximum estimate will be calculated using densities of marine mammals determined for non-acoustic areas and times. These density estimates will be calculated from data collected during (a) vessel based surveys in non-operational areas, or (b) observations from the source vessel or supply boats during non-operational periods. The estimated densities in areas without data acquisition activity will be applied to the amount of area exposed to the relevant levels of sound to calculate the maximum number of animals potentially exposed or deflected. This report will be due 90 days after termination of the 2009 open-water season and will include the results from any seismic work conducted in the Chukchi/Beaufort Seas in 2009 under the previous IHA, which expires on August 19, 2009, or upon issuance of this proposed IHA.

Comprehensive Monitoring Reports

In November, 2007, Shell (in coordination and cooperation with other Arctic seismic IHA holders) released a final, peer-reviewed edition of the 2006 Joint Monitoring Program in the Chukchi and Beaufort Seas, July-November 2006 (LGL, 2007). This report is available on the NMFS Protected Resources website (see **ADDRESSES**). In March, 2009, Shell released a final, peer-reviewed edition of the Joint Monitoring Program in the Chukchi and Beaufort Seas, Open Water Seasons, 2006–2007 (Ireland *et al.*, 2009). This report is also available on the NMFS Protected Resources website (see **ADDRESSES**). A draft comprehensive report for 2008 (Funk *et al.*, 2009) was provided to NMFS and those attending the Arctic Stakeholder Open-water Workshop in Anchorage, Alaska, on April 6–8, 2009. The 2008 report provides data and analyses from a number of industry monitoring and research studies carried out in the Chukchi and Beaufort Seas during the 2008 open-water season with comparison to data collected in 2006 and 2007. Reviewers plan to provide comments on the 2008 report to Shell shortly. Once Shell is able to incorporate reviewer comments, the final 2008 report will be made available to the public.

Following the 2009 open-water season, a comprehensive report describing the acoustic and vessel-based monitoring programs will be prepared. The comprehensive report will describe the methods, results, conclusions and limitations of each of the individual data sets in detail. The report will also integrate (to the extent possible) the program into an assessment of 2009 industry activities and their imµPacts on marine mammals. The report will help to establish long term data sets that can assist with the evaluation of changes, if any, in the Chukchi Sea ecosystem. The report will attempt to provide a regional synthesis of available data on industry activity in offshore areas of northern Alaska that may influence marine mammal density, distribution, and behavior.

This report will consider data from many different sources including differing types of acoustic systems for data collection (net array and OBH systems) and vessel based observations. Collection of comparable data across the wide array of programs will help with the synthesis of information and allow integration of the data sets over a period of years. Data protocols for the acoustic operations will be similar to those used in 2006–2008 to facilitate this integration.

Endangered Species Act

NMFS previously consulted under section 7 of the ESA on the issuance of IHAs for seismic survey activities in the Beaufort and Chukchi Seas. In a Biological Opinion issued on July 17, 2008, NMFS concluded that the issuance of seismic survey permits by MMS and the issuance of the associated IHAs for seismic surveys are not likely to jeopardize the continued existence of threatened or endangered species (specifically the bowhead, humpback, and fin whales) under the jurisdiction of NMFS or destroy or adversely modify any designated critical habitat. The 2008 Biological Opinion takes into consideration all oil and gas related activities that are reasonably likely to occur, including exploratory (but not production) oil drilling activities. NMFS believes that Shell's proposed activities described and analyzed in this document for the 2009/2010 open-water season are adequately analyzed in the 2008 Biological Opinion. Therefore, NMFS does not plan to conduct a new section 7 consultation.

National Environmental Policy Act (NEPA)

NMFS is currently conducting an analysis, pursuant to NEPA, to determine whether or not this proposed activity may have a significant effect on the human environment. This analysis will be completed prior to the issuance or denial of this proposed IHA.

Preliminary Determinations

Based on the information provided in Shell's application, Shell's answers to the supplemental information request, this document, the 2006 and 2007 Final Comprehensive Reports, and the 2008 Draft Comprehensive Report, NMFS has preliminarily determined that the impact of Shell conducting its proposed

open-water marine survey program (site clearance and shallow hazards and strudel scour surveys) in the Chukchi Sea during the 2009/2010 open-water season may result, at worst, in a temporary modification in behavior (Level B Harassment) of small numbers of 12 species of marine mammals, will have no more than a negligible impact on the affected species or stocks, and will not have an unmitigable adverse impact on the availability of such species or stock for taking for subsistence purposes, provided the mitigation measures described previously in this document are implemented.

While the number of potential incidental harassment takes will depend on the distribution and abundance of marine mammals (which vary annually due to variable ice conditions and other factors) in the area of survey operations, the number of potential harassment takings is estimated to be small (less than one percent of any of the estimated population sizes) and has been mitigated to the lowest level practicable through incorporation of the measures mentioned previously in this document. NMFS anticipates the actual take of individuals to be lower than the numbers presented in the analysis because those numbers do not reflect either the implementation of the proposed mitigation measures or the fact that some animals will avoid the sound at levels lower than those expected to result in harassment.

In addition, no take by death and/or serious injury is anticipated, and the potential for temporary or permanent hearing impairment will be avoided through the incorporation of the mitigation and monitoring measures proposed earlier in this document. This determination is supported by the fact that: (1) given sufficient notice through slow ship speed and ramp-up of acoustic equipment, marine mammals are expected to move away from a sound source prior to it becoming potentially injurious; (2) TTS is unlikely to occur, especially in odontocetes and pinnipeds, until sound levels above 180 dB re 1 μPa (rms) and 190 dB re 1 μPa (rms), respectively, are reached; and (3) injurious levels of sound are only likely very close to the vessel (approximately 160 m (525 ft) for the 180 dB (rms) radius and 50 m (164 ft) for the 190 dB (rms) radius). No rookeries, mating grounds, areas of concentrated feeding, or other areas of special significance for marine mammals occur within or near the planned area of operations during the season of operations.

NMFS has preliminarily determined that Shell's proposed open-water marine survey program in the Chukchi Sea in 2009/2010 will not have an unmitigable adverse impact on the subsistence uses of bowhead whales and other marine mammals. This preliminary determination is supported by the information in this **Federal Register** Notice, including: (1) Survey activities will not begin prior to the closure of the spring bowhead hunt in Chukchi coastal villages; (2) Shell will closely coordinate with and avoid impacts to beluga whale hunts through subsistence advisors; (3) activities are scheduled to avoid the traditional subsistence beluga hunt, which annually occurs in July in the community of Point Lay; (4) Barrow is east of the proposed project area, so the animals will reach Barrow before entering the project area on their fall westward migration through the Beaufort and Chukchi Seas; (5) the fact that survey activities will occur more than 113 km (70 mi) or more from shore, and most cetaceans and pinnipeds are hunted much closer to the shore; and (6) that several of the mitigation and monitoring conditions proposed for the IHA (described earlier in this document) are designed to ensure that there will not be an unmitigable adverse impact on subsistence uses of marine mammals.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to authorize the take of marine mammals incidental to Shell's 2009/2010 open-water marine survey program in the Chukchi Sea, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: May 26, 2009.

James H. Lecky,

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

[FR Doc. E9–12659 Filed 5–29–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0097]

Federal Acquisition Regulation; Submission for OMB Review; Taxpayer Identification Number Information

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of reinstatement request for an information collection requirement regarding an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR), Regulatory Secretariat has submitted to the Office of Management and Budget (OMB) a request to review and approve a request to reinstate a previously approved information collection requirement concerning Taxpayer Identification Number Information. A request for public comments was published at 73 FR 20613 on April 16, 2008. No comments were received.

Public comments are particularly invited on: Whether this collection of information is necessary; whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before July 1, 2009.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: General Services Administration (GSA) Desk Officer, OMB, Room 10236, NEOB, Washington, DC 20503, and a copy to the General Services Administration, Regulatory Secretariat (VPR), 1800 F Street NW., Room 4041, Washington, DC 20405. Please cite OMB Control No. 9000–0097, Taxpayer Identification Number Information, in all correspondence.

FOR FURTHER INFORMATION CONTACT: Mr. Ernest Woodson, Procurement Analyst, Contract Policy Division, GSA, (202) 501–3775.

SUPPLEMENTARY INFORMATION:

A. Purpose

When the IRS issued its final regulations implementing section 6050M of the Tax Reform Act of 1986 (Pub. L. 99–514), the reporting requirements included the requirement to report certain modifications to contracts that were awarded before January 1, 1989, necessitating a revision to Subpart 4.9 of the FAR. As implemented by Section 6050M of the

Tax Reform Act of 1986 (Pub. L. 99–514), the reporting requirements included the requirement to report certain modifications to contracts that were awarded before January 1, 1989 and entered into on or after April 1, 1990.

In accordance with *31 U.S.C. 7701(c),* a contractor doing business with a Government agency is required to furnish its Tax Identification Number (TIN) to that agency. *31 U.S.C. 3325(d)* requires the Government to include, with each certified voucher prepared by the Government payment office and submitted to a disbursing official, the TIN of the contractor receiving payment under the voucher. The TIN may be used by the Government to collect and report on any delinquent amounts arising out of the contractor's relationship with the Government. The TIN is also required for Government reporting of certain contract information and payment information to the IRS.

B. Annual Reporting Burden

Respondents: 250,000.
Responses per Respondent: 2.
Total Responses: 500,000.
Hours per Response: .39.
Total Burden Hours: 195,000.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (VPR), 1800 F Street NW., Room 4041, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0097, Taxpayer Identification Number Information, in all correspondence.

Dated: May 22, 2009.

Edward Loeb,

Acting Director, Office of Acquisition Policy.

[FR Doc. E9–12585 Filed 5–29–09; 8:45 am]

BILLING CODE 6820–EP–P

FEDERAL COMMUNICATIONS COMMISSION

[MB Docket No. 08–187; FCC 09–43]

Impact of Arbitron Audience Ratings Measurements on Radio Broadcasters

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document seeks comment on issues relating to the commercial use of a radio audience measurement device, developed by Arbitron, Inc., known as the portable people meter (''PPM''). It asks about the effects of the PPM methodology on competition and diversity, whether it is sufficiently accurate and reliable to merit the Commission's continued reliance on it, and the Commission's jurisdiction to take action in this area should it find an adverse effect in any of these areas.

DATES: Comments are due July 1, 2009 and reply comments are due July 31, 2009.

FOR FURTHER INFORMATION CONTACT: Mania Baghdadi, Industry Analysis Division, Media Bureau, at (202) 418–2133, or Julie Salovaara, Industry Analysis Division, Media Bureau, at (202) 418–0783. Press inquiries should be directed to David Fiske at (202) 418–0513.

SUPPLEMENTARY INFORMATION: This is a summary of the Federal Communications Commission's Notice of Inquiry (the ''NOI'') in MB Docket No. 08–187; FCC 09–43, adopted May 15, 2009, and released May 18, 2009. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY–A257, Washington, DC 20554. These documents will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs*). The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. To request this document in accessible formats (computer diskettes, large print, audio recording and Braille), send an e-mail to *fcc504@fcc.gov* or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Summary of the Notice of Inquiry

1. Introduction: In this Notice of Inquiry (''NOI''), we seek comment on issues relating to the commercial use of a radio audience measurement device, developed by Arbitron, Inc. (''Arbitron''), known as the portable people meter, or ''PPM.'' Broadcasters, media organizations, and others have raised concerns about the use of the PPM and its potential impact on audience ratings of stations that air programming targeted to minority audiences, and consequently, on the financial viability of those stations. They claim that the current PPM methodology undercounts and misrepresents the number and loyalty of minority radio listeners. They assert that, because audience ratings affect advertising revenues, undercounting minority audiences could negatively affect the ability of these stations to compete for advertising revenues and to continue to offer local service to minority audiences. They express concern that such undercounting could particularly affect the ratings of local, urban-formatted radio stations that broadcast programming of interest to African-American and Hispanic audiences. This NOI investigates the impact of PPM methodology on the broadcast industry as well as whether the audience ratings data is sufficiently accurate and reliable to merit the Commission's own reliance on it in its rules, policies and procedures. According to its proponents, the PPM methodology represents a technological improvement in measuring radio listening. We have a strong interest in encouraging innovative advancements that lead to improved information and data. We seek information on whether and how the PPM technological changes adversely affect diversity on the airwaves as well as the integrity and reliability of the Commission's processes that rely on Arbitron ratings data. If there is an adverse impact, we seek comment on further steps the Commission can and should take to address these issues.

2. Sections 4(i) and 403 of the Communications Act of 1934, as amended (the ''Act'') gives the Commission broad authority to initiate inquiries such as this one. The Commission's authority to initiate investigations under Section 403 is not limited to adversarial proceedings involving allegations of wrongdoing. Section 403 broadly authorizes, inter alia, inquiries ''concerning which any question may arise under any of the provisions of this Act .* * *'' 47 U.S.C. 403. We have frequently issued Notices of Inquiry under Section 403 in non-adversarial settings to seek information and comment to determine whether we should take further regulatory action.

3. Requests that the Commission institute an inquiry have been made in several contexts. The FCC's Advisory Committee on Diversity for Communications in the Digital Age (''Diversity Committee'') has passed a resolution requesting a Commission investigation of Arbitron's PPM measurement system to determine whether the system is having or will have a detrimental and discriminatory effect upon stations targeting minority audiences. Noting that Arbitron is the only company that currently provides quantitative audience data for radio stations, the Committee states that the financial success of a radio broadcast station often depends upon demonstrating to potential advertisers that the station has a substantial audience of desirable consumers. According to the Diversity Committee,

Arbitron's use of an audience measurement service that may not accurately measure minority audiences could lead to ''irreparable'' financial harm to stations serving such audiences and, thus, lead to the loss of service that such stations provide to the public.

4. In addition, the PPM Coalition (''PPMC'') has filed an Emergency Petition for a Section 403 Inquiry (''PPMC Petition''), requesting that the Commission immediately commence a fact-finding inquiry into the current PPM methodology. Under the inquiry sought by PPMC, the Commission would use subpoenas for document production, conduct witness testimony under oath, and fashion appropriate protective orders as necessary to avoid disclosure of confidential information. PPMC and others that supported PPMC's request for a Commission investigation express concern that the PPM methodology has had a detrimental effect on the ratings measurements for urban- and Hispanic-formatted stations and state that this is due to the under-representation of minorities in the sample panels and a failure to distribute PPM devices within minority groups. PPMC alleges that the PPM sample is deficient because only five to six percent of the PPM sample is comprised of cell-phone-only households, while a significant and growing percentage of young adults and Hispanics and African-Americans live in cell-phone-only households. PPMC asserts that 19.3 percent of Hispanic households and 18.3 percent of African-American households are cell-phone-only, whereas 12.9 percent of non-Hispanic white households are cell-phone-only. Among other things, PPMC also complains that: (1) PPM has a 66 percent smaller sample size than the diary, often making it impossible to target age or gender subsets of minority audiences because standard industry metrics require at least 30 respondents in a cell to run ratings data; (2) PPM samples are not built using street addresses, and therefore fail to ensure statistically representative inclusion of cell-phone-only households; (3) young minorities are reluctant to carry visible PPMs; (3) Hispanic PPM recruitment methods skew toward English-dominant persons because potential panelists are identified by origin rather than by language; (4) PPM response and compliance rates fall below industry norms; (5) PPMs record exposure to radio signals, but they do not capture listener loyalty, which is high among minorities; (6) PPM reports provide less granular data in terms of geography; (7) PPM reports do not contain income data, country of origin data, or data that accounts sufficiently for language preferences; and (8) PPM panelists may be corrupted more easily by radio personnel because the PPM device often visibly identifies them and their expected participation is two years instead of the usual one-week participation in the diary system.

5. PPMC states that radio programmers are taking the preliminary PPM under-reporting of minority radio listening so seriously that programmers who can do so are already beginning to abandon formats that target minority audiences. PPMC and others are concerned that the stability of the radio industry is at stake because radio broadcasters rely on the sale of commercial advertising for their only revenue stream, and Arbitron's data has a direct impact on advertising sales. While PPMC concedes that Arbitron has indicated its willingness to re-examine its sampling methods and make improvements by 2010, it contends that those improvements would be ''far too little and far too late.'' According to PPMC, most advertisers are likely to accept Arbitron's assertions that PPM results are more accurate than diary results, and will rely on flawed PPM data.

6. New Jersey Broadcasters Association has alerted the Commission of the ''unique and urgent circumstances'' in the State, arguing that ''the PPM sampling process employed by Arbitron in New Jersey is suspect in its erratic deployment and intrinsic underrepresentation of the population'' of many New Jersey counties, specifically Monmouth, Ocean, Morris, and Atlantic. ''To demonstrate this fact, consider the disparity in PPM deployment in two adjacent New Jersey counties, Monmouth (pop. 588,000) and Middlesex (pop. 732,000). Arbitron deployed 347 PPMs in Middlesex County, but only 96 PPMs in Monmouth. This represents 261% greater PPM sample size in Middlesex County, which only has a 25% greater population! Likewise, Morris County (pop. 454,000) has only 87 PPMs collecting listenership data, while its next door neighbor Union County (pop. 480,000) has 260 PPMs; an almost 200% greater population. Ocean County (pop. 564,000) has no PPMs at all resulting in two different sampling methodologies being used in one New Jersey market.'' Letter from Paul S. Rotella, Esq., President & CEO, New Jersey Broadcasters Association, to Jonathan S. Adelstein, Commissioner, FCC (Jan. 28, 2009).

7. Arbitron opposes PPMC's Petition and challenges the Commission's jurisdiction and the availability of remedies it can offer. Arbitron challenges PPMC's assertion that the ratings of minority-oriented stations suffer when PPM methodology is used. Arbitron provides several examples where the rankings of such stations remained the same or improved when PPMs were used. Arbitron maintains that PPM samples effectively represent Blacks and Hispanics in the 18–34 age group, and across other factors such as geographic location and language preferences. Arbitron is also implementing improvements to PPM methodology, as discussed below. Allscope Media supports Arbitron, noting that a delay of PPM service will harm the radio industry. Arbitron is also supported by J.L. Media, Inc., which contends that the Commission should not get involved in this dispute because Arbitron is continuously improving PPM methodology and the Commission lacks precedent for such involvement.

8. *Background:* Arbitron is an international media and marketing research firm serving radio, television, cable, online radio, and out-of-home media as well as advertisers and advertising agencies in the United States and Europe. Arbitron's main businesses include measuring network and local market radio audiences in the United States; surveying the retail, media, and product patterns of local market consumers; and providing application software used for analyzing media audience and marketing information data. Stations and advertisers use these ratings to negotiate advertising prices. To provide service to local stations and local advertisers, Arbitron has delineated more than 300 local geographic markets (called Metro Survey Areas or Metros) based on radio stations' audience ratings. More than 60 percent of commercial radio stations and three-fourths of the U.S. population of at least 12 years of age reside in these radio markets. Arbitron publishes listening data on commercial radio stations that obtain a minimum audience share in the radio market.

9. These radio market definitions are considered the industry standard and are used by the Commission for purposes of applying its ownership rules and evaluating them periodically to determine whether they remain necessary in the public interest. In its quadrennial ownership review proceedings, the Commission relies on the information produced by Arbitron to define local radio markets for purposes of fulfilling its statutory obligation to evaluate the continued necessity of its local radio ownership rule as well as the cross-ownership rules. Moreover, the

Commission relies on Arbitron-defined radio Metro markets, where these exist, when it makes its determination whether a particular license application, transfer, merger, or acquisition complies with the local radio ownership rules.

10. For many years, Arbitron has relied on a diary-based audience measurement system. A diary is a small foldout, pamphlet-style journal in which diary keepers record the radio stations, satellite radio channels, or Internet radio stations they listen to during each day of the survey week. A diary keeper records the time of day, the location, and the start and stop times of each listening occasion. The diary also requests certain demographic, socioeconomic, and lifestyle characteristics. Arbitron contacts potential diary keepers by calling a sample of households across the country. The company places over five million calls every year to potential diary keepers for participation in the survey. On average, nearly 75 percent of those asked to do so consent to filling out a radio diary. Potential diary keepers are first contacted by telephone and then sent the survey via mail. Arbitron mails 2.6 million diaries to survey participants each year.

11. Arbitron has recently replaced its diary-based rating system in certain markets with the PPM system. According to Arbitron, the PPM is a mobile-phone-sized device that consumers wear throughout the day. The PPM detects inaudible identification codes that are embedded in the audio of certain programming to which the consumer is exposed. An encoder at the programming or distribution source inserts the inaudible identification codes. In addition, a station monitor is installed at the programming source to ensure audio content is encoded properly. At the end of each day, each survey participant places the PPM device in a base station to recharge the battery and to send collected codes to a household collection device known as a ''hub.'' The household hub collects the codes from all the base stations in the survey household and transmits them to Arbitron. Arbitron describes the PPM as an enhancement over the diary method because it relies on a passive measurement of actual exposure, rather than memory recall; it delivers more detailed data that can be utilized by program directors; and PPMs allow Arbitron to provide audience measurement for children ages 6 to 11 and cell-phone-only households.

12. Arbitron has indicated that it plans to replace its diary-based audience measurement system with the PPM in the top 50 radio markets by 2010. It has already implemented PPMs in 14 local markets: New York, Los Angeles, Chicago, San Francisco, Dallas-Ft. Worth, Houston, Atlanta, Philadelphia, Washington, DC, Detroit, Nassau-Suffolk, Middlesex-Somerset-Union, Riverside-San Bernardino and San Jose. According to Arbitron, these markets account for 51.7 percent of the estimated radio station revenue in the top 50 radio markets. As discussed below, Arbitron has committed to improving its PPM methodology and has taken steps to do so. Arbitron states that its has steadfastly demonstrated its willingness to work with all stakeholders, including advertisers, stations, the Media Rating Council (''MRC''), and the Commission to help bring the measurement of radio audiences into alignment with the measurement of audiences for competing media.

13. The MRC sets industry standards for audience measurement. These standards are designed to ensure reliability. Among other activities, MRC establishes and administers ''Minimum Standards'' for rating operations; performs accreditation of rating services on the basis of information submitted by these services; and conducts audits, through independent certified public accounting firms, of the activities of rating services. Arbitron reports that it has received MRC accreditation for its PPM services in the Houston and Riverside-San Bernardino markets. More generally, however, in his statement at the Commission's July 29, 2008 en banc hearing, George Ivie, MRC Executive Director and Chief Executive Officer, stated that MRC has ''important ongoing concerns'' about the implementation details of the PPM measurement system. Concerns and ongoing dialogue with Arbitron surround ''two key measurement issues: Response rates and panelist compliance with the PPM technique.'' In February 2008, MRC announced that its audit committee voted not to grant accreditation to the PPM service in the Philadelphia and New York PPM markets. MRC is currently reviewing the PPM services in Philadelphia and New York, as well as in a number of other major markets including Atlanta, Chicago, Dallas-Ft. Worth, Detroit, Los Angeles, San Francisco, and Washington, DC.

14. On July 8, 2008, the Chief of the Media Bureau wrote, separately, to Arbitron and MRC seeking a response to the concerns raised by minority and other broadcasters. Both Arbitron and MRC responded. The letters to Arbitron and MRC from the Bureau Chief, as well as Arbitron's and MRC's responses, will be included in the docket of this proceeding. MRC submitted several documents detailing various aspects of Arbitron's implementation of the PPM system and MRC's accreditation of it. While acknowledging that the PPM technology has the potential to be ''disruptive'' on a short term basis, Arbitron claimed that PPMs provide audience measurements that are superior to the diary method. It added that it is committed to working with minority and Spanish-language broadcasters regarding their concerns that the PPM method is having a disproportionate impact upon them and their audiences as reflected in decreases in their ratings. Arbitron detailed specific measures it takes with respect to Black, Hispanic and Spanish-dominant panelists to enhance their participation in PPM surveys, adding that the sample proportion of Blacks, Hispanics and young adults is higher, on average, for PPM service than it was for the diary service. Arbitron also asserted that broadcasters operating in markets where PPM methodology has been introduced are learning from the data and executing new programming and marketing strategies designed to optimize the ratings results for an electronic meter rather than a diary methodology.

15. The Attorneys General of New York, New Jersey, and Maryland have investigated Arbitron's PPM implementation in their respective states to assess whether the PPM methodology undercounts minority audiences. Earlier this year, Arbitron entered into separate settlement agreements with the three states and agreed to improve its sample participant recruitment methods. On January 7, 2009, the New York Attorney General and the New Jersey Attorney General announced separate settlement agreements with Arbitron, in which Arbitron agreed, among other things to: (1) Ensure a higher level of participation across racial demographics by increasing the recruitment of individuals who only use cell phones and by combining an address-based sampling methodology with telephone-based sampling; (2) make reasonable efforts to obtain MRC accreditation in those markets; (3) promote minority radio by funding advertising campaigns and by making monetary contributions to minority trade associations; and (4) make payments to the states to resolve the claims against it. In addition, Arbitron entered into an agreement with the Attorney General of Maryland on February 6, 2009, to improve its ratings methodology for the Washington, DC

and Baltimore radio markets. Arbitron agreed to: (1) Increase its recruitment of cell phone-only households; (2) recruit racial and ethnic minorities commensurate with the racial and ethnic composition of the geographic areas being surveyed, using home addresses and not just telephone numbers, to identify potential participants; (3) meet numerical measures of proportionality between Arbitron's sample results and the actual populations in those radio markets; and (4) provide additional information about the PPM sample results to broadcasters, advertisers, and other users of the data. Arbitron reports that it is successfully meeting its obligations under these agreements.

16. Arbitron has also committed to extending some of these improvements to all PPM markets. It confirmed in March 2009, that it has been implementing in all PPM markets a number of the key methodological enhancements that the company committed to in its agreements with the Attorneys General of New Jersey, New York and Maryland. Arbitron's methodology improvements for all PPM customers focus on four areas: (1) Cell-phone-only sampling; (2) address-based sampling; (3) in-tab compliance rates; and (4) response metrics. Arbitron promised to increase the sample target for cell-phone-only households in all PPM markets to an average of 15 percent by year-end 2010, and in the interim, raise the current target of 7.5 percent to 12.5 percent in PPM markets by the end of 2009. PPMC asserted that Arbitron's previous five to six percent cap on cell-phone-only households in its PPM samples under-sampled households with young adults and Hispanics and African-Americans, who are more likely than other demographics to use only cell phones. Based on data from 2007, PPMC stated that the percentage of cell-phone-only households is nearly 16 percent among all U.S. households, 19.3 percent for Hispanics, and 18.3 percent for African-Americans. In addition, Arbitron expressed its commitment to use address-based sampling for at least 10 percent of its sampling efforts by late 2009 and for at least 15 percent of its recruitment efforts by the end of December 2010 in all PPM markets. PPMC contends that address-based sampling increases the likelihood that cell-phone-only households are included. Furthermore, Arbitron claimed that all PPM customers will see greater transparency for more of the sample metrics in the Arbitron PPM survey research, including the distribution of sample by zip code and by cell phone status. PPMC argued that broadcasters need to know ratings by zip codes in order to tailor program schedules and advertising schedules to advertisers that serve geographically discrete minority communities. Arbitron also stated that it will continue to share with all customers any current and future findings of the impact of nonresponse on the PPM service. PPMC argues that the fewer people who agree to participate in a random sample, the less representative the sample is.

17. In addition, Arbitron has created a training program, called ''Feet on the Street,'' which is designed specifically to reach out to young African-American and Hispanic respondents in Arbitron PPM panels to help them improve their use of the meters. If such a respondent has not demonstrated good habits of carrying the meter within the first eight days of being on a PPM panel, a bilingual Arbitron representative will meet with him in person within his first 28 days on the panel, attempt to show him how to use the meter, and provide incentives to use the meter properly. Arbitron states that the program is scheduled to have bilingual representatives ''knocking on the doors'' of newly-recruited Hispanics and African-Americans aged 18–34 in the top ten PPM markets by the end of April 2009. Arbitron reported that the program's pilot tests in April 2008 in New York and Philadelphia resulted in double digit gains in the in-tab rates of young African-Americans and Hispanics and a decreased turnover rate. Arbitron therefore anticipates that the program will improve the representation of these groups on its PPM panels.

18. *Discussion and Request for Comment:* Broadcasters, particularly minority broadcasters, have raised serious concerns that the PPM methodology is flawed and that its undercounting of minority audiences will harm diversity and competition by harming the revenues of minority and urban-formatted broadcasters. National Association of Black Owned Broadcasters (''NABOB'') Executive Director James L. Winston, in testimony at the Commission en banc hearing, indicated that the financial well-being of minority owned stations is dependent on their ability to generate advertising revenue based on audience shares, as measured by Arbitron. According to Winston, the PPM methodology is critically flawed, resulting in a bias against reporting of minority audiences and potentially jeopardizing the viability of minority stations. Specifically, Winston pointed to PPM test data from New York, Chicago, and Los Angeles that revealed a decline in average quarter hour (AQH) ratings and market rank for virtually all of the stations serving African-American and Hispanic communities. According to Winston, some of the concerns with the PPM are attributable to Arbitron's deficiencies in the recruitment, retention, and participation of young African-Americans and Hispanics in the sample panel. In addition, NABOB asserts that MRC's PPM accreditation process may have uncovered additional factors that impact the reliability of the ratings computed for minority-owned broadcast stations.

19. We seek comment and empirical evidence with respect to the PPM methodology and its effect on minority and urban-formatted station revenues in markets where PPMs are currently being used. Commenters should describe any changes or projected changes in program service to their local communities as a result of lowered advertising sales revenue based on a decline in audience ratings as measured by PPMs. What has been the experience in other radio markets where the PPM methodology is being used? Do PPMs measure active and sporadic listening in the same manner and, if not, what impact does the difference in treatment have on ratings? Are these concerns that the Commission can or should address?

20. We also seek information concerning Arbitron's sampling methods to determine the impact on the radio market of commercialization of PPMs, particularly with respect to the shift to collecting audience data by PPMs rather than by diaries. Broadcasters and others have raised concerns that the samples for the electronic data collection may produce inaccurate estimates, particularly in some demographic groups and in certain states like New Jersey. Arbitron, on the other hand, defends the PPM methodology, asserting that the sampling approaches used for PPMs and diaries are essentially the same. Further, as noted above, Arbitron has claimed that the PPM methodology is superior to diary ratings in measuring listening. We have a strong interest in encouraging technological innovation and do not wish to inhibit the introduction of a new methodology that represents a significant improvement. Accordingly, we invite comment as to whether the PPM methodology produces ratings that are more accurate than diary ratings.

21. Reliable audience ratings are important to determine critical demographic information about listeners, which radio stations compete for the same listeners, and how many listeners each radio station attracts according to specific demographic

characteristics. This information is used by stations and potential advertisers to develop station-specific advertising strategies. With these concerns in mind, we seek comment on the issues raised regarding Arbitron's sampling, particularly samples selected for deployment of PPMs. Specifically we seek comment on the issues raised in several analyses of the implementation of PPMs in Houston, Philadelphia, New York, and any other markets in which PPMs are being used. We seek comment on allegations that the sampling methodology undercounts and misrepresents audience sizes, particularly minority audiences. Are these allegations valid? If so, we seek comment on means that could be employed to correct the problems to ensure that the reported audience ratings accurately reflect actual listening. We also seek comment on the difference in ratings between markets where an address database was used to select the sample and markets where samples were chosen using telephone-based surveys. Could ratings changes have resulted from a flawed sample selection process? Are cell-phone-only households underrepresented, as some allege, and if so, what is the effect of the alleged undersampling of cell-phone-only households? Does this skew the results and, if so, how? Is there a disparity, as PPMC alleges, between minority and non-minority groups in terms of cell-phone-only usage, and if so, to what extent? Commenters are invited to provide statistics on current cell-phone-only use in the United States. How should we assess Arbitron's level of cell-phone-only households in its panel samples in comparison to these statistics? What changes could be made to improve sample selection to deal with alleged problems? We seek comment on the suggestion of an Arbitron executive that differential compensation between demographic groups could be useful to improve the size of underrepresented demographic groups. We further seek comment on the likely difference in results between the diary and PPM sampling methods, such as the effect of the alleged undersampling of demographic subgroups on the resulting ratings data and the ability to determine the audience of radio stations targeting specific demographic groups (e.g., African-American women ages 18–34). We also request comment on allegations that PPM response rates are below suggested averages and that Arbitron's failure to raise the average response rate is a factor in its failure to receive accreditation for the PPM surveys. What could be done, and what is being done, to increase response rates? The PPMC observes that ratings by zip code are important for programming and sales operations, and also notes that country of origin is often a significant factor in format selection for Spanish radio. We seek comment on the lack of zip code and country of origin data to accompany PPM ratings. Will this impair stations' and advertisers' ability to assess the accuracy of the results? We also seek comment on the collection of data on listeners aged 6 to 11 years old and whether the sample from this age range should be reallocated to the 12 and over age groups.

22. We note that Arbitron has reached settlements regarding its PPM methodologies in New York, New Jersey and Maryland, has adopted improvements to the methodology, and has committed to continuing to improve its PPM methodology. Have these improvements resolved the problems in whole or in part? Are the commitments made by Arbitron to improve the PPM methodology in the settlement markets and voluntarily in others sufficient to cure the problems cited by commenters? Are these improvements consistent with MRC's standards for accreditation?

23. Finally, we seek comment on the importance and adequacy of MRC accreditation in ensuring the integrity of the sampling methodology and the resulting audience measurements. We also seek information on the status of Arbitron's MRC accreditation applications and any objections, problems or concerns that have been raised regarding them.

24. *Use of Arbitron Data by the Commission:* The Commission's local multiple ownership rules limit the number of radio and television stations one entity may own in a local market, and they also limit the cross-ownership of radio stations, television stations and/or newspapers in the same geographic market. *See* 47 CFR 73.3555. The local radio ownership rule limits the number of radio stations one entity can own within a local radio market. *See* 47 CFR 73.3555(a). The Commission must define a radio market in order to determine whether license transfers, mergers and acquisitions comply with the numerical limits of the local radio ownership rule. The Commission relies on radio Metro markets, defined by Arbitron, to determine compliance for stations located within, or garnering sufficient listeners located within, the geographically defined Arbitron radio Metro markets. *2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* 68 FR 46286, 46308 (2003), *aff'd in part and remanded in part, Prometheus*, 373 F.3d at 435, stay modified on rehearing, No. 03–3388 (3d Cir. Sept. 3, 2004), cert. denied, 545 U.S. 1123 (2005). For markets geographically outside Arbitron-defined Metros, the Commission relies on signal contours to determine compliance. As described earlier, Arbitron's delineation of radio markets, which is based on its audience measurement data, is the industry standard.

25. How do the concerns regarding the reliability of the PPM methodology implicate the Commission's use of Arbitron data in reviewing transactions to determine compliance with the Commission's broadcast ownership rules? Do the alleged declines in audience ratings for some stations when PPMs are utilized impact radio market definitions or Arbitron's designation of radio Metro markets? Do issues regarding the reliability of Arbitron's PPMs raise concerns about the Commission's reliance on Arbitron radio markets to determine compliance with the Commission's local ownership rules? Are there any other more reliable data available on which the Commission should rely?

26. In addition, the Commission relies on the information produced by Arbitron to fulfill its statutory obligation to evaluate the continued necessity of its local radio ownership rule as well as the cross-ownership rules. The Commission is statutorily required to quadrennially review its multiple ownership rules to determine whether the rules remain necessary in the public interest. The Commission is required to repeal or modify any regulation it determines to be no longer in the public interest. In past reviews, the Commission has evaluated the performance of media markets as part of its effort to determine whether the multiple ownership rules remain necessary in the public interest. Commenters are asked to address the integrity of future Commission analyses or trend reporting using Arbitron data derived from PPM measurements. Would the Commission's use of Arbitron data based on PPM data affect its policies and rules regarding media ownership, ownership diversity, and competition? If so, how would use of PPM data impact the reliability of Commission analysis and decision-making? Should licensees be able to rely on ratings obtained through the use of PPM methodology for Commission purposes, such as in demonstrating compliance with local ownership rules

in transfer and assignment applications? Should MRC accreditation be required before licensees can rely on PPM methodology in filings with the Commission?

27. *Commission Action:* PPMC supports its argument for Commission jurisdiction in this matter by noting that the Commission relies upon the accuracy of Arbitron's market definitions as a central component of its multiple ownership analysis. PPMC contends that the Commission has ample authority to seek information about the validity and accuracy of Arbitron's ratings data that may potentially affect the formulation of the Commission's own rules and regulations. PPMC asserts that Section 403 provides the Commission authority to conduct an investigation into PPMs. Arbitron opposes this investigation, stating that the Commission lacks jurisdiction and relevant expertise and cannot address the role of advertisers and the impact of their decisions regarding the stations on which they decide to purchase advertising time. Bonneville International Corporation and other broadcasters support Arbitron's position that the Commission lacks jurisdiction to review PPMC's claims and initiate an inquiry.

28. Commenters that advocate particular actions should specifically address the Commission's statutory authority to take such actions. Does the Commission have jurisdiction to require the submission of information concerning PPM methodology or to regulate PPM methodology? If so, what is the basis of that jurisdiction? Is the Commission's reliance in its rules and procedures on Arbitron ratings data and market definitions a sufficient basis to require submission of the data necessary to evaluate their reliability? Does the impact of Arbitron ratings data on diversity and competition in the radio industry, which the Commission is charged with fostering, provide a basis for the Commission to require submission of information concerning the new ratings methodology or to take other action? Is the operation of PPMs so intertwined with a type of broadcasting transmission that the Commission's jurisdiction extends to this matter? Arbitron provides participating broadcasters encoding equipment at no cost, which broadcasters use to embed a unique inaudible code into their audio signals. The PPMs receive and record these codes. Does the transmission of encoded broadcast signals to Arbitron's PPMs, made possible with Arbitron's encoding equipment, bring the operation and use of PPMs under the Commission's oversight? If so, what statutory provisions would govern the Commission's jurisdiction over PPMs?

29. If the Commission has jurisdiction over this matter, we also seek comment on the specific actions, if any, the Commission should take in response to the information it receives in this investigation. Should the Commission modify its own reliance on Arbitron market data in applying its multiple ownership rules if it determines that PPM data are unreliable? Commenters are also invited to suggest any steps that they believe would be useful in the conduct of the Commission's investigation.

30. *Comment Filing Procedures:* Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://www.fcc.gov/cgb/ecfs/* or the Federal eRulemaking Portal: *http://www.regulations.gov*. Filers should follow the instructions provided on the Web site for submitting comments. For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to *ecfs@fcc.gov*, and include the following words in the body of the message, ''get form.'' A sample form and directions will be sent in response.
- *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. 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 we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, 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. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building.
- 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.

31. *People with Disabilities:* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

32. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY–A257, Washington, DC 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.

33. *Ex Parte Information:* The NOI is an exempt proceeding. Ex parte presentations regarding the issues addressed in the NOI are permitted, except during the Sunshine Agenda period, and need not be disclosed. *See* 47 CFR 1.1204(b)(1).

34. The Media Bureau contact is Julie Salovaara at (202) 418–0783. Press inquiries should be directed to David Fiske at (202) 418–0513.

35. *Ordering Clauses:* Accordingly, *it is ordered*, pursuant to the authority contained in Sections 1, 4(i) & (j), and 403 of the Communications Act of 1934, 47 U.S.C 151, 154(i) & (j), and 403, that this *Notice of Inquiry* is adopted.

36. It is further ordered that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this *Notice of Inquiry*, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E9–12638 Filed 5–29–09; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Sunshine Act Meeting; FCC To Hold Open Commission Meeting Wednesday, June 3, 2009

The Federal Communications Commission will hold an Open Meeting on Wednesday, June 3, 2009, which is scheduled to commence at 9:30 a.m. in Room TW–C305, at 445 12th Street, SW., Washington, DC.

• The meeting will include presentations and discussion by agency officials as well as industry, consumer groups and others involved in the Digital Television Transition. A list of presenters will be released prior to the meeting.

• Congress has set June 12, 2009, as the deadline for terminating full-power analog television broadcasting in the United States. The purpose of the meeting is to educate and inform the Commission and the public about the final preparations for the digital television transition, including the availability of consumer support and hands-on assistance for those who may need it.

The meeting site is fully accessible to people using wheelchairs or other mobility aids. Sign language interpreters, open captioning, and assistive listening devices will be provided on site. Other reasonable accommodations for people with disabilities are available upon request. Include a description of the accommodation you will need. Also include a way we can contact you if we need more information. Last minute requests will be accepted, but may be impossible to fill. Send an e-mail to: *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

Additional information concerning this meeting may be obtained from Audrey Spivack or David Fiske, Office of Media Relations, (202) 418–0500; TTY 1–888–835–5322. Audio/Video coverage of the meeting will be broadcast live with open captioning over the Internet from the FCC's Audio/Video Events Web page at *http://www.fcc.gov/realaudio.*

For a fee this meeting can be viewed live over George Mason University's Capitol Connection. The Capitol Connection also will carry the meeting live via the Internet. To purchase these services call (703) 993–3100 or go to *http://www.capitolconnection.gmu.edu.*

Copies of materials adopted at this meeting can be purchased from the FCC's duplicating contractor, Best Copy and Printing, Inc. (202) 488–5300; Fax (202) 488–5563; TTY (202) 488–5562. These copies are available in paper format and alternative media, including large print/type; digital disk; and audio and video tape. Best Copy and Printing, Inc. may be reached by e-mail at *FCC@BCPIWEB.com.*

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E9–12771 Filed 5–28–09; 4:15 pm]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of a Matter To Be Added to the Agenda for Consideration at an Agency Meeting

Pursuant to the provisions of the ''Government in the Sunshine Act'' (5 U.S.C. 552b), notice is hereby given that the following matter will be added to the ''summary agenda'' for consideration at the open meeting of the Board of Directors of the Federal Deposit Insurance Corporation scheduled to be held at 10 a.m. on Friday, May 29, 2009, in the Board Room on the sixth floor of the FDIC Building located at 550—17th Street, NW., Washington, DC:

Memorandum and resolutions re: Honoring Employees with 35 Years of Federal Service.

This Board meeting will be Webcast live via the Internet and subsequently made available on-demand approximately one week after the event. Visit *http://www.vodium.com/goto/fdic/boardmeetings.asp* to view the event. If you need any technical assistance, please visit our Video Help page at: *http://www.fdic.gov/video.html.*

The FDIC will provide attendees with auxiliary aids (*e.g.,* sign language interpretation) required for this meeting. Those attendees needing such assistance should call (703) 562–6067 (Voice or TTY), to make necessary arrangements.

Requests for further information concerning the meeting may be directed to Mr. Robert E. Feldman, Executive Secretary of the Corporation, at (202) 898–7043.

Dated: May 28, 2009.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. E9–12731 Filed 5–28–09; 4:15 pm]

BILLING CODE P

GENERAL SERVICES ADMINISTRATION

[OMB Control No. 3090–0112]

Submission for OMB Review; Federal Management Regulation; GSA Form 3040, State Agency Monthly Donation Report of Surplus Property

AGENCY: Federal Acquisition Service, GSA.

ACTION: Notice of request for comments regarding a renewal to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the General Services Administration will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement regarding GSA Form 3040, State Agency Monthly Donation Report of Surplus Property. The clearance currently expires on July 31, 2009.

Public comments are particularly invited on: Whether this collection of information is necessary and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate and based on valid assumptions and methodology; and ways to enhance the quality, utility, and clarity of the information to be collected.

DATES: Submit comments on or before: July 1, 2009.

FOR FURTHER INFORMATION CONTACT: Joyce Spalding, Federal Acquisition Service, GSA at telephone (703) 605–2888 or via e-mail to *joyce.spalding@gsa.gov.*

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the Regulatory Secretariat (VPR), General Services Administration, 1800 F Street, NW., Room 4041, Washington, DC 20405. Please cite OMB Control No. 3090–0112, GSA Form 3040, State Agency Monthly Donation Report of Surplus Personal Property, in all correspondence.

SUPPLEMENTARY INFORMATION:

A. Purpose

This report complies with Public Law 94–519, which requires annual reports

of donations of personal property to public agencies for use in carrying out such purposes as conservation, economic development, education, parks and recreation, public health, and public safety.

B. Annual Reporting Burden

Respondents: 55.
Responses per Respondent: 4.
Total Responses: 220.
Hours per Response: 1.5.
Total Burden Hours: 330.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 3090–0112, GSA Form 3040, State Agency Monthly Donation Report of Surplus Personal Property, in all correspondence.

Dated: May 20, 2009.

Casey Coleman,

Chief Information Officer.

[FR Doc. E9–12586 Filed 5–29–09; 8:45 am]

BILLING CODE 6820–34–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Toxicology Program (NTP); NTP Interagency Center for the Evaluation of Alternative Toxicological Methods (NICEATM); Independent Scientific Peer Review Panel Report: Updated Validation Status of New Versions and Applications of the Murine Local Lymph Node Assay: A Test Method for Assessing the Allergic Contact Dermatitis Potential of Chemicals and Products: Notice of Availability and Request for Public Comments

AGENCY: National Institute of Environmental Health Sciences (NIEHS), National Institutes of Health (NIH).

ACTION: Request for comments.

SUMMARY: NICEATM, in collaboration with the Interagency Coordinating Committee on the Validation of Alternative Methods (ICCVAM), convened an independent, international, scientific peer review panel (hereafter, Panel) on April 28–29, 2009, to evaluate three non-radioactive modified versions and new applications for the Murine Local Lymph Node Assay (LLNA). The LLNA is an alternative test method that can be used to determine the allergic contact dermatitis potential of chemicals and products. The Panel report from this meeting is now available. The report contains (1) the Panel's evaluation of the updated validation status of the methods and (2) the Panel's comments on the updated draft ICCVAM test method recommendations. NICEATM invites public comment on the Panel's report. The report is available on the NICEATM–ICCVAM Web site at *http://iccvam.niehs.nih.gov/docs/immunotox_docs/LLNAPRPRept2009.pdf* or by contacting NICEATM at the address given below.

DATES: Written comments on the Panel report should be received by July 15, 2009.

ADDRESSES: Comments should be submitted preferably electronically via the NICEATM–ICCVAM Web site at *http://iccvam.niehs.nih.gov/contact/FR_pubcomment.htm*. Comments can also be submitted by e-mail to *niceatm@niehs.nih.gov*. Written comments can be sent by mail or fax to Dr. William S. Stokes, Director, NICEATM, NIEHS, P.O. Box 12233, *Mail Stop:* K2–16, Research Triangle Park, NC 27709; (fax) 919–541–0947. *Courier address:* NIEHS, NICEATM, 530 Davis Drive, Room 2035, Durham, NC 27713.

FOR FURTHER INFORMATION CONTACT: Dr. William S. Stokes (telephone) 919–541–2384, (fax) 919–541–0947 and (e-mail) *niceatm@niehs.nih.gov*.

SUPPLEMENTARY INFORMATION:

Background

In January 2007, the Consumer Product Safety Commission submitted a nomination to NICEATM and ICCVAM to assess the validation status of (1) the use of the LLNA to determine potency for hazard classification purposes, (2) LLNA protocols using non-radioactive procedures, (3) the LLNA limit dose procedure, and (4) the use of the LLNA to test mixtures, aqueous solutions, and metals (*i.e.*, an updated assessment of the applicability domain of the LLNA). In June 2007, the Scientific Advisory Committee on Alternative Toxicological Methods (SACATM) endorsed these activities as high priorities for ICCVAM. NICEATM, on behalf of ICCVAM, also sought input from the public on these activities and requested data from studies using the LLNA or modified versions of the LLNA (72 FR 27815). After considering all comments received, ICCVAM endorsed carrying out these activities as high priorities. ICCVAM also developed draft LLNA performance standards to facilitate evaluation of modified LLNA protocols that are functionally and mechanistically similar to the traditional LLNA. These draft LLNA performance standards were made public and comments were requested in September 2007 (72 FR 52130).

ICCVAM and NICEATM prepared draft background review documents (BRDs) that provided comprehensive reviews of available data and relevant information for each of the modifications and new applications of the LLNA. ICCVAM also developed draft test method recommendations regarding the proposed usefulness and limitations, standardized protocols, and future studies. NICEATM announced availability of the draft BRDs and draft recommendations for public comment and the public peer review meeting in January 2008 (73 FR 1360).

The Panel met in public session on March 4–6, 2008, to review these topics, and their report was made available in May 2008 (73 FR 29136). The draft BRDs and draft test method recommendations, the draft ICCVAM LLNA test method performance standards, the Panel's report, and all public comments were made available to SACATM for comment at their meeting on June 18–19, 2008 (73 FR 25754).

As a result of additional data received by ICCVAM subsequent to the March 2008 Panel meeting, the draft BRDs for the following were updated:

- The validation status of three modified LLNA test method protocols that do not require the use of radioactive substances.
- The use of the LLNA for testing pesticide formulations, other products, and aqueous solutions.

Second Meeting of the Peer Review Panel

The Panel met again in public session on April 28–29, 2009 (74 FR 8974). The Panel reviewed the revised draft ICCVAM documents for completeness, errors, and omissions of any existing relevant data or information. The Panel evaluated the information in the revised draft documents to determine the extent to which each of the applicable criteria for validation and acceptance of toxicological test methods (ICCVAM, 2003) had been appropriately addressed. The Panel then considered the ICCVAM draft recommendations for test method uses and limitations, proposed standardized protocol, proposed plans for development of test method performance standards, and proposed additional studies, and commented on the extent that the recommendations were supported by the information provided in the draft BRDs.

Availability of the Peer Panel Report

The Panel's conclusions and recommendations are detailed in the

Independent Scientific Peer Review Panel Report: Updated Validation Status of New Versions and Applications of the Murine Local Lymph Node Assay: A Test Method for Assessing the Allergic Contact Dermatitis Potential of Chemicals and Products (available at *http://iccvam.niehs.nih.gov/docs/immunotox_docs/LLNAPRPRept2009.pdf*). The revised draft documents reviewed by the Panel and the draft ICCVAM test method recommendations are available at *http://iccvam.niehs.nih.gov/methods/immunotox/llna_PeerPanel.htm*.

Request for Public Comments

NICEATM invites the submission of written comments on the Panel's report. When submitting written comments, please refer to this **Federal Register** notice and include appropriate contact information (name, affiliation, mailing address, phone, fax, e-mail, and sponsoring organization, if applicable). All comments received will be made publicly available via the NICEATM–ICCVAM Web site at *http://iccvam.niehs.nih.gov/methods/immunotox/llna_PeerPanel.htm*. In addition, there will be an opportunity for oral public comments on the Panel's report during an upcoming meeting of SACATM scheduled for June 25–26, 2009 (74 FR 19562). Information concerning the SACATM meeting is available at *http://ntp.niehs.nih.gov/go/7441*. ICCVAM will consider the Panel report along with SACATM and public comments when finalizing test method recommendations. An ICCVAM test method evaluation report, which will include the final ICCVAM recommendations, will be forwarded to relevant Federal agencies for their consideration. The evaluation report will also be available to the public on the NICEATM–ICCVAM Web site at *http://iccvam.niehs.nih.gov/methods/immunotox/llna.htm* and by request from NICEATM (see **ADDRESSES** above).

Background Information on ICCVAM, NICEATM, and SACATM

ICCVAM is an interagency committee composed of representatives from 15 Federal regulatory and research agencies that use, generate, or disseminate toxicological information. ICCVAM conducts technical evaluations of new, revised, and alternative methods with regulatory applicability and promotes the scientific validation and regulatory acceptance of toxicological test methods that more accurately assess the safety and hazards of chemicals and products and that refine, reduce, and replace animal use. The ICCVAM Authorization Act of 2000 (42 U.S.C. 285*l*–3) established ICCVAM as a permanent interagency committee of the NIEHS under NICEATM. NICEATM administers ICCVAM and provides scientific and operational support for ICCVAM-related activities. NICEATM and ICCVAM work collaboratively to evaluate new and improved test methods applicable to the needs of U.S. Federal agencies. Additional information about ICCVAM and NICEATM can be found on their Web site (*http://iccvam.niehs.nih.gov*).

SACATM was established January 9, 2002, and is composed of scientists from the public and private sectors (67 FR 11358). SACATM provides advice to the Director of the NIEHS, ICCVAM, and NICEATM regarding the statutorily mandated duties of ICCVAM and activities of NICEATM. Additional information about SACATM, including the charter, roster, and records of past meetings, can be found at *http://ntp.niehs.nih.gov/* see ''Advisory Board & Committees'' (or directly at *http://ntp.niehs.nih.gov/go/167*).

Reference

ICCVAM. 2003. ICCVAM Guidelines for the Nomination and Submission of New, Revised, and Alternative Test Methods. NIH Publication No. 03–4508. Research Triangle Park, NC: NIEHS. Available at: *http://iccvam.niehs.nih.gov.*

Dated: May 19, 2009.

John R. Bucher,

Associate Director, NTP.

[FR Doc. E9–12360 Filed 5–29–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission for OMB Review; Comment Request; Survey of NHLBI Constituents' Health Information Needs and Preferred Formats

Summary: Under the provisions of Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Heart, Lung and Blood Institute (NHLBI), the National Institutes of Health (NIH) has submitted to the Office of Management and Budget (OMB) a request for review and approval of the information collection listed below. This proposed information collection was previously published in the **Federal Register** on March 19, 2009, pages 11736–11737 and allowed 60 days for public comment. No public comments were received. The purpose of this notice is to allow an additional 30 days for public comment. The National Institutes of Health may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

Proposed Collection: Title: Survey of NHLBI Constituents' Health Information Needs and Preferred Formats. *Type of Information Collection Request:* NEW. *Need and Use of Information Collection:* The purpose of this survey is to obtain information from NHLBI constituents (health professionals, patients and their families, and the general public) for the purpose of evaluating their health information and education needs and format preferences. The Consumer Services Team (CST) will use the data collected in this survey to create a 3-year Strategic Plan. The findings from the survey, described in the Strategic Plan, will be used to develop new health information materials for NHLBI constituents and to revise materials currently in the Institute's portfolio. *Frequency of Response:* Once every 3 years. *Affected Public:* Individuals. *Type of Respondents:* Individuals who have been consumers of NHLBI information within the past 3 years. The annual reporting burden is as follows: *Estimated Number of Respondents:* 2,450; *Estimated Number of Responses per Respondent:* 1; *Average Burden Hours per Response:* 0.2; and *Estimated Total Annual Burden Hours Requested:* 162. The annualized cost to respondents is estimated at: $3,518.62. There are no Capital Costs, Operating Costs and/or Maintenance Costs to report.

Type of respondents	Estimated number of respondents	Estimated number of responses per respondent	Average burden hours per response	Estimated total annual burden hours requested
General Public	1,075	0.33	0.2	71
Private Companies	332	0.33	0.2	22

Type of respondents	Estimated number of respondents	Estimated number of responses per respondent	Average burden hours per response	Estimated total annual burden hours requested
Public Sector Groups	332	0.33	0.2	22
Health Professionals	711	0.33	0.2	47
Totals	2,450			162

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.

Direct Comments to OMB: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the: Office of Management and Budget, Office of Regulatory Affairs, *OIRA_submission@omb.eop.gov* or by fax to 202–395–6974, *Attention:* Desk Officer for NIH. To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Dr. Ann M. Taubenheim, Principal Investigator, National Heart, Lung, and Blood Institute, Office of Communications and Legislative Activities, NIH, 31 Center Drive, Building 31, Room 4A10, Bethesda, MD 21045, or call non-toll-free number 301–496–4236 or e-mail your request, including your address, to *taubenha@nhlbi.nih.gov*.

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 30 days of the date of this publication.

Dated: May 22, 2009.

Ann M. Taubenheim,

Principal Investigator, NHLBI, National Institutes of Health.

[FR Doc. E9–12604 Filed 5–29–09; 8:45 am]

BILLING CODE 4140–10–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0220]

Agency Information Collection Activities; Proposed Collection; Comment Request; Experimental Study of Nutrition Symbols on Food Packages

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the Experimental Study of Nutrition Symbols on Food Packages.

DATES: Submit written or electronic comments on the collection of information by July 31, 2009.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Jonna Capezzuto, Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3794.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Experimental Study of Nutrition Symbols on Food Packages

FDA has been following the emergence of front-of-package nutrition symbols in the marketplace. These symbols are associated with programs from sources including food manufacturers, retailers, and third party organizations (e.g., trade and health organizations). The symbols are intended to assist consumer choice by providing simplified and easily-accessible information on the nutritional attributes of a food product. Relevant and nonproprietary information about the effects of nutrition symbols on consumers, however, is limited (see, for example, Feunekes et al., 2008; ''FDA Comments on Symbols Public Hearing and Current Plans for Addressing Issues,'' Docket

No. FDA–2007–N–0198).[1] [2] Therefore, FDA is proposing to conduct an experimental study to assess quantitative consumer reactions to front-of-package nutrition symbols.

FDA conducts research and educational and public information programs relating to food safety under its broad statutory authority, set forth in section 903(b)(2) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 393 (b)(2)), to protect the public health by ensuring that foods are ''safe, wholesome, sanitary, and properly labeled,'' and in section 903(d)(2)(C) (21 U.S.C. 393 (d)(2)(C)), to conduct research relating to foods, drugs, cosmetics and devices in carrying out the act.

The purpose of the study is to help enhance FDA's understanding of consumer understanding and use of a selected sample of nutrition symbols in the domestic marketplace. The study is part of the agency's continuing effort to enable consumers to make informed dietary choices and construct healthful diets.

The proposed experimental study will use a Web-based survey to collect information from a sample of adult members in an online consumer panel established by a contractor. The study plans to randomly assign each of 2,400 participants to view a label from a set of food labels that vary in the presence and type of symbol, the type of food product, and the quality of nutritional attributes of the product. The study plans to make the mandatory Nutrition Facts label available to all participants. The study will focus on the following types of consumer reaction: (1) Judgments about a food product in terms of its nutritional attributes, overall healthfulness, health benefits, and other characteristics such as taste; (2) judgments about a label in terms of its credibility in conveying the product's nutritional attributes and helpfulness in product choices; (3) identification of the more nutritious product in a pair of products; and (4) impact of the symbol on the use of the Nutrition Facts label. To help understand consumer reactions, the study will also collect information on participants' background, including but not limited to consumption and perceptions of food products, nutrition attitudes and practice, food label use, health literacy, and health status.

In addition, the study will conduct a separate face-to-face eye-tracking examination using a separate sample of 30 adult consumers to explore their label viewing patterns when they are asked to judge product attributes and to compare products. Participants will be selected from a commercial database of consumers.

The study results will be used to help the agency in its continuing evaluation of issues related to the use of nutrition symbols in food labeling. The results of the experimental study will not be used to develop population estimates.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

Portion of Study	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
Cognitive interview screener	144	1	144	0.083	12
Cognitive interview	18	1	18	1	18
Pretest invitation	1,600	1	1,600	0.033	53
Pretest	200	1	200	0.25	50
Survey invitation	19,200	1	19,200	0.033	634
Survey	2,400	1	2,400	0.25	600
Eye-tracking screener	240	1	240	0.083	20
Eye-tracking	30	1	30	1	30
Total					1,417

[1] There are no capital costs or operating and maintenance costs associated with this collection of information..

To help design and refine the questionnaire to be used for the experimental study, we plan to conduct cognitive interviews by screening 144 adult consumers in order to obtain 18 participants in the interviews. Each screening is expected to take 5 minutes (0.083 hours) and each cognitive interview is expected to take 1 hour. The total for cognitive interview activities is 30 hours (12 hours + 18 hours). Subsequently, we plan to conduct pretests of the survey questionnaire before it is administered in the study. We expect that 1,600 invitations, each taking 2 minutes (0.033 hours), will need to be sent to adult members of an online consumer panel to have 200 of them complete a 15–minute (0.025 hours) pretest. The total for the pretest activities is 103 hours (53 hours + 50 hours). For the survey, we estimate that 19,200 invitations, each taking 2 minutes (0.033 hours), will need to be sent to adult members of an online consumer panel to have 2,400 of them complete a 15–minute (0.025 hours) questionnaire. The total for the survey activities is 1,234 hours (634 hours + 600 hours). To conduct the eye-tracking study, we expect to screen 240 adult consumers, each taking 5 minutes (0.083 hours), to have 30 of them participate in an 1-hour interview. The total for the eye-tracking activities is 50 hours (20 hours + 30 hours). Thus, the total estimated burden is 1,417 hours. FDA's burden estimate is based on prior experience with research that is similar to this proposed study.

[1] Feunekes, G. I. J., I. A. Gortemaker, A. A. Willems, and R. Lion, Front-of-pack Nutrition Labeling: Testing Effectiveness of Different Nutrition Labeling Formats Front-of-pack in Four European Countries, *Appetite* 50(1): 57-70, 2008.

[2] *http://www.cfsan.fda.gov/~dms/cfsup196.html.*

Dated: May 26, 2009.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E9–12669 Filed 5–29–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–09–0743]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–5960 or send an e-mail to *omb@cdc.gov*. Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–6974. Written comments should be received within 30 days of this notice.

Proposed Project

Assessment and Monitoring of Breastfeeding-Related Maternity Care Practices in Intra-partum Care Facilities in the United States and Territories (OMB Control No. 0920–0743, Exp. 7/31/2009)–Revision–National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Substantial evidence demonstrates the health benefits of breastfeeding. Breastfeeding mothers have lower risks of breast and ovarian cancers and type 2 diabetes, and breastfeeding better protects infants against infections, chronic diseases like diabetes and obesity, and even childhood leukemia and sudden infant death syndrome (SIDS). However, the groups that are at higher risk for diabetes, obesity, and poor health overall persistently have the lowest breastfeeding rates. Public health priorities for the U.S. include increasing the overall rate of breastfeeding, and reducing variation in breastfeeding rates across population subgroups.

The health care system is one of the most important and effective settings to improve breastfeeding. In 2007, CDC conducted the first national survey of Maternity Practices in Infant Nutrition and Care (known as the mPINC Survey) in health care facilities (hospitals and free-standing childbirth centers). The survey was designed to provide baseline information and to be repeated again in 2009. It inquired about patient education and support for breastfeeding throughout the maternity stay as well as staff training and maternity care policies. Each responding organization received a customized Benchmark Report as well as other feedback to use in self-assessment and quality improvement activities.

CDC proposes to repeat the mPINC in 2009 using previously fielded questions and methodology. In addition to all facilities that participated in 2007, the 2009 survey will include those that were invited but did not participate in 2007 and any that are new since then. All birth centers and hospitals with ≥ 1 registered maternity beds will be screened via a brief phone call to assess their eligibility, identify additional locations, and identify the appropriate point of contact.

A major goal of the 2009 survey is to be fully responsive to respondents' needs for information and technical assistance. CDC will again provide customized benchmark reports to respondents and document progress since 2007 on their quality improvement efforts. National and state reports will use de-identified data to describe incremental changes in practices and care processes over time at the facility, state, and national levels.

Participation in the survey is voluntary, and responses may be submitted by mail or through a web-based system. There are no costs to respondents other than their time. The total estimated annualized burden hours are 1,686.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Hospitals	Telephone Screening Interview for Hospitals	3,897	1	5/60
	2009 mPINC Survey for Hospitals	2,568	1	30/60
Birth Centers	Telephone Screening Interview for Birth Centers	192	1	5/60
	2009 mPINC Survey for Birth Centers	122	1	30/60

Dated: May 26, 2009.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E9–12631 Filed 5–29–09; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day-0920–09BS]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–5960 and send comments to Maryam I. Daneshvar, CDC Acting Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov*.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the

agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Formative Evaluation and Message Testing to Inform the Development of Health Promotion Materials for the National Hemophilia Foundation's Hemophilia and AIDS/HIV Network for the Dissemination of Information (HANDI)—NEW—National Center on Birth Defects and Developmental Disabilities (NCBDDD), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Division of Blood Disorders, located within the National Center on Birth Defects and Developmental Disabilities, implements health promotion and wellness programs designed to prevent secondary conditions in people with bleeding and clotting disorders. These programs are carried out in partnership with community-based organizations on the national and local level. The division's largest and longest standing cooperative agreement is held by the National Hemophilia Foundation (NHF). NHF, founded in 1948, has a long history of service through education, advocacy and research for people and families with hemophilia and other bleeding disorders.

The Hemophilia and AIDS/HIV Network for the Dissemination of Information (HANDI) is NHF's resource center which provides information, materials, and support to people with bleeding and clotting disorders. Over the past 17 years, HANDI's resource collection has grown to meet the changing needs of the community. HANDI processes thousands of requests for information from a wide variety of individuals and organizations including NHF chapters, medical professionals, consumers and their families, and teachers and students conducting research. The types of information requested reflect a diversity of needs—topics include home care, orthopedics, physical therapy, rare factor deficiencies, psychosocial issues, blood safety, women's health, and financial and insurance reimbursement issues. HANDI's current resource library collection contains nearly 13,000 items. However, the process by which materials have been selected for development has not been informed by a systematic needs assessment or other exploratory research. Therefore it is not known if the materials and messages that have been developed are meeting the information needs of the audiences they were intended to serve.

While there seems to be many HANDI materials available that focus on parents and family members of newly diagnosed children, considerably less attention has been given to developing materials for young children and adolescents, particularly materials that address transition issues. There are many types of transitions for the person with a bleeding disorder. These include acceptance of the bleeding disorder, self care, progressing through school, vocational/career planning, moving to an adult center, starting a family, middle age, and retirement. Transition occurs throughout life for all people, but for those with chronic illness, it takes on additional significance due to the nature of their condition.

The CDC's Division of Blood Disorders in conjunction with the National Hemophilia Foundation will conduct focus groups to gather information that will be used to design educational materials and health promotion programs for young children (aged 5–12 years) and adolescents (aged 16–19 years) that address transition issues. Focus groups will be used to explore the type of information, resources, and support young children and adolescents need related to transition issues. The groups will also be used to explore how young children and adolescents prefer to receive health messages and health information (e.g., brochures, videos, podcasts, U-tube, etc.). These findings will inform the development of key messages tailored to the target audiences that will then be tested during another set of focus groups to see how well the messages resonate with the intended end users.

The Contractor selected will work with CDC and NHF, through its chapter network, to identify and recruit focus group participants. Formative research participants will include parents of young children (aged 5–12 years), parents of teenagers or young adults who can reflect back upon their experience and share what information, resources, and support they wished had been available when their child was young, and adolescents (aged 16–19 years). Message testing participants will include parents of young children (aged 5–12 years) and adolescents (aged 16–19 years). Participants will be recruited to participate in one of sixteen in-person focus groups that will be conducted in the following cities:

- Detroit, Atlanta, Philadelphia, San Francisco (for the formative research task), and
- Milwaukee, Houston, Boston, and San Diego (for the message testing task)

There are no costs to the respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Parents (formative groups)	36	1	2	72
Adolescents (formative groups)	36	1	2	72
Parents (message testing groups)	36	1	2	72
Adolescents (message testing groups)	36	1	2	72
Total				288

Dated: May 26, 2009.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E9–12630 Filed 5–29–09; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–09–05CS]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–5960 or send an e-mail to *omb@cdc.gov*. Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–6974. Written comments should be received within 30 days of this notice.

Proposed Project

Nurse Delivered Risk Reduction Intervention for HIV-Positive Women—New—National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention, Centers for Disease Control and Prevention (CDC).

Background and Brief Description

During the past two decades, HIV surveillance data indicates an increase in HIV/AIDS cases among women in the non-urban Southeastern United States. In 2006, the majority of HIV/AIDS cases (80%) among women were attributed to high-risk heterosexual contact with an infected partner. Black women in particular have been disproportionately impacted by HIV/AIDS. Factors shown to be associated with HIV in the South include poverty, lack of access to medical care, poor education, lack of awareness of the disease, and exposure to other sexually transmitted diseases. Presently, there is an urgent need for enhanced HIV transmission prevention interventions for HIV positive women in the southeastern United States.

The purpose of this project is to adapt and test the efficacy of an HIV transmission prevention intervention for reducing sexual risk among 330 HIV-positive women in North Carolina and to identify factors associated with risk among women. The study will be conducted in two parts (intervention trial and individual in-depth interviews). The intervention trial will evaluate a brief, nurse delivered, single session intervention. The trial will use a randomized wait-list comparison design with a three-month follow-up assessment. To determine eligibility for participation in the study, a brief, in-person, screening will be used. Eligible participants will complete baseline and follow-up behavioral assessments. The assessments contain questions about participants' background, health and health care, sexual activity, substance use, and other psychosocial issues. The in-depth interviews will be conducted with a subgroup of 25–30 women. The purpose of the in-depth interviews is to assess experiences with the intervention, elicit recommendations for developing risk reduction intervention strategies, and to better understand the factors that place women at risk for HIV. Study participants will be recruited from health departments and clinics providing healthcare to HIV-positive women and AIDS Service Organizations. There is no cost to the participants other than their time. The total estimated annual burden hours are 635.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Avg. burden per response (in hours)
Potential Participants	Screener Contact Form	550	1	10/60
Intervention Participants—and Comparison Group)	Locator Form	330	1	3/60
Intervention Participants—and Comparison Group	Assessment Baseline	330	1	45/60
Intervention Participants—and Comparison Group	Assessment Follow-up	330	1	45/60
Subset of Intervention Group	In-depth Interview	30	1	1

Dated: May 26, 2009.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E9–12622 Filed 5–29–09; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2005–N–0464] (formerly Docket No. 2005N–0403)

Guidance for Industry on Providing Regulatory Submissions in Electronic Format—Drug Establishment Registration and Drug Listing; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance for industry entitled ''Providing Regulatory Submissions in Electronic Format—Drug Establishment Registration and Drug Listing.'' This guidance document is designed to assist industry (e.g., manufacturers, repackers, and relabelers) with the electronic submission of drug establishment registration and drug listing information. Specifically, the document provides guidance to industry on the types of information to include for purposes of drug establishment registration and drug listing and on how to prepare and submit the information in an electronic format that FDA can process, review, and archive.

DATES: Submit written or electronic comments on agency guidances at any time. As of June 1, 2009, FDA will only accept electronic submissions of drug establishment registration and drug

listing information, unless a waiver is granted.

ADDRESSES: Submit written requests for single copies of this guidance to the Office of Critical Path Programs (HF–18), Office of the Commissioner, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857. Send one self-addressed adhesive label to assist that office in processing your requests. The guidance may also be obtained by mail by calling the Office of Critical Path Programs at 301–827–1512. Submit written comments on the guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.regulations.gov*. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Lonnie Smith, Office of Critical Path Programs (HF–18), Office of the Commissioner, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–594–0011.

SUPPLEMENTARY INFORMATION:

I. Background

Requirements for drug establishment registration and drug listing are set forth in section 510 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360) and section 351 of the Public Health Service Act (the PHS Act) (42 U.S.C. 262) and 21 CFR part 207. Fundamental to FDA's mission to protect the public health is the collection of this information, which is used for important activities such as postmarket surveillance for serious adverse drug reactions, inspection of drug manufacturing and processing facilities, and monitoring of drug products imported into the United States. Comprehensive, accurate, and up-to-date information is critical to conducting these activities with efficiency and effectiveness.

Changes in the act, resulting from the Food and Drug Administration Amendments Act of 2007 (FDAAA) (Public Law 110–85), require that drug establishment registration and drug listing information be submitted electronically, unless a waiver is granted. Before FDAAA was enacted, section 510(p) of the act expressly provided that drug establishment registration information must be submitted electronically, based on a finding that electronic receipt was feasible, and section 510(j) of the act stipulated that drug listing information must be submitted in the form and manner prescribed by FDA. Section 224 of FDAAA, which amends section 510(p) of the act, now expressly requires drug listing to be submitted by electronic means in addition to requiring electronic drug establishment registration.

Drug establishment registration and drug listing information have, until now, been submitted using a paper-based format, i.e., Form FDA 2656 (Registration of Drug Establishment/Labeler Code Assignment), Form FDA 2657 (Drug Product Listing), and Form FDA 2658 (Registered Establishments' Report of Private Label Distributors). Moving from a paper-based format to an electronic system will improve the timeliness and accuracy of the submissions.

This guidance is designed to assist manufacturers, repackers, and relabelers with electronic submissions of drug establishment registrations and drug listing information. The guidance and accompanying technical documents explain (among other things):

- The statutory requirement to submit electronically drug establishment registration and drug listing information;
- How to create a Structured Product Labeling (SPL) file for submitting drug establishment registration and drug listing information to FDA through the Electronic Submissions Gateway (ESG) using defined code sets and codes, i.e., a language recognized by the computer system; and
- That FDA intends to no longer accept drug establishment registration and drug listing information in paper format, unless a waiver is granted. FDA encourages manufacturers, repackers, and relabelers to establish a gateway account as soon as possible so that they will be prepared to electronically submit drug establishment registration and drug listing information by June 1, 2009.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the agency's current thinking on providing regulatory submissions in electronic format for drug establishment registration and drug listing information. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Comments

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

III. Paperwork Reduction Act of 1995

This guidance contains information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collection(s) of information in this guidance was approved under OMB control number 0910–0045.

IV. Electronic Access

Persons with access to the Internet may obtain the document at *http://www.fda.gov/cder/guidance/index.htm*, *http://www.fda.gov/cber/guidelines.htm*, *http://www.fda.gov/cvm/guidance/guidance.html*, and *http://www.regulations.gov*.

Dated: May 27, 2009.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E9–12743 Filed 5–28–09; 4:15 pm]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0664]

Advisory Committee for Pharmaceutical Science and Clinical Pharmacology; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Advisory Committee for Pharmaceutical Science and Clinical Pharmacology.

General Function of the Committee: To provide advice and recommendations to the agency on FDA's regulatory issues.

Date and Time: The meeting will be held August 4, 2009, from 8 a.m. to 5 p.m.

Location: Hilton Washington DC/Silver Spring, The Ballrooms, 8727

Colesville Rd., Silver Spring, MD. The hotel telephone number is 301–589–5200.

Contact Person: Janie Kim, Center for Drug Evaluation and Research (HFD–21), Food and Drug Administration, 5600 Fishers Lane (for express delivery, 5630 Fishers Lane, rm. 1093) Rockville, MD 20857, 301–827–7001, FAX: 301–827–6776, email: *Janie.kim@fda.hhs.gov*, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572) in the Washington, DC area), code 3014512539. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

Agenda: The committee will discuss bioequivalence recommendations for oral vancomycin hydrochloride capsule drug products.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/ohrms/dockets/ac/acmenu.htm*, click on the year 2009 and scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before July 21, 2009. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. Those desiring to make formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before July 13, 2009. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by July 14, 2009.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Janie Kim at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/oc/advisory/default.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: May 20, 2009.

Randall W. Lutter,

Deputy Commissioner for Policy.

[FR Doc. E9–12627 Filed 5–29–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0664]

Dermatologic and Ophthalmic Drugs Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Dermatologic and Ophthalmic Drugs Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the agency on FDA's regulatory issues.

Date and Time: The meeting will be held on June 26, 2009, from 8 a.m. to 5 p.m.

Location: Hilton Washington DC/Silver Spring, Maryland Ballrooms, 8727 Colesville Rd., Silver Spring, MD. The hotel phone number is 301–589–5200.

Contact Person: Paul Tran, Center for Drug Evaluation and Research (HFD–21), Food and Drug Administration, 5600 Fishers Lane (for express delivery, 5630 Fishers Lane, Rm. 1093) Rockville, MD 20857, 301–827–7001, FAX: 301–827–6778, e-mail: *paul.tran@fda.hhs.gov*, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 3014512534. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

Agenda: The committee will discuss new drug applications (NDAs) 22–288, BEPREVE (bepotastine besilate) ophthalmic solution, 1.5%, ISTA Pharmaceuticals, Inc., proposed for the treatment of ocular itching associated with allergic conjunctivitis, and NDA 22–358, sodium hyaluronate ophthalmic solution, 0.18%, River Plate Biotechnology, Inc., proposed for the treatment of the signs and symptoms of dry eye disease.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/ohrms/dockets/ac/acmenu.htm*, click on the year 2009 and scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before June 17, 2009. Oral presentations from the public will be scheduled between approximately 9:30 a.m. to 10 a.m., and 1:30 p.m. to 2 p.m. Those desiring to make formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed

participants, and an indication of the approximate time requested to make their presentation on or before June 11, 2009. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by June 12, 2009.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact John Lauttman at 301–827–7001, at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/oc/advisory/default.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: May 20, 2009.

Randall W. Lutter,

Deputy Commissioner for Policy.

[FR Doc. E9–12625 Filed 5–29–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Privacy Act of 1974, as Amended; Computer Matching Program

AGENCY: Administration for Children and Families (ACF).

ACTION: Notice of a computer matching program.

SUMMARY: In compliance with the Privacy Act of 1974, as amended by Public Law 100–503, the Computer Matching and Privacy Protection Act of 1988, ACF is publishing a notice of a computer matching program. The purpose of this computer match is to identify specific individuals who are receiving benefits from the Department of Veterans Affairs (VA) and also receiving payments pursuant to various benefit programs administered by both the Department of Health and Human Services (HHS) and the Department of Agriculture. ACF will facilitate this program on behalf of the State Public Assistance Agencies (SPAAs) that participate in the Public Assistance Reporting Information System (PARIS) for verification of continued eligibility for public assistance. The match will utilize VA and SPAA records.

DATES: ACF will file a report of the subject matching program with the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform of the House of Representatives and the Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB). The dates for the matching program will be effective as indicated below.

ADDRESSES: Interested parties may comment on this notice by writing to the Director, Office of Financial Services, Office of Administration, 370 L'Enfant Promenade, SW., Washington, DC 20047. All comments received will be available for public inspection at this address.

FOR FURTHER INFORMATION CONTACT: Director, Office of Financial Services, Office of Administration, 370 L'Enfant Promenade, SW., Washington, DC 20047. Telephone: (202) 401–7237.

SUPPLEMENTARY INFORMATION: Public Law 100–503, the Computer Matching and Privacy Protection Act of 1988, amended the Privacy Act (5 U.S.C. 552a) by adding certain protections for individuals applying for and receiving Federal benefits. The law regulates the use of computer matching by Federal agencies when records in a system of records are matched with other Federal, State, and local government records.

Federal agencies that provide or receive records in computer matching programs must:

1. Negotiate written agreements with source agencies;

2. Provide notification to applicants and beneficiaries that their records are subject to matching;

3. Verify match findings before reducing, suspending, or terminating an individual's benefits or payments;

4. Furnish detailed reports to Congress and OMB; and

5. Establish a Data Integrity Board that must approve matching agreements.

This computer matching program meets the requirements of Public Law 100–503.

Dated: 05/27/2009.

Curtis L. Coy,

Deputy Assistant Secretary for Administration, ACF.

Notice of Computer Matching Program

A. PARTICIPATING AGENCIES

VA and SPAAs.

B. PURPOSE OF THE MATCH

To identify specific individuals who are receiving benefits from the VA and also receiving payments pursuant to HHS and Department of Agriculture benefit programs, and to verify their continued eligibility for such benefits. SPAAs will contact affected individuals and seek to verify the information resulting from the match before initiating any adverse actions based on the match results.

C. AUTHORITY FOR CONDUCTING THE MATCH

The authority for conducting the matching program is contained in section 402(a)(6) of the Social Security Act [42 U.S.C. 602(a)(6)].

D. RECORDS TO BE MATCHED

VA will disclose records from its Privacy Act system of records titled, ''Compensation, Pension, Education, and Rehabilitation Records—VA (58VA21/22/28)'' last published at 74 FR 14865 on April 1, 2009. VA's disclosure of information for use in this computer match is listed as a routine use in this system of records.

VA, as the source agency, will prepare electronic files containing the names and other personal identifying data of eligible veterans receiving benefits. These records are matched electronically against SPAA files consisting of data regarding monthly Medicaid, Temporary Assistance for Needy Families, general assistance, and Food Stamp beneficiaries.

1. The electronic files provided by the SPAAs will contain client names and Social Security Numbers (SSNs).

2. The resulting output returned to the SPAAs will contain personal identifiers, including names, SSNs, employers, current work or home addresses, etc.

E. INCLUSIVE DATES OF THE MATCHING PROGRAM

The effective date of the matching agreement and date when matching may actually begin shall be at the expiration of the 40-day review period for OMB and Congress, or 30 days after publication of the matching notice in the **Federal Register**, whichever date is later. The matching program will be in effect for 18 months from the effective date, with an option to renew for 12 additional months, unless one of the parties to the agreement advises the

others by written request to terminate or modify the agreement.

[FR Doc. E9–12676 Filed 5–29–09; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–D–0224]

Small Entity Compliance Guide: Bottled Water: Residual Disinfectants and Disinfection Byproducts; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance for industry entitled ''Bottled Water: Residual Disinfectants and Disinfection Byproducts—Small Entity Compliance Guide'' for a direct final rule published in the **Federal Register** of March 28, 2001. This small entity compliance guide (SECG) is intended to set forth in plain language the requirements of the regulation and to help small businesses understand the regulation.

DATES: Submit written or electronic comments on the SECG at any time.

ADDRESSES: Submit written comments on the SECG to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments on the SECG to *http://www.regulations.gov*. Submit written requests for single copies of the SECG to the Division of Plant and Dairy Food Safety (HFS–317), Office of Food Safety, Center for Food Safety and Applied Nutrition, Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, or fax your request to 301–436–2651. Send one self-addressed adhesive label to assist that office in processing your request. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the SECG.

FOR FURTHER INFORMATION CONTACT: Lauren Posnick Robin, Center for Food Safety and Applied Nutrition (HFS–317), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–1639.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of March 28, 2001 (66 FR 16858), FDA issued a direct final rule amending its bottled water quality standard regulations by establishing allowable levels for three residual disinfectants (chloramine, chlorine, and chlorine dioxide) and three types of disinfection byproducts (DBPs) (bromate, chlorite, and haloacetic acids (HAA5)), and by revising the existing allowable level for the DBP total trihalomethanes (TTHM). FDA also revised, for the three residual disinfectants and four types of DBPs only, the monitoring requirement for source water found in the current good manufacturing practice (CGMP) regulations for bottled water. On July 5, 2001 (66 FR 35373), FDA issued a technical amendment to correct an editorial error and confirmed the effective date of January 1, 2002.

FDA examined the economic implications of the direct final rule as required by the Regulatory Flexibility Act (5 U.S.C. 601–612) and determined that the rule would have a significant economic impact on a substantial number of small entities. In compliance with section 212 of the Small Business Regulatory Enforcement Fairness Act (Public Law 104–121), FDA is making available this SECG stating in plain language the legal requirements of the March 28, 2001, direct final rule set forth in 21 CFR parts 129 and 165 concerning the allowable levels and monitoring requirements for the three residual disinfectants (chloramine, chlorine, and chlorine dioxide) and four types of DBPs (bromate, chlorite, HAA5, and TTHM).

FDA is issuing this SECG as level 2 guidance consistent with FDA's good guidance practices regulation (21 CFR 10.115(c)(2)). The SECG represents the agency's current thinking on this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Comments

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

III. Electronic Access

Persons with access to the Internet may obtain the document at *http://www.cfsan.fda.gov/guidance.html* or *http://www.regulations.gov.*

Dated: May 22, 2009.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E9–12671 Filed 5–29–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2009–0079]

The National Infrastructure Advisory Council

AGENCY: Directorate for National Protection and Programs, Department of Homeland Security.

ACTION: Committee Management; Notice of Federal Advisory Council Meeting

SUMMARY: The National Infrastructure Advisory Council (NIAC) will meet on Tuesday July 14, 2009 at the J.W. Marriott's Salons E and F, 1331 Pennsylvania Avenue, Washington, DC 20004.

DATES: The National Infrastructure Advisory Council will meet Tuesday July 14, 2009 from 12:30 p.m. to 3:30 p.m. Please note that the meeting may close early if the committee has completed its business.

For additional information, please consult the NIAC Web site, *http://www.dhs.gov/niac*, or contact Matthew Sickbert by phone at 703–235–2888 or by e-mail at *Matthew.Sickbert@associates.dhs.gov*.

ADDRESSES: The meeting will be held at the J.W. Marriott's Salons E and F, 1331 Pennsylvania Avenue, Washington, DC 20004. While we will be unable to accommodate oral comments from the public, written comments may be sent to Nancy J. Wong, Department of Homeland Security, Directorate for National Protection and Programs, Washington, DC 20528. Written comments should reach the contact person listed no later than July 7, 2009. Comments must be identified by DHS–2009–0079 and may be submitted by *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *E-mail: matthew.sickbert@associates.dhs.gov.* Include the docket number in the subject line of the message.
- *Fax:* 703–235–3055

• *Mail:* Nancy J. Wong, Department of Homeland Security, Directorate for National Protection and Programs, Washington, DC 20528.

Instructions: All submissions received must include the words ''Department of Homeland Security'' and the docket number for this action. Comments received will be posted without alteration at *http://www.regulations.gov*, including any personal information provided.

Docket: For access to the docket to read background documents or comments received by the National Infrastructure Advisory Council, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Nancy J. Wong, NIAC Designated Federal Officer, Department of Homeland Security, Washington, DC 20528; telephone 703–235–2888.

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. App. (Pub. L. 92–463). The National Infrastructure Advisory Council shall provide the President through the Secretary of Homeland Security with advice on the security of the critical infrastructure sectors and their information systems.

The National Infrastructure Advisory Council will meet to address issues relevant to the protection of critical infrastructure as directed by the President. The July 14, 2009 meeting will include a final report from the Frameworks for Dealing with Disasters and Related Interdependencies Working Group and a status report from the Critical Infrastructure Resilience Working Group.

The meeting agenda is as follows:

I. Opening of Meeting	Nancy J. Wong, Designated Federal Officer (DFO), NIAC, Department of Homeland Security (DHS).
II. Roll Call of Members	Nancy J. Wong, DFO, NIAC, DHS.
III. Opening Remarks and Introductions	NIAC Chairman Erle A. Nye, Chairman Emeritus, TXU Corp. Janet Napolitano, Secretary, DHS (invited).
Participating but not Expected to Make Remarks	Jane Holl Lute, Deputy Secretary, DHS (invited). Rand Beers, Under Secretary, Deputy Under Secretary for the National Protection and Programs Directorate, DHS (invited). Philip Reitinger, Deputy Under Secretary for the National Protection and Programs Directorate, DHS (invited). James L. Snyder, Deputy Assistant Secretary for Infrastructure Protection, DHS (invited). Jason Brown, Director, Cyber Security Policy, Homeland Security Council (invited).
IV. Working Group Final Presentation and Deliberation of Final Report.	NIAC Chairman Erle A. Nye Presiding.
A. The Frameworks for Dealing with Disasters and Related Interdependencies Working Group.	Edmund G. Archuleta, President and CEO, El Paso Water Utilities, NIAC Member; James B. Nicholson, Chairman and CEO, PVS Chemicals, Inc., NIAC Member; and The Honorable Tim Pawlenty, Governor, The State of Minnesota, NIAC Member.
V. Working Group Status Update	NIAC Chairman Erle A. Nye Presiding.
A. The Critical Infrastructure Resilience Working Group.	Wesley Bush, President and COO, Northrop Grumman, NIAC Member; and Margaret E. Grayson, (former) President, Coalescent Technologies, Inc., NIAC Member.
VII. Continuing Business	NIAC Chairman Erle A. Nye, Vice Chairman Alfred R. Berkeley III, NIAC Members.
VIII. Closing Remarks	James L. Snyder, Acting Assistant Secretary for Infrastructure Protection, DHS (invited).
IX. Adjournment	NIAC Chairman Erle A. Nye, Presiding.

Procedural

While this meeting is open to the public, participation in the National Infrastructure Advisory Council deliberations is limited to committee members, Department of Homeland Security officials, and persons invited to attend the meeting for special presentations.

Information on Services for Individuals With Disabilities

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact the NIAC Secretariat at 703–235–2888 as soon as possible.

Dated: May 20, 2009.

Nancy J. Wong,

Designated Federal Officer for the NIAC.

[FR Doc. E9–12666 Filed 5–29–09; 8:45 am]

BILLING CODE 9110–9P–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5318–N–01]

Notice of Availability: Notice of Funding Availability (NOFA) for the Indian Community Development Block Grant (ICDBG) Program Under the American Recovery and Reinvestment Act of 2009 (FR–5318–N–01)

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice.

SUMMARY: HUD announces the availability of, and funding criteria for, approximately $10 million that is available to Indian tribes and tribal organizations that received ICDBG grants in Fiscal Year 2008, authorized under the American Recovery and Reinvestment Act of 2009 (Public Law 111–5, approved February 17, 2009). This 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 program requirements and funding criteria is available on the HUD Web site at: *http://www.hud.gov/recovery/icdblockh.cfm.*

FOR FURTHER INFORMATION CONTACT: Questions regarding specific program requirements should be directed to your Area Office of Native American Programs (ONAP). A contact list for each Area ONAP can be accessed at *http://www.hud.gov/offices/pih/ih/codetalk/onap/map/nationalmap.cfm.* Questions may also be directed to the ICDBG program at *http://www.hud.gov/recovery/questions.cfm.* Persons with hearing or speech impairments may access these numbers via TTY by calling

the Federal Information Relay Service at 1–800–877–8339.

Dated: May 21, 2009.

Paula O. Blunt,

General Deputy Assistant Secretary for Public and Indian Housing.

[FR Doc. E9–12672 Filed 5–28–09; 11:15 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5317–N–01]

Notice of Availability: Notice of Funding Availability (NOFA) for Native American Housing Block Grant Program Under the American Recovery and Reinvestment Act of 2009.

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice.

SUMMARY: HUD announces the availability of, and funding criteria for, approximately $242,250,000 available in competitive grants to Indian tribes and other entities eligible to receive Native American Housing and Self-Determination Act (NAHASDA) funds under the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5, approved February 17, 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 program requirements is available on the HUD Web site at: *http://www.hud.gov/recovery*

FOR FURTHER INFORMATION CONTACT: Questions on program requirements should be directed to your Area Office of Native American Programs (ONAP). A contact list for each Area ONAP can be found at *http://www.hud.gov/offices/pih/ih/codetalk/onap/map/nationalmap.cfm.* Persons with hearing or speech impairments may access these numbers via TTY by calling the Federal Information Relay Service at 1–800–877–8339.

Dated: May 21, 2009.

Paula O. Blunt,

General Deputy Assistant Secretary for Public and Indian Housing.

[FR Doc. E9–12677 Filed 5–28–09; 11:15 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Plan for the Use and Distribution of Judgment Funds Awarded to the Pueblo of San Ildefonso in Docket 660–87L

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: Notice is hereby given that the plan for the use and distribution of the judgment funds awarded to the *Pueblo of San Ildefonso* v. *U.S.*, Docket 660–87L, is effective as of March 10, 2009. The judgment fund was awarded by the United States Court of Federal Claims on June 10, 1991, and appropriated on August 14, 1991.

FOR FURTHER INFORMATION CONTACT: Iris A. Drew, Bureau of Indian Affairs, Division of Tribal Government Services, 1001 Indian School Road, NW., Albuquerque, New Mexico 87104. *Telephone number:* (505) 563–3530.

SUPPLEMENTARY INFORMATION: On September 2, 2008, the plan for the use and distribution of the funds was submitted to Congress pursuant to Section 137 of the Act of November 10, 2003, Public Law 108–108; 117 Stat. 1241, and the Indian Tribal Judgment Fund Act, 25 U.S.C. 1401 *et seq.* Receipt of the Plan by the House of Representatives and the Senate was recorded in the Congressional Record on September 16, 2008, and September 18, 2008, respectively. The plan became effective on March 10, 2009, because a joint resolution disapproving it was not enacted. The plan reads as follows:

Plan

For the Use and Distribution of Judgment Funds Awarded to the Pueblo of San Ildefonso in Docket No. 660–87L Before the United States Court of Federal Claims

The judgment funds appropriated August 14, 1991, in satisfaction of the award granted to the Pueblo de San Ildefonso in settlement of Docket 660–87L before the United States Court of Federal Claims, less attorney fees and litigation expenses, and including all interest and investment income accrued, and pursuant to Section 14 of the Pueblo de San lldefonso Claims Settlement Act of 2005 and the Indian Tribal Judgment Funds Use and Distribution Act, shall be as follows:

A. Management

All judgment funds, including accrued interest and investment income, shall be managed by the Pueblo de San Ildefonso upon approval of this Plan for Use and Distribution of Judgment Funds by the Secretary of the Interior. After approval, the Secretary shall disburse these judgment funds and accrued interest, which shall be reinvested, in accordance with future tribal council resolutions and applicable Federal Regulations.

B. Authorized Expenditures

Judgment funds shall be used or distributed for Governmental Purposes only. Governmental Purposes includes, but is not limited to, programs owned or operated by the Pueblo including social and economic development for the benefit of the Pueblo de San Ildefonso. The Tribal Council, pursuant to Tribal Council Resolution, may expend judgment funds, including accrued interest, for use for any tribal program, including land purchases, economic development, tribal loan repayments, or other tribal governmental purposes established for the social and economic welfare of the members of the Pueblo.

No authorized tribal program shall provide per capita or dividend payments to tribal members.

Dated: May 21, 2009.

George T. Skibine,

Deputy Assistant Secretary for Policy and Economic Development.

[FR Doc. E9–12635 Filed 5–29–09; 8:45 am]

BILLING CODE 4310–4J–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Privacy Act of 1974, as Amended; Amendment of an Existing System of Records

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Proposed Amendment of an Existing Privacy Act System of Records Notice.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974, as amended (5 U.S.C. 552a), the Department of the Interior (Department) is issuing a public notice of its intent to amend an existing Privacy Act system of records notice, entitled, Interior, BIA–2 ''Safety Management Information System.'' One of the revisions is to change the name of the system to BIA–2, ''Safety Records System (SRS).'' The amendments will also update the existing notice and include a new group of information which will be collected as a result of new policy. The new information is a result of documentation required to issue a Motor Vehicle Operation

Authorization Card. Other changes to Interior BIA–2 include updating data in the following fields: System Locations, Categories of Individuals Covered by the System, Categories of Records in the System, Routine Uses of Records Maintained in the System, Categories of Users and the Purposes of Such Uses, System Manager, and Retention and Disposal.

DATES: Comments must be received by July 13, 2009.

ADDRESSES: Mail or hand-deliver comments to: Indian Affairs Privacy Officer, 625 Herndon Parkway, Herndon, Virginia 20170, or by e-mail to *Joan.Tyler@bia.gov*.

FOR FURTHER INFORMATION CONTACT: Paul J. Holley, Bureau Safety Manager, Bureau of Indian Affairs (BIA), Office of Facilities, Environmental and Cultural Resources, Division of Safety and Risk Management, 1011 Indian School Road, NW., Suite 331, Albuquerque, New Mexico 87104, or by e-mail to: *paul.holley@bia.gov.*

SUPPLEMENTARY INFORMATION: The BIA maintains the Safety Records System. The information collected for this system is to be used to provide complete recordkeeping on qualified motor vehicle operators in the BIA and the Bureau of Indian Education (BIE), employee and other individual accidents or incidents, Federal employees' compensation claims and adjudication of tort claims filed against BIA and BIE. Information in this system of records is necessary to comply with BIA safety management, motor vehicle safety policy, and issuance of Motor Vehicle Operation Authorization Identification Cards. The purpose of the name change is to differentiate this system from another system maintained by the Department with the same name.

Under 5 U.S.C. 552a(e)(11), the public must be provided with a 30-day period in which to comment on the agency's intended use of the information in the system of records. The Office of Management and Budget (OMB), in its Circular A–130, requires an additional 10-day period (for a total of 40 days) in which to make comments. Comments must be received by the date specified in the **DATES** section of this notice. Comments received within 40 days of publication in the **Federal Register** will be considered. The system will be effective as proposed at the end of the comment period unless comments are received which would require a contrary determination. The Department will publish a revised notice if changes are made based upon a review of comments received. A copy of the notice, with changes incorporated follows.

Before including your address, telephone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: March 26, 2009.

George T. Skibine,

Deputy Assistant Secretary for Policy and Economic Development.

INTERIOR/BIA–2

SYSTEM NAME:

Safety Records System—Interior, BIA–2.

SYSTEM LOCATION:

Motor Vehicle Authorization Card information may be located with managers and supervisors in offices of Indian Affairs (BIA and BIE). This and other Safety Record System information is located with the Chief, Division of Safety and Risk Management, 1011 Indian School Road, NW., Suite 331, Albuquerque, New Mexico 87104, and regional Safety Managers and Safety Officers listed below in the System Manager section.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

(1) Employee and contractor operators and incidental operators of a privately owned or leased, or government owned or leased motor vehicle and equipment; (2) Federal employees and contractors who have had an accident or an incident; (3) Injured employees and contractors who submit claims for medical attention or loss of earning capability due to on-the-job injury; and (4) Individuals filing tort claims against the United States government.

CATEGORIES OF RECORDS IN THE SYSTEM:

(1) Documents supporting the issuance of Motor Vehicle Operators Authorization Cards to employees such as driver tests, authorization to use, safe driving award and correspondence, forms for authorization and driving records history; (2) Reports of accident/incident by agency region, name of person involved and Social Security Number; (3) Employee claims case files pertaining to claims submitted to the Office of Workmen's Compensation; (4) Case files with supporting documents pertaining to tort claims filed by an individual against the United States government; (5) Records concerning individuals which have arisen as a result of that individual's misuse of or damage to government-owned or government-leased motor vehicles, other equipment/facilities, and salary overpayments as a result of misuse of leave relating to Office of Workmen's Compensation claims deemed to be invalid; and (6) Records relating to individual employee operation of government-owned vehicles, including driver tests, authorization to use, safe driving awards, and related correspondence.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 7902; 28 U.S.C. 2671–2680; 31 U.S.C. 242–243.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

The primary use of the records is to provide complete recordkeeping on qualified motor vehicle operators in BIA and BIE, employee and other individual accidents or incidents, Federal employees' compensation claims and adjudication of tort claims.

DISCLOSURES OF THESE RECORDS OUTSIDE THE DEPARTMENT OF THE INTERIOR WILL BE LIMITED TO:

(1)(a) To any of the following entities or individuals, when the circumstances set forth in paragraph (b) are met:

(i) The U.S. Department of Justice (DOJ);

(ii) A court or an adjudicative or other administrative body;

(iii) A party in litigation before a court or an adjudicative or other administrative body; or

(iv) Any Department employee acting in his or her individual capacity if the Department or DOJ has agreed to represent that employee or pay for private representation of the employee;

(b) When:

(i) One of the following is a party to the proceeding or has an interest in the proceeding:

(A) Department or any component of the Department;

(B) Any other Federal agency appearing before the Office of Hearings and Appeals;

(C) Any Department employee acting in his or her official capacity;

(D) Any Department employee acting in his or her individual capacity if Department or DOJ has agreed to represent that employee or pay for private representation of the employee;

(E) The United States, when DOJ determines that the Department is likely to be affected by the proceeding; and

(ii) The Department deems the disclosure to be:

(A) Relevant and necessary to the proceeding; and

(B) Compatible with the purpose for which the records were compiled.

(2) To a congressional office in response to a written inquiry that an individual covered by the system, or the heir of such individual if the covered individual is deceased, has made to the office.

(3) To any criminal, civil, or regulatory law enforcement authority (whether Federal, State, territorial, local, Tribal or foreign) when a record, either alone or in conjunction with other information, indicates a violation or potential violation of law—criminal, civil, or regulatory in nature, and the disclosure is compatible with the purpose for which the records were compiled.

(4) To an official of another Federal agency to provide information needed in the performance of official duties related to reconciling or reconstructing data files or to enable that agency to respond to an inquiry by the individual to whom the record pertains.

(5) To Federal, State, territorial, local, Tribal, or foreign agencies that have requested information relevant or necessary to the hiring, firing or retention of an employee or contractor, or the issuance of a security clearance, license, contract, grant or other benefit, when the disclosure is compatible with the purpose for which the records were compiled.

(6) To representatives of the National Archives and Records Administration to conduct records management inspections under the authority of 44 U.S.C. 2904 and 2906.

(7) To State and local governments and Tribal organizations to provide information needed in response to court order and/or discovery purposes related to litigation, when the disclosure is compatible with the purpose for which the records were compiled.

(8) To an expert, consultant, or contractor (including employees of the contractor) of the Department that performs services requiring access to these records on Department's behalf to carry out the purposes of the system.

(9) To appropriate agencies, entities, and persons when:

(a) It is suspected or confirmed that the security or confidentiality of information in the system of records has been compromised; and

(b) The Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interest, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Department or another agency or entity) that rely upon the compromised information; and

(c) The disclosure is made to such agencies, entities and persons who are reasonably necessary to assist in connection with the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

(10) To OMB during the coordination and clearance process in connection with legislative affairs as mandated by OMB Circular A–19.

(11) To the Department of the Treasury to recover debts owed to the United States.

(12) To the news media when the disclosure is compatible with the purpose for which the records were compiled.

(13) To a consumer reporting agency if the disclosure requirements of the Debt Collection Act, as outlined at 31 U.S.C. 3711(e)(1), have been met.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Manual—Paper files.

RETRIEVABILITY:

(a) Indexed alphabetically by name of employee, and (b) Retrieved by manual search.

SAFEGUARDS:

Information in this system is maintained with controls meeting safeguard requirements identified in Departmental Privacy Act Regulations (43 CFR 2.51, Assuring the Integrity of Records) for manual record systems. Access to records is limited to authorized personnel whose official duties require such access and bureau officials have access only to records pertaining to their office and immediate employees. All BIA, BIE, and contractor employees with access to this system are required to complete annual Privacy Act, Records Management Act, and Security Training.

RETENTION AND DISPOSAL:

(1) Records relating to individual employee operation of Government-owned vehicles, including driver tests, authorization to use, safe driving awards, and related correspondence are retained in accordance with National Archives and Records Administration's General Records Schedule 10.7; and (2) Records related to safety management are retained in accordance with General Record Schedules 10 (Item 50), 18 (Item 11), and 20.

SYSTEM MANAGER(S) AND ADDRESS:

Contact the Safety Manager or Safety Officer in one of the following offices in which the information resides:

(1) *Central Office West:* Chief, Division of Safety and Risk Management, Bureau of Indian Affairs, 1011 Indian School Road, NW., Suite 331, Albuquerque, New Mexico 87104;

(2) *Great Plains Region:* Bureau of Indian Affairs, 115 4th Avenue SE., Aberdeen, South Dakota 57401;

(3) *Rocky Mountain Region:* Bureau of Indian Affairs, 316 North 26th Street, Billings, Montana 59101;

(4) *Navajo Region:* Bureau of Indian Affairs, P.O. Box 1060, Gallup, New Mexico 87301;

(5) *Southwest Region:* Bureau of Indian Affairs, 1001 Indian School Road NW., Albuquerque, New Mexico 87104;

(6) *Eastern Region:* Bureau of Indian Affairs, 545 Marriott Drive, Suite 700, Nashville, Tennessee 37214;

(7) *Southern Plains Region:* Bureau of Indian Affairs, P.O. Box 368, Anadarko, Oklahoma 73005;

(8) *Alaska Region:* Bureau of Indian Affairs, P.O. Box 25520, Juneau, Alaska 99802–5520;

(9) *Western Region:* Bureau of Indian Affairs, 400 North 5th Street, 2 AZ Center, 12th Floor, Phoenix, Arizona 85004;

(10) *Central Office East:* Bureau of Indian Affairs, 2051 Mercator Drive, Reston, Virginia 20191;

(11) *Midwest Region:* Bureau of Indian Affairs, One Federal Drive, Room 550, Ft. Snelling, Minneapolis 55111–4007;

(12) *Pacific Region:* Bureau of Indian Affairs, 2800 Cottage Way, Sacramento, California 95825;

(13) *Haskell Indian Nations University:* 155 Indian Avenue 5004, Lawrence, Kansas 66046;

(14) *Northwest Region:* Bureau of Indian Affairs, 911 NE. 11th Avenue, Portland, Oregon 97232–4169; and

(15) *Eastern Oklahoma Region:* Bureau of Indian Affairs, P.O. Box 8002, Muskogee, Oklahoma 74401.

NOTIFICATION PROCEDURE:

An individual requesting notification of the existence of records on himself or herself should send a signed, written inquiry to the Systems Manager identified above. The request envelope and letter should both be clearly marked ''PRIVACY ACT INQUIRY.'' A request for notification must meet the requirements of 43 CFR 2.60.

RECORD ACCESS PROCEDURES:

An individual requesting records on himself or herself should send a signed, written inquiry to the Systems Manager identified above. The request should

describe the records sought as specifically as possible. The request envelope and letter should both be clearly marked ''PRIVACY ACT REQUEST FOR ACCESS.'' A request for access must meet the requirements of 43 CFR 2.63.

CONTESTING RECORD PROCEDURES:

An individual requesting corrections or the removal of material from his or her records should send a signed, written request to the System Manager identified above. A request for corrections or removal must meet the requirements of 43 CFR 2.71.

RECORD SOURCE CATEGORIES:

Individuals involved in accidents, supervisors of employees involved in accidents, supervisors of operations where public visitors are involved in accidents, officials responsible for oversight of contractors and concessionaires, safety professionals and other management officials, and individuals being considered for a Motor Vehicle Operation Authorization Card.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. E9–12623 Filed 5–29–09; 8:45 am]

BILLING CODE 4310–XN–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1013 (Review)]

Saccharin From China

Determination

On the basis of the record [1] developed in the subject five-year review, the United States International Trade Commission (Commission) determines, pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)), that revocation of the antidumping duty order on saccharin from China would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

Background

The Commission instituted this review on June 2, 2008 (73 FR 31504) and determined on September 5, 2008 that it would conduct a full review (73 FR 53444, September 16, 2008). Notice of the scheduling of the Commission's review and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on December 1, 2008 (73 FR 72837). The hearing was held in Washington, DC, on March 26, 2009, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determination in this review to the Secretary of Commerce on May 21, 2009. The views of the Commission are contained in USITC Publication 4077 (May 2009), entitled *Saccharin From China: Investigation No. 731–TA–1013 (Review)*.

By order of the Commission.

Issued: May 27, 2009.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E9–12633 Filed 5–29–09; 8:45 am]

BILLING CODE 7020–09–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)).

DEPARTMENT OF JUSTICE

Notice of Lodging Proposed Consent Decree

In accordance with Departmental Policy, 28 CFR 50.7, notice is hereby given that a proposed Consent Decree in *United States* v. *Zelmer, Inc., and Spencer Heights, L.L.C.*, civil case number 09–4072, was lodged with the United States District Court for the District of South Dakota, Southern Division on May 21, 2009.

This proposed Consent Decree concerns a complaint filed by the United States against Zelmer, Inc., and Spencer Heights, L.L.C., pursuant to the Clean Water Act (''CWA''), 33 U.S.C. 1319(b) and (d), to obtain injunctive relief from and impose civil penalties against Zelmer, Inc., and Spencer Heights, L.L.C., for violating the Clean Water Act by discharging pollutants without a permit into waters of the United States, 33 U.S.C. 1311(a); for the violation of the conditions of the South Dakota General Permit for Storm Water Discharges Associated with Construction Activities; for the violations of orders issued to Defendants by the United States Environmental Protection Agency; and for failing to provide information in violation of 33 U.S.C. 1318. The proposed Consent Decree resolves these allegations by requiring the Defendants to restore the impacted areas, perform mitigation, implement a storm water compliance program and to pay a civil penalty.

The Department of Justice will accept written comments relating to this proposed Consent Decree for thirty (30) days from the date of publication of this Notice. Please address comments to: Alan D. Greenberg, 1961 Stout Street, 8th Floor, Denver, Colorado 80294 and refer to *United States* v. *Zelmer, Inc., and Spencer Heights, L.L.C.*, DJ number 90–5–1–1–17707.

The proposed Consent Decree may be examined at the Clerk's Office, United States District Court for the District of South Dakota, Southern Division, 400 South Phillips Avenue, Sioux Falls, SD 57104. In addition, the proposed Consent Decree may be viewed at *http://www.usdoj.gov/enrd/Consent_Decrees.html*.

Maureen M. Katz,

Assistant Section Chief, Environment & Natural Resources Division.

[FR Doc. E9–12584 Filed 5–29–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Office on Violence Against Women; Notice of Meeting

AGENCY: Office on Violence Against Women, United States Department of Justice.

ACTION: Notice of Meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of the forthcoming public meeting of the Section 904 Violence Against Women in Indian Country Task Force (hereinafter ''the Task Force'').

DATES: The meeting will take place on June 29, 2009 from 8:30 a.m. to 5 p.m. and on June 30, 2009 from 8:30 a.m. to 5 p.m.

ADDRESSES: The meeting will take place at the Office of Justice Program Conference Center, 810 Seventh Street, NW., Room 3102, Washington, DC 20531. The public is asked to pre-register by June 22, 2009 for the meeting (*see* below for information on pre-registration).

FOR FURTHER INFORMATION CONTACT: Lorraine Edmo, Deputy Tribal Director, Office on Violence Against Women, United States Department of Justice, 800 K Street, NW., Suite 920, Washington, DC 20530; *by telephone at:* (202) 514–8804; *e-mail: Lorraine.edmo@usdoj.gov*; or *fax:* 202 307–3911. You may also view information about the Task Force on the Office on Violence Against Women Web site at: *http://www.ovw.usdoj.gov/siw.htm.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is required under section

10(a)(2) of the Federal Advisory Committee Act. Title IX of the Violence Against Women Act of 2005 (VAWA 2005) requires the Attorney General to establish a Task Force to assist the National Institute of Justice (NIJ) to develop and implement a program of research on violence against American Indian and Alaska Native women, including domestic violence, dating violence, sexual assault, stalking, and murder. The program will evaluate the effectiveness of the Federal, State, and Tribal response to violence against Indian women, and will propose recommendations to improve the government response. The Attorney General, acting through the Director of the Office on Violence Against Women, established the Task Force on March 31, 2008.

This meeting will be the third meeting of the Task Force and will include a discussion addressing the Title IX, Section 904 proposed program of research and facilitated Task Force discussion of the proposal and the development of written recommendations from the Task Force. In addition, the Task Force is also welcoming public oral comment at this meeting and has reserved an estimated 30 minutes for this purpose. Members of the public wishing to address the Task Force must contact Lorraine Edmo, Deputy Tribal Director, Office on Violence Against Women, United States Department of Justice, 800 K Street, NW., Suite 920, Washington, DC 20530; *by telephone at:* (202) 514–8804; *e-mail: Lorraine.edmo@usdoj.gov*; or *fax:* 202 307–3911. Time will be reserved for public comment on June 29, 2008 from 11:30 a.m. to 12 p.m. See the section below for information on reserving time for public comment.

Access: This meeting will be open to the pubic but registration on a space available basis is required. All members of the public Persons who wish to attend must register at least six (6) days in advance of the meeting by contacting Lorraine Edmo, Deputy Tribal Director, Office on Violence Against Women, United States Department of Justice, by *e-mail: Lorraine.edmo@usdoj.gov*; or *fax:* 202 307–3911. All attendees will be required to sign in at the meeting registration desk. Please bring photo identification and allow extra time prior to the start of the meeting.

The meeting site is accessible to individuals with disabilities. Individuals who require special accommodation in order to attend the meeting should notify Lorraine Edmo, Deputy Tribal Director, Office on Violence Against Women, United States Department of Justice, by *e-mail: Lorraine.edmo@usdoj.gov*; or *fax:* 202 307–3911 no later than June 22, 2009. After this date, we will attempt to satisfy accommodation requests but cannot guarantee the availability of any requests.

Written Comments: Interested parties are invited to submit written comments by June 22, 2009 to Lorraine Edmo, Deputy Tribal Director, Office on Violence Against Women, United States Department of Justice, 800 K Street, NW., Suite 920, Washington, DC 20530 by mail; or by *e-mail: Lorraine.edmo@usdoj.gov*; or by *fax:* 202 307–3911.

Public Comment: Persons interested in participating during the public comment period of the meeting, which will address the Title IX, Section 904 Research Plan Proposal, are requested to reserve time on the agenda by contacting Lorraine Edmo, Deputy Tribal Director, Office on Violence Against Women, United States Department of Justice, by *e-mail: Lorraine.edmo@usdoj.gov*; or fax: 202 307–3911. Requests must include the participant's name, organization represented, if appropriate, and a brief description of the subject of the comments. Each participant will be permitted approximately 3 to 5 minutes to present comments, depending on the number of individuals reserving time on the agenda. Participants are also encouraged to submit written copies of their comments at the meeting. Comments that are submitted to Lorraine Edmo, Deputy Tribal Director, Office on Violence Against Women, United States Department of Justice, 800 K Street, NW., Suite 920, Washington, DC 20530 by mail; by *e-mail: Lorraine.edmo@usdoj.gov*; or fax: 202 307–3911 before June 22, 2009 will be circulated to Task Force members prior to the meeting.

Given the expected number of individuals interested in presenting comments at the meeting, reservations should be made as soon as possible. Persons unable to obtain reservations to speak during the meeting are encouraged to submit written comments, which will be accepted at the meeting location or may be mailed to the Section 904 Violence Against Women in Indian Country Task Force, to the attention of Lorraine Edmo, Deputy Tribal Director, Office on Violence Against Women, United States Department of Justice, 800 K Street, NW., Suite 920, Washington, DC 20530.

Dated: May 21, 2009.

Catherine Pierce,

Acting Director, Office on Violence Against Women.

[FR Doc. E9–12598 Filed 5–29–09; 8:45 am]

BILLING CODE 4410–FX–P

DEPARTMENT OF JUSTICE

National Institute of Corrections

Solicitation for a Cooperative Agreement—National Sheriffs' Institute: Training Program Review, Delivery, Revision, and Evaluation

AGENCY: National Institute of Corrections, Department of Justice.

ACTION: Solicitation for a Cooperative Agreement.

SUMMARY: The National Institute of Corrections (NIC), Jails Division, is seeking applications for the review, delivery, evaluation, and revision of the curriculum for the National Sheriffs' Institute (NSI), which is co-sponsored by the National Institute of Corrections (NIC) and the National Sheriffs' Association (NSA). The NSI is a seven-day training program designed to introduce first-term sheriffs to leadership concepts as they apply to the Office of Sheriff. The project will be for a three-year period and will be carried out in conjunction with the NIC Jails Division. The awardee will work closely with NIC staff on all aspects of the project. To be considered, applicants must demonstrate, at a minimum: (1) Knowledge of the leadership role of sheriffs in their organization, local criminal justice system, and community; (2) in-depth expertise on contemporary leadership principles, concepts, and practices and their application to the leadership roles of sheriffs; (3) ability to conduct training, based on adult learning principles, on leadership principles, concepts, and practices; and (4) experience in conducting training for first-term sheriffs on their leadership roles.

DATES: Applications must be received by 4 p.m. (EDT) on June 19, 2009.

ADDRESSES: Mailed applications must be sent to: Director, National Institute of Corrections, 320 First Street, NW., Room 5007, Washington, DC 20534. Applicants are encouraged to use Federal Express, UPS, or similar service to ensure delivery by the due date as mail at NIC is sometimes delayed due to security screening.

Applicants who wish to hand-deliver their applications should bring them to 500 First Street, NW., Washington, DC

20534, and dial 202–307–3106, ext. 0, at the front desk for pickup.

Faxed or e-mailed applications will not be accepted; however, electronic applications can be submitted via *http://www.grants.gov*.

FOR FURTHER INFORMATION CONTACT: A copy of this announcement and links to the required application forms can be found on the NIC Web page at *http://www.nicic.gov/cooperativeagreements*.

Questions about this project and the application procedures should be directed to Jim T. Barbee, Correctional Program Specialist, National Institute of Corrections. Questions must be e-mailed to Mr. Barbee at *jbarbee@bop.gov*, and Mr. Barbee will respond by e-mail to the individual. Also, all questions and responses will be posted on NIC's Web site at *http://www.nicic.gov* for public review. (The names of those submitting the questions will not be posted.) The Web site will be updated daily and postings will remain on the Web site until the closing date of this cooperative agreement solicitation.

SUPPLEMENTARY INFORMATION:

Background: The NSI is a training program designed to introduce first-term sheriffs to their leadership role, specifically as it relates to the role of the sheriff in his/her own organization, the local criminal justice system, and the community. All leadership concepts are taught within the context of the experience of the first-term sheriff. Current program topics include: The Sheriff as Leader; Defining Your Leadership Direction; Self Awareness; Developing Your Executive Team; Ethics; Power and Influence; The External Environment and Public Partnerships; and Leading Change. The first two topics form the foundation for the program, and all other topics are taught as they relate to the sheriff's leadership role and the achievement of the sheriff's leadership direction. There are also two evening sessions—one conducted by NSA on the Office of Sheriff and one that provides a forum for discussing issues of the participants' choice. At the end of the program, each participant creates a leadership-development plan, based on what he/she has learned and self-assessments conducted throughout the program.

Although the current curriculum has been pilot tested and successfully conducted, NIC continuously assesses the content and delivery strategies for needed improvement. The current curriculum has been in place for about three years and is due for an overall review. NIC expects to work closely with the awardee and NSA to conduct the program, evaluate it, determine needed revisions, and make those revisions.

Scope of Work

NSI program delivery: The cooperative agreement awardee will facilitate the delivery of six NSI programs. This will entail contracting with five instructors to prepare for and deliver the program; ensuring all instructors are available and present for the entire program and a pre-program meeting (up to four hours) on the Sunday the program begins; managing the instructor team during the program; ensuring adherence to the lesson plans; facilitating participant learning activities; and managing participant activities and breaks to ensure compliance with timeframes noted in the lesson plans. NIC staff will be on site for each program, and the awardee will work closely with NIC staff during program delivery.

Note: The applicant must identify and describe the qualifications of at least four instructors who have committed to teaching the NSI under this cooperative agreement. The fifth instructor will be identified jointly by NIC and the awardee after the cooperative agreement is awarded. The work of the fifth instructor will be funded by the awardee and must be accounted for in the application budget.

The NSI begins on a Sunday with an instructor meeting in the afternoon and the opening program session Sunday night. The program concludes the following Saturday afternoon. For the foreseeable future, the program will be conducted in Longmont, Colorado.

The following are the responsibility of NIC or NSA: Recruiting and selecting participants; notifying participants of selection and program details; providing the training room, equipment, and materials; providing for participant lodging, meals, and transportation; mailing and ensuring completion of participants' pre-program assignments; and scoring the Myers-Briggs Type Inventory and the Leadership Practices Inventory. In addition to the program instructors, there is a mentoring sheriff for each program. NIC and NSA select and pay all expenses for the mentoring sheriff.

NSI program evaluation: There are three types of program evaluation for which the awardee will be responsible.

First, the awardee will, in conjunction with all program staff, observe and discuss participants' response to instructional modules; effectiveness of instructional strategies; relevance of content; and instructors' effectiveness in delivering the curriculum, managing participants, responding to participant questions, and engaging participants in learning activities. The awardee will facilitate a meeting of program staff to discuss these issues at the end of each day.

Second, the NIC Jails Division has developed two in-program evaluation forms. One is an evaluation form that participants complete at the end of each module. This form assesses, based on self report, each participant's level of knowledge about a given concept before and after completing the module; the relevance of each concept to the participant's work; and the degree to which each participant intends to use what he/she has learned. Participants are given time at the end of each module to complete the form. The awardee will distribute and collect the forms after each module for program staff review and discussion at the end of the day. The other in-program evaluation is an end-of-program questionnaire completed by each participant. The awardee will distribute and collect these forms for program staff review and discussion at the end of the program. Within three weeks after the program, the awardee will submit a report to NIC that includes: (1) Tabulation of all ratings from both evaluation forms, (2) compilation of all comments from both evaluation forms, and (3) a brief summary of evaluation results and their implications for program revision.

Third, NIC has developed a three-month follow-up evaluation to determine if participants implemented the concepts taught; the effect of implementation on their ability to lead; obstacles to implementation; participants' assessment of the effectiveness of the NSI; and participants' suggestions for improving the NSI. The awardee will conduct this evaluation through telephone interviews with program participants. Within one month of interview completion, the awardee will deliver to NIC a written report of evaluation findings and the implications for program content and delivery. The awardee will include in this report note of any correlation or discrepancies between the in-program evaluation results (degree of learning, assessment of concept relevance, and intention to implement concepts) and the findings of the follow-up evaluation.

Program revisions: Based on the evaluations noted above, the awardee will work closely with NIC staff to identify needed curriculum revisions. The awardee will also draft revisions, working with NIC staff. NIC staff will write the final version of the revised lesson plans and ensure they are in NIC's lesson plan format.

Meetings with NIC staff: Shortly after the award of the cooperative agreement,

the awardee and instructional team will meet with NIC staff for a ''kick-off'' meeting, which will last up to two days. Also, the awardee and up to four members of the instructional team will meet at three times each year of the award. These meetings will last up to two days and will focus on program planning, review, and revision.

Initial familiarization with the NSI: In preparation for the project kick-off meeting, the awardee will review all program lesson plans, participant manuals, presentation slides, and other program materials.

Application Requirements: An application package must include OMB Standard Form 425, Application for Federal Assistance; a cover letter that identifies the audit agency responsible for the applicant's financial accounts as well as the audit period or fiscal year under which the applicant operates (*e.g.*, July 1 through June 30); and an outline of projected costs with the budget and strategy narratives described in this announcement. The following additional forms must also be included: OMB Standard Form 424A, Budget Information—Non-Construction Programs; OMB Standard Form 424B, Assurances—Non-Construction Programs (both available at *http://www.grants.gov*); DOJ/FBOP/NIC Certification Regarding Lobbying, Debarment, Suspension and Other Responsibility Matters; and the Drug-Free Workplace Requirements (available at *http://www.nicic.org/Downloads/PDF/certif-frm.pdf*).

Applications should be concisely written, typed double spaced, and reference the NIC opportunity number and title referenced in this announcement.

If you are hand delivering or submitting via Fed-Ex, please include an original and three copies of your full proposal (program and budget narrative, application forms, assurances and other descriptions). The original should have the applicant's signature in blue ink. Electronic submissions will be accepted only via *http://www.grants.gov*.

The narrative portion of the application should include, at a minimum: a brief paragraph indicating the applicant's understanding of the project's purpose; a brief paragraph that summarizes the project goals and objectives; a clear description of the methodology that will be used to complete the project and achieve its goals; a statement or chart of measurable project milestones and timelines for the completion of each milestone; a description of the qualifications of the applicant organization and a resume for the principal and each staff member assigned to the project (including instructors) that documents relevant knowledge, skills, and abilities to carry out the project; and a budget that details all costs for the project, shows consideration for all contingencies for the project, and notes a commitment to work within the proposed budget.

The narrative portion of the application should not exceed ten double-spaced typewritten pages, excluding attachments related to the credentials and relevant experience of staff.

Authority: Public Law 93–415.

Funds Available: NIC is seeking the applicant's best ideas regarding accomplishment of the scope of work and the related costs for achieving the goals of this solicitation. Funds may be used only for the activities that are linked to the desired outcome of the project.

Eligibility of Applicants: An eligible applicant is any State or general unit of local government, private agency, educational institution, organization, individual, or team with expertise in the described areas. Applicants must have demonstrated ability to implement a project of this size and scope.

Review Considerations: Applications will be subject to the NIC Review Process. The criteria for the evaluation of each application will be as follows:

Project Design and Management—30%

Is there a clear understanding of the purpose of the project and the nature and scope of project activities? Does the applicant give a clear and complete description of all work to be performed for this project? Does the applicant clearly describe a work plan, including objectives, tasks, and milestones necessary to project completion? Are the objectives, tasks, and milestones realistic and will they achieve the project as described in NIC's solicitation for this cooperative agreement? Are the roles and the time required of project staff clearly defined? Is the applicant willing to meet with NIC staff, at a minimum, as specified in the solicitation for this cooperative agreement?

Applicant Organization and Project Staff Background—45%

Is there a description of the background and expertise of all project personnel as they relate to this project? Is the applicant capable of managing this project? Does the applicant have an established reputation or skill that makes the applicant particularly well qualified for the project? Do project personnel, individually or collectively, have knowledge of the leadership role of sheriffs in their organization, local criminal justice system, and community? Do the project personnel, individually or collectively, have in-depth expertise on contemporary leadership principles, concepts, and practices and their application to the leadership roles of sheriffs? Do the project personnel, individually or collectively, have the ability to conduct training, based on adult learning principles, on leadership principles, concepts, and practices? Do project personnel, individually or collectively, have experience in conducting training for first-term sheriffs on their leadership roles? Does the staffing plan propose sufficient and realistic time commitments from key personnel? Are there written commitments from proposed staff that they will be available to work on the project as described in the application?

Budget—25%

Does the application provide adequate cost detail to support the proposed budget? Are potential budget contingencies included? Does the application include a chart that aligns the budget with project activities along a timeline with, at a minimum, quarterly benchmarks? In terms of program value, is the estimated cost reasonable in relation to work performed and project products?

Note: NIC will not award a cooperative agreement to an applicant who does not have a Dun and Bradstreet Database Universal Number (DUNS) and is not registered in the Central Contractor Registry (CCR).

Applicants can obtain a DUNS number at no cost by calling the dedicated toll-free DUNS number request line at 800–333–0505. Applicants who are sole proprietors should dial 866–705–5711 and select option #1.

Applicants may register in the CCR Online at the CCR Web site at *http://www.ccr.gov*. Applicants can also review a CCR handbook and worksheet at this Web site.

Number of Awards: One.

NIC Opportunity Number: 09J70. This number should appear as a reference line in the cover letter, where the opportunity number is requested on Standard Form 424, and on the outside of the envelope in which the application is sent.

Catalog of Federal Domestic Assistance Number: 16.601.

Executive Order 12372: This project is not subject to the provisions of the executive order.

Morris L. Thigpen,

Director, National Institute of Corrections.

[FR Doc. E9–12629 Filed 5–29–09; 8:45 am]

BILLING CODE 4410–36–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (09–045)]

Review of U.S. Human Space Flight Plans Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration announces a meeting of the Review of U.S. Human Space Flight Plans Committee. For specifics on agenda topics, see the **SUPPLEMENTARY INFORMATION** section of this notice.

DATES: Wednesday, June 17, 2009, 9 a.m.–5 p.m.

ADDRESSES: Carnegie Institution, 1530 P Street, NW., Washington, DC 20005, *phone:* 202–387–6400.

FOR FURTHER INFORMATION CONTACT: Mr. Philip R. McAlister, Office of Program Analysis and Evaluation, National Aeronautics and Space Administration, Washington, DC 20546. Phone 202–358–0712.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the seating capacity of the room. It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants. The agenda topics for the meeting include:

- Previous Studies on U.S. Human Space Flight.
- Current U.S. Space Policy.
- International Cooperation.
- Evolved Expendable Launch Vehicle.
- Commercial Human Space Flight Capabilities.
- Exploration Technology Planning.

P. Diane Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. E9–12661 Filed 5–29–09; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

[Docket No. 50–389;NRC–2009–0221]

Florida Power and Light; Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. NPF–16, issued to Florida Power and Light (the licensee), for operation of the St. Lucie Plant Unit 2 located in St. Lucie County, Florida.

The proposed amendment would revise Technical Specification (TS) 3.1.3.4, related to requirements for Control Element Assembly (CEA) drop time to increase the available margin for CEA drop time testing.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in Title 10 of the Code of Federal Regulations (10 CFR), Section 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. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

The proposed change increases the required CEA drop time. This new CEA drop time requirement must be verified prior to Modes 1 or 2 of plant operations. The probability of an accident previously evaluated remains unchanged since the CEAs drop into the core as a result of a core anomaly or undesired condition, and the fact that the CEA drop time was increased does not in itself initiate an accident. Likewise, the consequences of an accident previously evaluated remain unchanged since for both LOCA [loss-of-coolant accident] and non-LOCA analyses, it has been verified that the proposed slower reactivity insertion rate at all rod positions will not preclude meeting the trip reactivity limits used in the analyses.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

The proposed change does not involve a physical alteration of the plant (no new or different type of equipment will be installed) or a change in the methods governing normal plant operation. The proposed change will not introduce new failure modes or effects and will not, in the absence of other unrelated failures, lead to an accident whose consequences exceed the consequences of accidents previously analyzed.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

The increase in CEA drop time as proposed in this TS change has been determined to have no adverse impact on the St. Lucie Unit 2 safety analysis described in the UFSAR [Updated Final Safety Analysis Report], and thus does not have any effect on the existing margins of safety for the fuel, the fuel cladding, the reactor vessel, or the containment building. The change in CEA drop time does not impact the power shapes (assumed for Relaxed Axial Offset Control or the safety analyses) or statepoints; hence there is no impact on the thermal hydraulic or fuel rod design analysis. There is no impact on the mechanical design. The slightly slower drop would produce a smaller impact on the fuel assembly and lower stresses on the CEA. Since there is no adverse impact, current mechanical design analyses remain applicable.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied.

Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

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.

Within 60 days after the date of publication of this notice, any person(s) whose interest may be affected by this action may file a request for a hearing and a petition to intervene with respect to issuance of the amendment to the subject facility operating license.

Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/*. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner/requestor must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. 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 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, 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 on August 28, 2007 (72 FR 49139). The E-Filing process requires participants to submit and serve all adjudicatory documents over the Internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 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 may seek assistance through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html* or by calling the NRC electronic filing Help Desk, which is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays. The electronic filing Help Desk can be contacted by telephone at 1–866–672–7640 or by e-mail at *MSHD.Resource@nrc.gov*.

Participants who believe that they have a good cause for not submitting documents electronically must file a motion, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Non-timely requests and/or petitions and contentions will not be entertained absent a determination by the Commission 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 submissions.

For further details with respect to this license amendment application, see the application for amendment dated May 21, 2009, which is available for public inspection at the Commission's PDR, located at One White Flint North, File Public Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov*.

Dated at Rockville, Maryland, this 22nd day of May 2009.

For the Nuclear Regulatory Commission.

Marlayna G. Vaaler,

Project Manager, Plant Licensing Branch II–2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E9–12620 Filed 5–29–09; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF STATE

[Public Notice: 6642]

60-Day Notice of Proposed Information Collection: Form DS–6002, Prior Notification; OMB Control Number 1405–0171

ACTION: Notice of request for public comments.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for information collection described below. The purpose of this notice is to allow 60 days for public comment in the **Federal Register** preceding submission to OMB. We are conducting this process in accordance with the Paperwork Reduction Act of 1995.

Title of Information Collection: Prior Notification.

OMB Control Number: 1405–0171.

Type of Request: Extension of currently approved collection.

Originating Office: Bureau of Political Military Affairs, Directorate of Defense Trade Controls, PM/DDTC.

Form Number: DS–6002.

Respondents: Business organizations.

Estimated Number of Respondents: 18 (total).

Estimated Number of Responses: 47 (per year).

Average Hours per Response: 1 hour.

Total Estimated Burden: 47 hours (per year).

Frequency: On Occasion.

Obligation to Respond: Mandatory.

DATES: The Department will accept comments from the public up to 60 days from June 1, 2009.

ADDRESSES: Comments and questions should be directed to Mary F. Sweeney, Office of Defense Trade Controls Policy, Department of State, who may be reached via the following methods:

E-mail: Sweeneymf@state.gov.

Mail: Mary F. Sweeney, SA–1, 12th Floor, Directorate of Defense Trade Controls, Bureau of Political Military Affairs, U.S. Department of State, Washington, DC 20522–0112.

Fax: 202–261–8199.

You must include the information collection title in the subject line of your message/letter.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including a copy of the supporting document, to Mary F. Sweeney, PM/DDTC, SA–1, 12th Floor, Directorate of Defense Trade Controls, Bureau of Political Military Affairs, U.S. Department of State, Washington, DC 20522–0112, who may be reached via

phone at (202) 663–2865, or via e-mail at *sweeneymf@state.gov*.

SUPPLEMENTARY INFORMATION: We are soliciting public comments to permit the Department to:

Evaluate whether the proposed collection of information is necessary for the proper performance of our functions.

Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.

Enhance the quality, utility, and clarity of the information to be collected.

Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of technology.

Abstract of proposed collection: An exporter is required to submit prior notification in accordance with 22 CFR 126.8(a)(2) regarding the sale of significant military equipment to foreign persons.

Methodology: This information collection may be sent to the Directorate of Defense Controls via mail.

Dated: May 22, 2009.

Robert S. Kovac,

Acting Deputy Assistant, Secretary for Defense Trade, Bureau of Political-Military Affairs, U.S. Department of State.

[FR Doc. E9–12655 Filed 5–29–09; 8:45 am]

BILLING CODE 4710–27–P

DEPARTMENT OF STATE

[Public Notice 6644]

60-Day Notice of Proposed Information Collection: Form DS–6004, Request To Change End User, End Use and/or Destination of Hardware; OMB Control Number 1405–0173.

ACTION: Notice of request for public comments.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. The purpose of this notice is to allow 60 days for public comment in the **Federal Register** preceding submission to OMB. We are conducting this process in accordance with the Paperwork Reduction Act of 1995.

Title of Information Collection: Request To Change End User, End Use and/or Destination or Hardware.

OMB Control Number: 1405–0173.

Type of Request: Extension of currently approved collection.

Originating Office: Bureau of Political Military Affairs, Directorate of Defense Trade Controls, PM/DDTC.

Form Number: DS–6004.

Respondents: Business organizations.

Estimated Number of Respondents: 300 (total).

Estimated Number of Responses: 1,470 (per year).

Average Hours Per Response: 1 hour.

Total Estimated Burden: 1,470 hours (per year).

Frequency: On Occasion.

Obligation to Respond: Mandatory.

DATES: The Department will accept comments from the public up to 60 days from June 1, 2009.

ADDRESSES: Comments and questions should be directed to Mary F. Sweeney, Office of Defense Trade Controls Policy, Department of State, who may be reached via the following methods:

E-mail: Sweeneymf@state.gov.

Mail: Mary F. Sweeney, SA–1, 12th Floor, Directorate of Defense Trade Controls, Bureau of Political Military Affairs, U.S. Department of State, Washington, DC 20522–0112.

Fax: 202–261–8199.

You must include the information collection title in the subject line of your message/letter.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including a copy of the supporting document, to Mary F. Sweeney, PM/DDTC, SA–1, 12th Floor, Directorate of Defense Trade Controls, Bureau of Political Military Affairs, U.S. Department of State, Washington, DC 20522–0112, who may be reached via phone at (202) 663–2865, or via e-mail at *sweeneymf@state.gov*.

SUPPLEMENTARY INFORMATION: We are soliciting public comments to permit the Department to:

Evaluate whether the proposed collection of information is necessary for the proper performance of our functions.

Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.

Enhance the quality, utility, and clarity of the information to be collected.

Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of technology.

Abstract of proposed collection: Form DS–6004 is used to request approval prior to any sale, transfer, transshipment, or disposal of classified or unclassified defense articles, whether permanent or temporary to any end user, end use, or destination other than as stated on the license or other approval or on a Shipper's Export Declaration.

Methodology: This information collection may be sent to the Directorate of Defense Controls via mail.

Dated: May 22, 2009.

Robert S. Kovac,

Acting Deputy Assistant, Secretary for Defense Trade, Bureau of Political-Military Affairs, U.S. Department of State.

[FR Doc. E9–12657 Filed 5–29–09; 8:45 am]

BILLING CODE 4710–27–P

DEPARTMENT OF STATE

[Public Notice 6645]

60-Day Notice of Proposed Information Collection: Form DS–6001, Request for Advisory Opinion; OMB Control Number 1405–0174

ACTION: Notice of request for public comments.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. The purpose of this notice is to allow 60 days for public comment in the **Federal Register** preceding submission to OMB. We are conducting this process in accordance with the Paperwork Reduction Act of 1995.

Title of Information Collection: Request for Advisory Opinion.

OMB Control Number: 1405–0174.

Type of Request: Extension of currently approved collection.

Originating Office: Bureau of Political Military Affairs, Directorate of Defense Trade Controls, PM/DDTC.

Form Number: DS–6001.

Respondents: Business organizations.

Estimated Number of Respondents: 170 (total).

Estimated Number of Responses: 250 (per year).

Average Hours per Response: 1 hour.

Total Estimated Burden: 250 hours (per year).

Frequency: On occasion.

Obligation to Respond: Mandatory.

DATES: The Department will accept comments from the public up to 60 days from June 1, 2009.

ADDRESSES: Comments and questions should be directed to Mary F. Sweeney, Office of Defense Trade Controls Policy, Department of State, who may be reached via the following methods:

E-mail: Sweeneymf@state.gov.

Mail: Mary F. Sweeney, SA–1, 12th Floor, Directorate of Defense Trade Controls, Bureau of Political Military Affairs, U.S. Department of State, Washington, DC 20522–0112.

Fax: 202–261–8199.

You must include the information collection title in the subject line of your message/letter.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including a copy of the supporting document, to Mary F. Sweeney, PM/DDTC, SA–1, 12th Floor, Directorate of Defense Trade Controls, Bureau of Political Military Affairs, U.S. Department of State, Washington, DC 20522–0112, who may be reached via phone at (202) 663–2865, or via e-mail at *sweeneymf@state.gov*.

SUPPLEMENTARY INFORMATION: We are soliciting public comments to permit the Department to:

Evaluate whether the proposed collection of information is necessary for the proper performance of our functions.

Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.

Enhance the quality, utility, and clarity of the information to be collected.

Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of technology.

Abstract of proposed collection: Form DS–6001 is used when an exporter desires an opinion as to whether the Directorate of Defense Trade Controls would likely grant a license or other approval for a particular export transaction involving defense articles or defense services. Also, the DS–6001 may be used to satisfy the prior approval requirements of 22 CFR 126.8 for a proposal to sell or manufacture abroad significant military equipment to foreign persons.

Methodology: This information collection may be sent to the Directorate of Defense Controls via mail.

Dated: May 22, 2009.

Robert S. Kovac,

Acting Deputy Assistant, Secretary for Defense Trade, Bureau of Political-Military Affairs, U.S. Department of State.

[FR Doc. E9–12658 Filed 5–29–09; 8:45 am]

BILLING CODE 4710–27–P

DEPARTMENT OF STATE

[Public Notice 6647]

Determination Related to Serbia Under Section 7072(c) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2009 (Div. H, Pub. L. 111–8)

Pursuant to the authority vested in me as Secretary of State, including under section 7072(c) of the Department of State, Foreign Operations, and Related Programs Appropriations Act (SFOAA), 2009 (Div. H, Pub. L. 111–8), and the President's Delegation of Responsibilities Related to the Federal Republic of Yugoslavia, dated March 22, 2001, I hereby determine and certify that the Government of Serbia is:

(1) Cooperating with the International Criminal Tribunal for the former Yugoslavia including access for investigators, the provision of documents, timely information on the location, movement, and sources of financial support of indictees, and the surrender and transfer of indictees or assistance in their apprehension, including Ratko Mladic;

(2) taking steps that are consistent with the Dayton Accords to end Serbian financial, political, security, and other support which has served to maintain separate Republika Srpska institutions; and

(3) taking steps to implement policies which reflect a respect for minority rights and the rule of law.

This Determination and related Memorandum of Justification shall be provided to the appropriate committees of the Congress. This Determination shall be published in the **Federal Register**.

Dated: May 20, 2009.

Hillary Rodham Clinton,

Secretary of State, Department of State.

[FR Doc. E9–12663 Filed 5–29–09; 8:45 am]

BILLING CODE 4710–23–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2009–0058]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel CHRISTIANS JOY IV.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket MARAD–2009–0058 at *http://www.regulations.gov*. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR Part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

DATES: Submit comments on or before July 1, 2009.

ADDRESSES: Comments should refer to docket number MARAD–2009–0058. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov*. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel CHRISTIANS JOY IV is:

Intended Use: ''Pleasure/Recreational and a vessel to use for charter.''

Geographic Region: ''California''

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Dated: May 20, 2009.

By Order of the Maritime Administrator.

Christine Gurland,

Acting Secretary, Maritime Administration.

[FR Doc. E9–12610 Filed 5–29–09; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2009–0055]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel ISLAND LADY.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket MARAD–2009–0055 at *http://www.regulations.gov*. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR Part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

DATES: Submit comments on or before July 1, 2009.

ADDRESSES: Comments should refer to docket number MARAD–2009–0055. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov*. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., ET, Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket are available on the World Wide Web at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel ISLAND LADY is:

Intended Use: ''Carry passengers for hire.''

Geographic Region: ''Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, Georgia, Florida, California, South Carolina.''

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Dated: May 20, 2009.

By Order of the Maritime Administrator.

Christine Gurland,

Acting Secretary, Maritime Administration.

[FR Doc. E9–12615 Filed 5–29–09; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2009–0052]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel S/V CLOUDIA.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket MARAD–2009–0052 at *http://www.regulations.gov*. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR Part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

DATES: Submit comments on or before July 1, 2009.

ADDRESSES: Comments should refer to docket number MARAD–2009–0052. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov*. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., ET, Monday through Friday, except federal holidays. An electronic version of this

document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel S/V CLOUDIA is:

Intended Use: ''San Diego Harbor tours, Whale watching, Charters.''

Geographic Region: ''California, Oregon, Washington, Alaska.''

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Dated: May 12, 2009.

By order of the Maritime Administrator.

Christine Gurland,

Acting Secretary, Maritime Administration.

[FR Doc. E9–12614 Filed 5–29–09; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2009 0051]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel FARALLON.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket MARAD–2009–0051 at *http://www.regulations.gov*. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR Part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted.

Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

DATES: Submit comments on or before July 1, 2009.

ADDRESSES: Comments should refer to docket number MARAD–2009–0051. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov*. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979.

SUPPLEMENTARY INFORMATION: As described by the applicant, the intended service of the vessel FARALLON is:

Intended Use: ''Passenger.''

Geographic Region: ''California.''

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Dated: May 18, 2009.

By order of the Maritime Administrator.

Christine Gurland,

Acting Secretary, Maritime Administration.

[FR Doc. E9–12612 Filed 5–29–09; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2009 0056]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel SUNDANCER.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket MARAD–2009–0056 at *http://www.regulations.gov*. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR Part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

DATES: Submit comments on or before July 1, 2009.

ADDRESSES: Comments should refer to docket number MARAD–2009–0056. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140,

1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov*. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., ET, Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket are available on the World Wide Web at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel SUNDANCER is:

Intended Use: ''Sailboat Charters.''

Geographic Region: ''Hawaii, California, Oregon, Washington, Alaska.''

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Dated: May 20, 2009.

By order of the Maritime Administrator.

Christine Gurland,

Acting Secretary, Maritime Administration.

[FR Doc. E9–12613 Filed 5–29–09; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2009 0050]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel FREDRIKSTAD.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket MARAD–2009–0050 at *http://www.regulations.gov*. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR Part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

DATES: Submit comments on or before July 1, 2009.

ADDRESSES: Comments should refer to docket number MARAD–2009–0050. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov*. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel FREDRIKSTAD is:

Intended Use: ''We are to use the boat to train cadets in all aspects of Yacht Management, Maintenance, Boat handling, and engineering.''

Geographic Region: ''Maine, Massachusetts, New Hampshire, Rhode Island, Connecticut, New York, New Jersey, Maryland, Virginia, North Carolina, South Carolina, Georgia, Florida, Louisiana, Texas, Mississippi, Ohio, Michigan, Wisconsin, Illinois, Indiana, and Alabama''

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Dated: May 18, 2010.

By order of the Maritime Administrator.

Christine Gurland,

Acting Secretary, Maritime Administration.

[FR Doc. E9–12611 Filed 5–29–09; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD 2009 0049]

Information Collection Available for Public Comments and Recommendations

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Maritime Administration's (MARAD's) intention to request extension of approval for three years of a currently approved information collection.

DATES: Comments should be submitted on or before July 31, 2009.

FOR FURTHER INFORMATION CONTACT: Robert Brown, Maritime Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. *Telephone:* 202–366–2277 or *e-mail: Robert.Brown@dot.gov*. Copies of this collection also can be obtained from that office.

SUPPLEMENTARY INFORMATION: Maritime Administration (MARAD).

Title of Collection: Automated Mutual-Assistance Vessel Rescue System (AMVER).

Type of Request: Extension of currently approved information collection.

OMB Control Number: 2133–0025.

Form Numbers: None.

Expiration Date of Approval: Three years from date of approval by the Office of Management and Budget.

Summary of Collection of Information: This collection of information is used to gather information regarding the location of U.S.-flag vessels and certain other U.S. citizen-owned vessels for the purpose of search and rescue in the saving of lives at sea and for the marshalling of ships for national defense and safety purposes.

Need and Use of the Information: The collection of information is necessary for maintaining a current plot of U.S.-flag and U.S.-owned vessels.

Description of Respondents: U.S.-flag and U.S. citizen-owned vessels.

Annual Responses: 29,280 responses.

Annual Burden: 2,050 hours.

Comments: Comments should refer to the docket number that appears at the top of this document. Written comments may be submitted to the Docket Clerk, U.S. DOT Dockets, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. Comments also may be submitted by electronic means via the Internet at *http://www.regulations.gov/search/index.jsp*. Specifically address whether this information collection is necessary for proper performance of the functions of the agency and will have practical utility, accuracy of the burden estimates, ways to minimize this burden, and ways to enhance the quality, utility, and clarity of the information to be collected. All comments received will be available for examination at the above address between 10 a.m. and 5 p.m. *EDT* (*or EST*), Monday through Friday, except Federal holidays. An electronic version of this document is available on the World Wide Web at *http://www.regulations.gov/search/index.jsp*.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://www.regulations.gov/search/index.jsp*.

Authority: 49 CFR 1.66.

Dated: May 18, 2009.

By order of the Maritime Administrator.

Christine Gurland,

Acting Secretary, Maritime Administration.

[FR Doc. E9–12608 Filed 5–29–09; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[FTA Docket No. 2009–0029]

Notice of Request for Reinstatement of Information Collections

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the intention of the Federal Transit Administration (FTA) to request the Office of Management and Budget (OMB) to approve the reinstatement of the following information collections:

(1) Bus Testing Program

(2) Transit Research, Development, Demonstration and Deployment Projects

DATES: Comments must be submitted before July 31, 2009.

ADDRESSES: To ensure that your comments are not entered more than once into the docket, submit comments identified by the docket number by only one of the following methods:

1. *Web site: http://www.regulations.gov*. Follow the instructions for submitting comments on the U.S. Government electronic docket site. (Note: The U.S. Department of Transportation's (DOT's) electronic docket is no longer accepting electronic comments.) All electronic submissions must be made to the U.S. Government electronic docket site at *http://www.regulations.gov*. Commenters should follow the directions below for mailed and hand-delivered comments.

2. *Fax:* 202–493–2251.

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

4. *Hand Delivery:* U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Docket Operations, M–30, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001 between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays.

Instructions: You must include the agency name and docket number for this notice at the beginning of your comments. Submit two copies of your comments if you submit them by mail. For confirmation that FTA has received your comments, include a self-addressed stamped postcard. Note that all comments received, including any personal information, will be posted and will be available to Internet users, without change, to *http://www.regulations.gov*. You may review DOT's complete Privacy Act Statement in the **Federal Register** published April 11, 2000, (65 FR 19477), or you may visit *http://www.regulations.gov*.

Docket: For access to the docket to read background documents and comments received, go to www.regulations.gov at any time. Background documents and comments received may also be viewed at the U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Docket Operations, M–30, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001 between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays.

FOR FURTHER INFORMATION CONTACT:

—Mr. Marcel Belanger, FTA Office of Research, Demonstration and Innovation, (202) 366–0725, or *e-mail: marcel.belanger@dot.gov* (for the Bus Testing Program).

—Mr. Bruce Robinson, FTA Office of Research, Demonstration and Innovation, (202) 366–4052, or *e-mail: bruce.robinson@dot.gov* (for Transit Research, Development, Demonstration and Deployment Projects).

SUPPLEMENTARY INFORMATION: Interested parties are invited to send comments regarding any aspect of this information collection, including: (1) The necessity and utility of the information collection for the proper performance of the functions of the FTA; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the collected information; and (4) ways to minimize the collection burden without reducing the quality of the collected information. Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection.

Title: Bus Testing Program (OMB Number: 2132–0550)

Background: 49 U.S.C. Section 5323(c) provides that no federal funds appropriated or made available after September 30, 1989, may be obligated or expended for the acquisition of a new bus model (including any model using alternative fuels) unless the bus has been tested at the Bus Testing Center (Center in Altoona, Pennsylvania. 49 U.S.C. Section 5318(a) further specifies that each new bus model is to be tested for maintainability, reliability, safety, performance (including braking performance), structural integrity, fuel economy, emissions and noise.

The operator of the Bus Testing Center, the Thomas D. Larson Pennsylvania Transportation Institute (LTI), has entered into a cooperative agreement with FTA. LTI operates and

maintains the Center and establishes and collects fees for the testing of the vehicles at the facility. Upon completion of the testing of the vehicles at the Center, a test report is provided to the manufacturer of the new bus model. The bus manufacturer certifies to an FTA grantee that the bus the grantee is purchasing has been tested at the Center. Also, grantees that are planning to purchase a bus use this report to assist them in making their purchasing decisions. LTI maintains a reference file for all the test reports which are made available to the public.

Respondents: Bus Manufacturers.

Estimated Annual Burden on Respondents: 30 testing determinations at 3 hours each; 18 tests at 3 hours each and 520 requirements at 0.5 hours each.

Estimated Total Annual Burden: 404 hours.

Frequency: Annual.

Title: 49 U.S.C. Section 5312(a) Transit Research, Development, Demonstration and Deployment Projects.

Background: 49 U.S.C. Section 5312(a) authorizes the Secretary of Transportation to make grants or contracts for research, development, demonstration and deployment projects and evaluation of technology of national significance to public transportation that the Secretary determines will improve mass transportation service or help transportation service meet the total urban transportation needs at a minimum cost. In carrying out the provisions of this section, the Secretary is also authorized to request and receive appropriate information from any source. As an example, FTA's United We Ride Program is funded under the Transit Research Program. Research for the United We Ride Program is being conducted to gather information on how the objectives of Executive Order 13330 on Human Services Transportation Coordination are being achieved.

The information collected is submitted as part of the application for grants and cooperative agreements and is used to determine eligibility of applicants. Collection of this information also provides documentation that the applicants and recipients are meeting program objectives and are complying with FTA Circular 6100.1B and other federal requirements.

Respondents: FTA grant recipients.

Estimated Annual Burden on Respondents: 56.2 hours for each of the 200 respondents.

Estimated Total Annual Burden: 11,240 hours.

Frequency: Annual.

Issued: May 26, 2009.

Ann M. Linnertz,

Associate Administrator for Administration.

[FR Doc. E9–12605 Filed 5–29–09; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Buy America Waiver Notification

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: This notice provides information regarding the FHWA's finding that a Buy America waiver is appropriate for the use of a foreign Three-Ton Chain Hoist in the Federal-aid construction project for the Hood Canal Bridge BR–0104 (25) retrofit and replacement in Washington.

DATES: The effective date of the waiver is June 2, 2009.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Gerald Yakowenko, FHWA Office of Program Administration, (202) 366–1562, or via e-mail at *gerald.yakowenko@dot.gov*. For legal questions, please contact Mr. Michael Harkins, FHWA Office of the Chief Counsel, (202) 366–4928, or via e-mail at *michael.harkins@dot.gov*. Office hours for the FHWA are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded from the **Federal Register**'s home page at: *http://www.archives.gov* and the Government Printing Office's database at: *http://www.access.gpo.gov/nara*.

Background

The FHWA's Buy America policy in 23 CFR 635.410 requires a domestic manufacturing process for any steel or iron products (including protective coatings) that are permanently incorporated in a Federal-aid construction project. The regulation also provides for a waiver of the Buy America requirements when the application of such requirements would be inconsistent with the public interest or when satisfactory quality domestic steel and iron products are not sufficiently available. This notice provides information regarding the FHWA's finding that a Buy America waiver is appropriate for the Three-Ton Chain Hoist for the Hood Canal Bridge retrofit and replacement in Washington.

In accordance with Division I, section 126 of the ''Omnibus Appropriations Act, 2009'' (Pub. L. 111–8), the FHWA published a notice of intent to issue a waiver on its Web site for the Three-Ton Chain Hoist (*http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=32*) on April 16. The FHWA received no comments in response to this notice, which suggested that the Three-Ton Chain Hoist may not be available domestically. During the 15-day comment period, the FHWA conducted an additional nationwide review to locate potential domestic manufacturers for the Three-Ton Chain Hoist. Based on all the information available to the agency, the FHWA concludes that there are no domestic manufacturers for the Three-Ton Chain Hoist. Thus, the FHWA concludes that a Buy America waiver is appropriate as provided by 23 CFR 635.410(c)(1).

In accordance with the provisions of section 117 of the SAFETEA–LU Technical Corrections Act of 2008 (Pub. L. 110–244, 122 Stat. 1572), the FHWA is providing this notice as its finding that a waiver of Buy America requirements is appropriate. The FHWA invites public comment on this finding for an additional 15 days following the effective date of the finding. Comments may be submitted to the FHWA's Web site via the link provided to the Washington waiver page noted above.

Authority: 23 U.S.C. 313; Pub. L. 110–161, 23 CFR 635.410.

Issued on: May 15, 2009.

King W. Gee,

Associate Administrator for Infrastructure.

[FR Doc. E9–12637 Filed 5–29–09; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Office of Hazardous Materials Safety; Notice of Delays in Processing of Special Permits Applications

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of applications delayed more than 180 days.

SUMMARY: In accordance with the requirements of 49 U.S.C. 5117(c), PHMSA is publishing the following list of special permit applications that have been in process for 180 days or more. The reason(s) for delay and the expected

completion date for action on each application is provided in association with each identified application.

FOR FURTHER INFORMATION CONTACT: Delmer F. Billings, Director, Office of Hazardous Materials Special Permits and Approvals, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, PHH–30, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001, (202) 366–4535.

Key to "Reason for Delay"

1. Awaiting additional information from applicant.
2. Extensive public comment under review.
3. Application is technically complex and is of significant impact or precedent-setting and requires extensive analysis.
4. Staff review delayed by other priority issues or volume of special permit applications.

Meaning of Application Number Suffixes

N—New application

M—Modification request

PM—Party to application with modification request

Issued in Washington, DC, on May 26, 2009.

Delmer F. Billings,

Director, Office of Hazardous Materials, Special Permits and Approvals.

Application No.	Applicant	Reason for delay	Estimated date of completion
	MODIFICATION TO SPECIAL PERMITS		
14167–M	Trinityrail, Dallas, TX	4	06–30–2009
8723–M	Alaska Pacific Powder Company, Anchorage, AK	1	06–30–2009
14562–M	The Lite Cylinger Company, Franklin, TN	1	06–30–2009
	NEW SPECIAL PERMIT APPLICATIONS		
14689–N	Trinity Industries, Inc., Dallas, TX	2, 3	06–30–2009
14733–N	GTM Technologies, Inc., San Francisco, CA	1,3	06–30–2009

[FR Doc. E9–12621 Filed 5–29–09; 8:45 am]

BILLING CODE 4910–60–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Polk County, IA

AGENCY: Federal Highway Administration (FHWA), DOT, Polk County.

SUMMARY: The FHWA and Iowa DOT are issuing this notice to advise the public a tiered EIS will be prepared for a proposed roadway project in Polk County, Iowa. This is a change from a standard EIS to a tiered EIS. The Notice of Intent for the original EIS was published on July 21, 2005. The planned tiered EIS will evaluate potential transportation improvement alternatives for serving northeast Des Moines and its neighboring communities between I–80/US65 west of Altoona to US69/NE 126 Avenue north of Ankeny.

FOR FURTHER INFORMATION CONTACT: Michael La Pietra, Environment and Realty Manager, FHWA Iowa Division Office, 105 Sixth Street, Ames, IA 50010, Phone 515–233–7302; or James P. Rost, Director, Office of Location and Environment, Iowa Department of Transportation, 800 Lincoln Way, Ames, IA 50010, Phone 515–239–1798.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document is available for free download from the Federal Bulletin Board (FBB). The FBB is a free electronic bulletin board service of the Superintendent of Documents, U.S. Government Printing Office (GPO).

The FBB may be accessed in four ways: (1) Via telephone in dial-up mode or via the Internet through (2) telnet, (3) FTP, and (4) the World Wide Web.

For dial-up mode a user needs a personal computer, modem, telecommunications software package, and telephone line. A hard disk is recommended for file transfers.

For Internet access a user needs Internet connectivity. Users can telnet or FTP to: *fedbbs.access.gpo.gov*. Users can access the FBB via the World Wide Web at *http://fedbbs.access.gpo.gov*.

User assistance for the FBB is available from 7 a.m. until 5 p.m., Eastern Time, Monday through Friday (except federal holidays) by calling the GPO Office of Electronic Information Dissemination Services at 202–512–1530, toll-free at 888–293–6498; sending an e-mail to *gpoaccess@gpo.gov*; or sending a fax to 202–512–1262.

Access to this notice is also available to Internet users through the **Federal Register**'s home page at *http://www.nara.gov/fedreg*.

Background

The FHWA, in coordination with the Iowa Department of Transportation and Polk County will prepare a Tiered EIS for the proposed Northeast Beltway study. The proposed project would include roadway improvements to provide a high-speed connection from I–80 near Altoona to U.S. 69 north of Ankeny.

The purpose of the Northeast Polk County Beltway is to prepare for increased travel demand in and around Ankeny and its neighboring communities. Traffic congestion on I–35 between Des Moines and Ankeny would be alleviated, and traffic would be reduced on the Northeast systems interchange (35/80/235).

Alternatives under consideration include: (1) Taking no action; (2) widening existing roadways; and (3) constructing a roadway in a new location. The build alternative will include consideration of various alignments and grades.

The Northeast Beltway will be reclassified from an EIS to a tiered EIS. A tiered EIS is more appropriate for the Northeast Beltway project due to funding constraints and construction scheduling. Decisions made in the first tier document will include build or no build, project corridor, and logical termini for project segmentation. A specific alignment within the corridor would be identified in the Tier Two documents.

Letters describing the proposed action and soliciting comments will be sent to appropriate Federal, State, and local agencies, and to private organizations and citizens who have previously expressed or are known to have interest in this proposal. A series of public meetings will be held in 2009 and 2010. In addition, a public hearing will be

held upon completion of the draft EIS. Public notice will be given of the time and place of the public meetings and public hearing. The draft EIS will be available for public and agency review and comment prior to the public hearing.

Another public information meeting will be held to identify significant issues to be addressed in the tiered environmental impact statement. The date and location of the meeting have not yet been determined but will be advertised in various local media.

To ensure that the full range of issues related to this proposed action are addressed and all significant issues are identified, comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to the FHWA or Iowa Department of Transportation at the address provided in the caption **FOR FURTHER INFORMATION CONTACT**.

(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. 315; 49 CFR 1.48)

Dated: May 26, 2009.

Lubin M. Quinones,

Division Administrator, FHWA, Iowa Division.

[FR Doc. E9–12639 Filed 5–29–09; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD 2009 0048]

Notice of Ship Disposal: SS Pioneer Commander

The Maritime Administration plans to dispose of the obsolete vessel SS *Pioneer Commander*, which is currently located at its Beaumont Reserve Fleet in Beaumont, Texas. The Maritime Administration, in consultation with the Texas Historical Commission, determined that the vessel is eligible for listing on the National Register of Historic Places due to its role in a pivotal moment in U.S. history; the evacuation of more than 44,000 Americans, Vietnamese military and refugees from South Vietnam in 1975. This operation signaled the close of America's long involvement in Vietnam.

The National Defense Authorization Act for Fiscal Year 2004, Section 3512 of Public Law 108–136, authorizes the Maritime Administration to afford qualified public and non-profit organizations the opportunity to obtain, via donation, obsolete ships from the National Defense Reserve Fleet (NDRF) for use as memorials and/or in other non-commercial enterprises.

The Maritime Administration will accept completed donation applications for the SS *Pioneer Commander* from qualified organizations in accordance with the Ship Donation Program Requirements for a period of 45 days beginning June 1, 2009. For more information visit the Marad Ship Donation Program at *http://www.marad.dot.gov* or contact Mr. Kevin Smith at 202–366–3798 or via e-mail at *kevin.r.smith@dot.gov*.

Dated: May 18, 2009.

By Order of the Maritime Administrator.

Christine Gurland,

Acting Secretary, Maritime Administration.

[FR Doc. E9–12616 Filed 5–29–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Community Volunteer Income Tax Assistance (VITA) Matching Grant Program—Availability of Application Packages

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: This document provides notice of the availability of application packages for the 2010 Community Volunteer Income Tax Assistance (VITA) Matching Grant Program.

DATES: Application packages are available from the IRS at this time. The deadline for submitting an application to the IRS is July 17, 2009. Electronic copies of the application package can be obtained by visiting: *http://www.irs.gov* (key word search—''VITA Grant''). Application packages may also be requested by sending an e-mail to *Grant.Program.Office@irs.gov.* Applications must be submitted by mail. The mailing address is listed below. Applications will not be accepted via *grants.gov* due to the expected increase in system activity resulting from the American Recovery and Reinvestment Act of 2009.

ADDRESSES: Application packages should be mailed to: Internal Revenue Service, Grant Program Office, 401 West Peachtree St., NW., Stop 420–D, Atlanta, GA 30308.

FOR FURTHER INFORMATION CONTACT: Grant Program Office (404) 338–7894 (not a toll free number). The e-mail address is *Grant.Program.Office@irs.gov.*

SUPPLEMENTARY INFORMATION: Authority for the 2010 Community Volunteer Income Tax Assistance (VITA) Matching Grant Demonstration Program for tax return preparation is contained in H. R. 1105 Omnibus Appropriations Act, 2009 (Division D—Financial Services and General Government Appropriations Act, 2009).

Dated: May 12, 2009.

Elizabeth Blair,

Chief, Grant Program Office.

[FR Doc. E9–12169 Filed 5–29–09; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Advisory Group to the Internal Revenue Service; Tax Exempt and Government Entities Division (TE/GE); Meeting

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: The Advisory Committee on Tax Exempt and Government Entities (ACT) will hold a public meeting on Wednesday, June 10, 2009.

FOR FURTHER INFORMATION, CONTACT: Steven J. Pyrek, Director, TE/GE Communications and Liaison; 1111 Constitution Ave., NW.; SE:T:CL—Penn Bldg; Washington, DC 20224. *Telephone:* 202–283–9966 (not a toll-free number). *E-mail address: Steve.J.Pyrek@irs.gov*.

SUPPLEMENTARY INFORMATION: By notice herein given, pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988), a public meeting of the ACT will be held on Wednesday, June 10, 2009, from 10 a.m. to 1 p.m., at the Internal Revenue Service; 1111 Constitution Ave., NW.; Room 3313; Washington, DC. Issues to be discussed relate to Employee Plans, Exempt Organizations, and Government Entities. Due to an administrative error, less than 15 days notice is provided for this meeting.

Reports from four ACT subgroups cover the following topics:

- *Exempt Organizations:* Recommendations to Improve the Tax Rules Governing International Grantmaking.
- *Employee Plans:* International Pension Issues in a Global Economy: A Survey and Assessment of IRS' Role in Breaking Down the Barriers.

• *Tax Exempt Bonds:* Record Retention Requirements for Tax-Exempt Bonds and Tax Credit Bonds: A Specific Proposal for Published Guidance.

• *Federal, State and Local Governments:* Federal-State-Local Government Compliance Verification Checklist for Public Employers

Last minute agenda changes may preclude advance notice. Due to limited seating and security requirements, attendees must call Cynthia PhillipsGrady to confirm their attendance. Ms. PhillipsGrady can be reached at (202) 283–9954.

Attendees are encouraged to arrive at least 30 minutes before the meeting begins to allow sufficient time for security clearance. Picture identification must be presented. Please use the main entrance at 1111 Constitution Ave., NW., to enter the building. Should you wish the ACT to consider a written statement, please call (202) 283–9966, or write to: Internal Revenue Service; 1111 Constitution Ave., NW.; SE:T:CL—Penn Bldg; Washington, DC 20224, or e-mail *Steve.J.Pyrek@irs.gov*.

Dated: May 20, 2009.

Steven J. Pyrek,

Designated Federal Official, Tax Exempt and Government Entities Division.

[FR Doc. E9–12171 Filed 5–29–09; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Tax Counseling for the Elderly (TCE) Program Availability of Application Packages

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: This document provides notice of the availability of Application Packages for the 2010 Tax Counseling for the Elderly (TCE) Program.

DATES: Application Packages are available from the IRS at this time. The deadline for submitting an application package to the IRS for the 2010 Tax Counseling for the Elderly (TCE) Program is August 3, 2009. Applications must be submitted via hardcopy by the United States Postal Service, mail, or private delivery service by the deadline date.

Applications will not be accepted electronically through *Grants.gov.* due to the increased system activity expected resulting from the American Recovery and Reinvestment Act of 2009.

ADDRESSES: Application Packages may be requested by contacting: Internal Revenue Service, 401 W. Peachtree St., NW., Stop 420–D, Atlanta, GA 30308, Attention: Tax Counseling for the Elderly Grant Program Office.

FOR FURTHER INFORMATION CONTACT: The TCE Grant Program Office at the non-toll-free telephone number (404) 338–7894 or by e-mail at *tce.grant.office@irs.gov*.

SUPPLEMENTARY INFORMATION: Authority for the Tax Counseling for the Elderly (TCE) Program is contained in Section 163 of the Revenue Act of 1978, Public Law 95–600, (92 Stat. 12810), November 6, 1978. Regulations were published in the **Federal Register** at 44 FR 72113 on December 13, 1979. Section 163 gives the IRS authority to enter into cooperative agreements with private or public non-profit agencies or organizations to establish a network of trained volunteers to provide free tax information and return preparation assistance to elderly individuals. Elderly individuals are defined as individuals age 60 and over at the close of their taxable year.

Cooperative agreements will be entered into based upon competition among eligible agencies and organizations. Because applications are being solicited before the FY 2010 budget has been approved, cooperative agreements will be entered into subject to appropriation of funds. Once funded, sponsoring agencies and organizations will receive a grant from the IRS for administrative expenses and to reimburse volunteers for expenses incurred in training and in providing tax return assistance. The Tax Counseling for the Elderly (TCE) Program is referenced in the Catalog of Federal Domestic Assistance in Section 21.006.

Dated: May 13, 2009.

Elizabeth Blair,

Chief, Grant Program Office.

[FR Doc. E9–12168 Filed 5–29–09; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–New (NSV)]

Agency Information Collection (National Survey of Veterans, Active Duty Service Members, Activated National Guard and Reserve Members, Family Members and Survivors) Activities Under OMB Review

AGENCY: Office of Policy and Planning, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Office of Policy and Planning (OPP), Department of Veterans Affairs, has submitted the collection of information as abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before July 1, 2009.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov;* or to VA's OMB Desk Officer, Office of Information and Regulatory Affairs, New Executive Office Building, Room 10235, Washington, DC 20503, (202) 395–7316. Please refer to ''OMB Control 2900–New (NSV)'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or *e-mail: denise.mclamb@.va.gov.* Please refer to ''OMB Control No. 2900–New (NSV).

SUPPLEMENTARY INFORMATION:

Title: National Survey of Veterans, Active Duty Service Members, Activated National Guard and Reserve Members, Family Members and Survivors (NSV).

OMB Control Number: 2900–New (NSV).

Type of Review: New collection.

Abstract: The NSV will be conducted to obtain needed information that is not available in VA administrative files. The survey will be used to help VA improve services for beneficiaries and their families. For the first time, the NSV will include active duty service members; activated National Guard and Reserves; and family members and survivors in addition to veterans. The scope of the survey will be expanded to address the requirements of Public Law 108–454, section 805, to assess awareness of veterans' benefits and services. The NSV provides VA, Congress, stakeholders, and the public more accurate descriptions and assessments of the characteristics of the veteran population to evaluate existing programs and policies, to establish baseline measures before planning and implementing new programs and policies, and to monitor progress of programs and policies and their impacts on the population. The NSV will provide information to support VA policy, planning, and quality improvement decisions.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on February 10, 2009, at page 6696.

Affected Public: Individuals or households.

Estimated Total Annual Burden: 9,053 hours.

Estimated Average Burden Per Respondent: 10 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 54,316.

Dated: May 22, 2009.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. E9–12505 Filed 5–29–09; 8:45 am]

BILLING CODE 8320–01–P

Federal Register

Monday,
June 1, 2009

Part II

The President

Memorandum of May 27, 2009—Classified Information and Controlled Unclassified Information

Federal Register
Vol. 74, No. 103
Monday, June 1, 2009

Presidential Documents

Title 3—

The President

Memorandum of May 27, 2009

Classified Information and Controlled Unclassified Information

Memorandum for the Heads of Executive Departments and Agencies

As outlined in my January 21, 2009, memoranda to the heads of executive departments and agencies on Transparency and Open Government and on the Freedom of Information Act, my Administration is committed to operating with an unprecedented level of openness. While the Government must be able to prevent the public disclosure of information where such disclosure would compromise the privacy of American citizens, national security, or other legitimate interests, a democratic government accountable to the people must be as transparent as possible and must not withhold information for self-serving reasons or simply to avoid embarrassment.

To these ends, I hereby direct the following:

Section 1. *Review of Executive Order 12958.* (a) Within 90 days of the date of this memorandum, and after consulting with the relevant executive departments and agencies (agencies), the Assistant to the President for National Security Affairs shall review Executive Order 12958, as amended (Classified National Security Information), and submit to me recommendations and proposed revisions to the order.

(b) The recommendations and proposed revisions shall address:

(i) Establishment of a National Declassification Center to bring appropriate agency officials together to perform collaborative declassification review under the administration of the Archivist of the United States;

(ii) Effective measures to address the problem of over classification, including the possible restoration of the presumption against classification, which would preclude classification of information where there is significant doubt about the need for such classification, and the implementation of increased accountability for classification decisions;

(iii) Changes needed to facilitate greater sharing of classified information among appropriate parties;

(iv) Appropriate prohibition of reclassification of material that has been declassified and released to the public under proper authority;

(v) Appropriate classification, safeguarding, accessibility, and declassification of information in the electronic environment, as recommended by the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction and others; and

(vi) Any other measures appropriate to provide for greater openness and transparency in the Government's security classification and declassification program while also affording necessary protection to the Government's legitimate interests.

Sec. 2. *Review of Procedures for Controlled Unclassified Information.* (a) *Background.* There has been a recognized need in recent years to enhance national security by establishing an information sharing environment that facilitates the sharing of terrorism-related information among government personnel addressing common problems across agencies and levels of government. The global nature of the threats facing the United States requires that our Nation's entire network of defenders be able rapidly to share sensitive

but unclassified information so that those who must act have the information they need.

To this end, efforts have been made to standardize procedures for designating, marking, and handling information that had been known collectively as ''Sensitive But Unclassified'' (SBU) information. Sensitive But Unclassified refers collectively to the various designations used within the Federal Government for documents and information that are sufficiently sensitive to warrant some level of protection, but that do not meet the standards for national security classification. Because each agency has implemented its own protections for categorizing and handling SBU, there are more than 107 unique markings and over 130 different labeling or handling processes and procedures for SBU information.

A Presidential Memorandum of December 16, 2005, created a process for establishing a single, standardized, comprehensive designation within the executive branch for most SBU information. A related Presidential Memorandum of May 9, 2008 (hereafter the ''May 2008 Presidential Memorandum''), adopted the phrase ''Controlled Unclassified Information'' (CUI) to refer to such information. That memorandum adopted, instituted, and defined CUI as the single designation for information within the scope of the CUI definition, including terrorism-related information previously designated SBU. The memorandum also established a CUI Framework for designating, marking, safeguarding, and disseminating CUI terrorism-related information; designated the National Archives and Records Administration as the Executive Agent responsible for overseeing and managing implementation of the CUI Framework, and created a CUI Council to perform an advisory and coordinating role.

The May 2008 Presidential Memorandum had the salutary effect of establishing a framework for standardizing agency-specific approaches to designating terrorism-related information that is sensitive but not classified. As anticipated, the process of implementing the new CUI Framework is still ongoing and is not expected to be completed until 2013. Moreover, the scope of the May 2008 Presidential Memorandum is limited to terrorism-related information within the information sharing environment. In the absence of a single, comprehensive framework that is fully implemented, the persistence of multiple categories of SBU, together with institutional and perceived technological obstacles to moving toward an information sharing culture, continue to impede collaboration and the otherwise authorized sharing of SBU information among agencies, as well as between the Federal Government and its partners in State, local, and tribal governments and the private sector.

Agencies and other relevant actors should continue their efforts toward implementing the CUI framework. At the same time, new measures should be considered to further and expedite agencies' implementation of appropriate frameworks for standardized treatment of SBU information and information sharing.

(b) *Interagency Task Force on CUI.* (i) The Attorney General and the Secretary of Homeland Security, in consultation with the Secretary of State, the Archivist of the United States, the Director of the Office of Management and Budget, the Director of National Intelligence, the Program Manager, Information Sharing Environment (established in section 1016 of the Intelligence Reform and Terrorism Prevention Act of 2004, as amended (6 U.S.C. 485)), and the CUI Council (established in the May 2008 Presidential Memorandum), shall lead an Interagency Task Force on CUI (Task Force). The Task Force shall be composed of senior representatives from a broad range of agencies from both inside and outside the information sharing environment.

(ii) The objective of the Task Force shall be to review current procedures for categorizing and sharing SBU information in order to determine whether such procedures strike the proper balance among the relevant imperatives. These imperatives include protecting legitimate security, law enforcement,

and privacy interests as well as civil liberties, providing clear rules to those who handle SBU information, and ensuring that the handling and dissemination of information is not restricted unless there is a compelling need. The Task Force shall also consider measures to track agencies' progress with implementing the CUI Framework, other measures to enhance implementation of an effective information sharing environment across agencies and levels of government, and whether the scope of the CUI Framework should remain limited to terrorism-related information within the information sharing environment or be expanded to apply to all SBU information.

(iii) Within 90 days of the date of this memorandum, the Task Force shall submit to me recommendations regarding how the executive branch should proceed with respect to the CUI Framework and the information sharing environment. The recommendations shall recognize and reflect a balancing of the following principles:

(A) A presumption in favor of openness in accordance with my memoranda of January 21, 2009, on Transparency and Open Government and on the Freedom of Information Act;

(B) The value of standardizing the procedures for designating, marking, and handling all SBU information; and

(C) The need to prevent the public disclosure of information where disclosure would compromise privacy or other legitimate interests.

Sec. 3. *General Provisions.* (a) The heads of agencies shall assist and provide information to the Task Force, consistent with applicable law, as may be necessary to carry out the functions of their activities under this memorandum. Each agency shall bear its own expense for participating in the Task Force.

(b) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) Authority granted by law or Executive Order to an agency, or the head thereof; or

(ii) Functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(c) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(d) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Sec. 4. *Publication.* The Attorney General is hereby authorized and directed to publish this memorandum in the *Federal Register*.

THE WHITE HOUSE,
Washington, May 27, 2009

[FR Doc. E9–12882
Filed 5–29–09; 11:15 am]
Billing code 4410–19–P

Reader Aids

Federal Register

Vol. 74, No. 103

Monday, June 1, 2009

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FEDERAL REGISTER PAGES AND DATE, JUNE

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CFR PARTS AFFECTED DURING JUNE

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "P L U S" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws.html*.

The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

S. 454/P.L. 111–23
Weapon Systems Acquisition Reform Act of 2009 (May 22, 2009; 123 Stat. 1704)

H.R. 627/P.L. 111–24
Credit Card Accountability Responsibility and Disclosure Act of 2009 (May 22, 2009; 123 Stat. 1734)

Last List May 22, 2009

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TABLE OF EFFECTIVE DATES AND TIME PERIODS—JUNE 2009

This table is used by the Office of the Federal Register to compute certain dates, such as effective dates and comment deadlines, which appear in agency documents. In computing these dates, the day after publication is counted as the first day.

When a date falls on a weekend or holiday, the next Federal business day is used. (See 1 CFR 18.17)

A new table will be published in the first issue of each month.

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